

NATIONAL JUDICIAL ACADEMY



VERBATIM REPORT

JUDGING AND JUDICIAL METHODS FOR NEWLY ELEVATED HIGH COURT JUDGES
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SESSION 1

Art, science, craft of judging

Dr. Geeta Oberoi- Very good morning to all of you. This conference is designed actually inspired by aa by a book by Benjamin Cardozo. You might have read all of you The Nature of Judicial Process. This book and subsequently many other books actually reveal how complex judging process is, how complex decision making process is. Further, the book Idea of Justice by Noble laureate Amartya Sen actually provide to us that decision making is more easy but providing reasons for reaching at those decisions is more complex and more difficult task. We all have now assembled for this 4 days conference to understand from ourselves and from each other also how complexities are there in our day to day decision making process aa a judges. aaa how this complexities could be resolved and we can understand from each other if there are better jurisprudential methods that could aid us in providing reasons for the decisions that we make. With this short introduction I would urge all honorable nonparticipating judges to introduce themselves to today's panelists, who will of-course will be introducing themselves after you all have introduced yourselves. Also apart from introduction I would urge that each one of Honorable justices also provide what are your expectation from this 4 days conference, in just 2-3 lines so that in the end we can evaluate whether we designed our conference in such a way that we were able to meet the expectations or there are something that we can take care in next year. With this short introduction maybe aa Mam aaa we can start with you.

Participant Judges - Good morning everyone, I am Meenakshi Madan Rai from Sikkim High Court, my expectation from this would be aa little guidance for what we are expected to do, that is I can't really say right now what I expect but aa let's see at the end of the session aaa at the end of the conference what we get out of it. Thank You.

I am Arvind Kumar Mishra from Allahabad High Court, aa since learning itself has been my target every moment so I think I am to learn the very well word used is complexities of writing judgment and the complex atmosphere we are working in and i expect that much guidance will be provided at the end.

Myself Raghvendra Kumar, Judge Allahabad High Court. There is no stage for learning, this training programme has nicely been carved out. We hope and expect aaa we hope this would enhance our capabilities and we would try to excel on the basis of learning which we received here. Thank you.

Myself Justice I.S. Mehta, from Delhi High Court. What has to be expected is we believe that we will do better in this conference and whatever been guided we would like to carry it out to Delhi for implementation for the same.

Good Morning this is. Justice Sangita Dhingra Sehgal, and aa as far as the conference is concerned I only want to say is that we learn daily and aaa we hope aaa we hope that you know whatever we discuss here will make us help to aaa us improve our work. So let's see.

Good Morning, I am Justice S. Sujatha from Karnataka High Court and we aa we all have assembled her to enhance to aa improve our skill on the qualities aa on the capabilities so that we could give good judgment and serve the society which is very much required aaa to discharge our duties aaa as a judge so that aa we can come as a good judge aaaa not only in out judicial work aaa in the overall aaa tendency that's what is required by us as a judge what we have to do and what the society expects from us that we have to fulfill it that's aaa hope we are aaa to learn all this aa and aa improve ourselves in this aspect. Thank you all.

Hello aa Good Morning everybody, I am Justice R.K. Phukan, from Gauhati Assam, so I am newly elevated this year in the month of January, so aaa I am from the lower judiciary for aa Grade I for around 10 years and from that practical experience I am from experience from the bench but it is always difficult to resolve the old pending cases because of the lawyers and their conduct aaa basically they focus on new cases so that they can procure some interim relief etc. o serve the purpose and then they are aa thereafter reluctant to continue the old matters before the hand whatever it may be civil or criminal and it creates problem for us, we have to call for aa we are bound to give adjournment also that is why we always feel that we have to overcome this one in particularly in Appeal cases when the appellant is absent the court have to wait for the appellant unless until aaa he has been heard for disposal of cases behind the appellant but what if when the council is reluctant they make so many pretext and on some occasions we also deliver judgment

in absence of the appellant and the Supreme Court will aaa in this way aaa we have to aaa I in some cases give some amicus curie so that their case may be conducted instead of laying years after years. It's a great difficulty. So we expect some guidance from this conference so that we can get this hurdle because majority of senior lawyers are reluctant to do this old pending cases and because aa unless we come across with this problem then the pendency of cases cannot be reduced aaa of course every judge has it's own course of conduct to handle the cases. But i suggest we should go for new ways so that we can reduce pending because people never get relief if such cases are pending before the court years after years. aaa we expect some practical guidelines, advise from this aa training programme, so that we can affectively deal with the cases in all whether it is civil or criminal. Thank You to all.

I am Justice Shivakant Prasad from Calcutta High Court, newly elevated in the month of March this year. I am basically from judicial service and I have started my career as Munsif Magistrate in Calcutta and aaa while presiding as a Munsif i learned that I have not llearned anything. So everything that I have localized but I would make out and I could not apply them. By the process of judicial proceeding in the court I learnt lot and still I feel that I have not learnt anything because the law is changing everyday new laws are coming up on the same points so we remain in fixed that which has to be applied. So in Law College, my professor told us that if you feel that you are master of law then you have lost, you are a great fool or a humble. So, we learn that every day is a day of learning. So I hope that I can hope only that in 4 days sessions we will be leaning a lot . How to apply the art and science in judging and to deliver good judgement and to do justice and to have the access to the justice to the litigant public. Thank You.

Sadar Pranaam to everybody. Good Morning to everybody in this morning, I am Sankar Acharyya from Calcutta High Court, I expect an effective discussion on the art, science and craft on the application and placement of precedents in judgment. Thank you all.

Good Morning, I am Justice B.S. Walia from the J & K high Court, I would request the Honorable resource persons to give guidance as to what are the parameters to be kept in mind while judging, how to expedite the justice delivery system, what are the ways and means which can be adopted so as to give quick and affective justice to the person who seeks redress and comes to

court with a feeling of a grievance. So I would be grateful if the Honorable resource persons give guidance on these aspects of the matter. Thank You.

Good Morning everybody, I am Justice Ratnaker Bhengra, from the Jharkhand High Court. I was practicing in the Jharkhand High Court, I have just been elevated in April of this year. aaa regarding the course I did go through the questionnaire that was sent to us and that kind of gave me aaa very little sense of what I think what was going to happen but after going through the chart that you have given us, it's kind of further makes it more complex, the picture is building up from that questionnaire to this chart and I am sure that when you go through the sessions it will even get more complex. So I think from the chart we can retain little bit of what is aaa what is given to us in the next few days. It will be a great learning experience for us. Thank You.

Good Morning, I am Justice B. Veerappa from Karnataka High Court, I am interested to learn more to swim this workshop. Thank You.

Good Morning to all, I am Justice Bajanthri, from Punjab & Haryana High Court. aaa I have a suggestion if this kind of programme could be aired through video conferencing so that aa number of judges can experience and a gain and aa put into action while discharging the duties of the post at the same time we even aaa these problems can be uploaded in YouTube so that it can be utilized by each and every judges who are interested in aaa this thing.

Good Morning, I am K.R. Mohapatra from Orissa High Court. In addition to the aaa schedule of the training programme, the focus will be more on how to get rid of and how to handle delay in disposal of cases, especially age old cases and how to aaa handle with the cases in which no advocates are appearing because since, I aaaa at present I am sitting at aaa I am hearing old civil appeals and the most of the aa the primary problem is that advocates are not appearing because it is age old cases and the matters are not regularized also because some appellant and respondents are died and in the meantime and aa their whereabouts are not known so when so I will be more focused on that and expecting something to learn how to handle those type of cases and to get rid of and handle the time factor is more important in disposal of cases. Thank You to all.

Good Morning everybody, I am Justice Sunil Thomas from Kerala High Court. I was a District and Sessions Judge elevated in April 2015. What I expect is to be taught about the qualitative and

early disposal of cases. So what I expect is to teach us or to help us to improve the quality of judgements. Thank You Everybody.

I am Satyanarayana Murthy from A.P., elevated in the month of October 2013, from Sub-ordinate Judiciary. Today I am expecting from the resource persons to learn something about interpretation of newly amended provisions in different enactments like, Section 6 of Hindu Succession Act, where there are conflicting decisions about its applicability and similarly when there are conflicting opinions on the same provision how to judge those complex issues and we expect some inputs from the resource persons to improve our qualitative performance in future. Thank You.

Good Morning, this is M.S.K. Jaiswal from Hyderabad. First we want to unlearn before we want to learn something and I aaa expect this 4 days session to help us in fine tuning and sharpening our knowledge in our performance of our functions as aaa judges of the High Court. Thank You.

Dr. Geeta Oberoi- That was really helpful, now I aaaa I think we will start with Sir, Sir Can you introduce yourself. He doesn't need any introduction, father of all legal education in India but aaa

Prof. Madhava Menon- Well I am a retired law teacher aaaaa presently involved in some continuing education work for aaaa advocates and lawyers and law teachers aaa settled in Trivandrum, occasionally come taking this long journey when aa Geeta calls me and that is because as many of you have said there is no limit to learning. The more you learn the more you understand how little you know and aaa this is a very well thing that what I heard from you that aaa you have that humility to aaa express publicly that we want to learn, we want to aaa as the judge there said we want to unlearn that is equally important. You know if we can unlearn many things we will be able to do what we are expected to do better. many of this baggage which we carry is difficult to overcome and the more you leave that baggage the more unbiased you become otherwise biases will remain in our heart of hearts which will reflect in your reasoning, in your judgement and things like that. So that word that was mentioned as aaa how to unlearn some of the things to be able to prepare for fresh learning is very interesting aaa only thing that I would like to submit in addition is that aaa some of you have been Trial Court Judges for a long time and aa there is aaa radical difference between judging in Trial Court and judging in the constitutional court and the difference is the constitution. Not that the constitution does not apply to the trail judge but here you have a

very important instrument which reflects the aspirations of 125 crores of people, the future destiny of the nation which was for long under subjugation wanting to rise as a progressive country with all its pluralism and diversity preserved. That is the challenge the aaa I mean it is shared by the legislature and the executive but it decisively rests with the judiciary and that with the High Court and the Supreme Court. There judging is therefore assumes a totally different dimension over and above what you have been doing in the Trial Courts. Thank You.

Ms. Paiker Nasir- Good Morning Sir, good morning Mam, good morning Honorable Justices I am Paiker Nasir, I am a Research Fellow here at National Judicial Academy and I am the programme coordinator for this programme. I have met all of you so aa welcome to the conference. Thank You.

Dr. Aruna Broota- Good Morning to all. It is aaa , it is very aaaa nervousing to speak before such an elite audience but I will however, try and try and try my best. I hope you will keep the patience if I aaa say something and it is ambiguous you are free to ask me questions. I am Aruna Broota and I am a Clinical Psychologist and aa you will be wondering what is a Psychologist doing with law makers and law abiders and law givers but I think aaa you need to now think that I wonder if any lawyer or any judge can work without a Psychologist have been harping on that a lot but still the mindset is that a Psychologist deals with a *pagal* which is not true and aaa I am going to bring to course what we need to understand what kind of work you are doing. I am grateful for this opportunity to Dr. Geeta Oberoi and to Paiker for aaa thinking of me, choosing me and aaaa if I am going to get a heart attack you are going to responsible aaa for this because it is not easy to speak before this august gathering aaaa it is also an additional pleasure that I get a chance to be with Prof. Menon. I was introduced to the National Judicial Academy by Prof. Menon. I think no one can surpass his modernity and thought process when he thinks law and psychology cannot do without each other. They they the understanding is very loud and clear. However, the topic for today aaaa. The topic for today was aaa given to me on telephone and then subsequently on emails and I was wondering aaa will the judges recognize that judgements are having an art and craft behind it. Yes, there is always a science behind it. And why do we feel the need that there is an art and craft behind judging that was absolutely a marvelous topic to think of aaa Paiker whether you have done it or Prof. Geeta Oberoi has done it hats off to you because I have always been saying that judging is not just based on past laws passed, judging is not based on the past judgments given,

judging is not only based on what your interpretation of the law is, judging is not only based on the evidence that is created before you, judging is based on a judge. That is why sometimes when there is a judgement in lower court it is reversed in High Court and it is re-reversed in Supreme Court. That means judging is a very arty and crafty aaa process. Now what makes it arty and crafty I would like to draw your attention. Here I would like to ask who is a judge? Is there a cordless mike. Who is judge? Anyone wants to answer that question

Participant Judge-A person deciding a dispute

Dr. Aruna Broota- A person who is deciding a dispute

Participant Judge- A person who is making decision

Dr. Aruna Broota- A person who is a decision maker while deciding on a matter. Is that all now? Anyone else who would like to say, who is a judge

Participant Judge- everybody is a judge. Everybody in every sphere is judging his acts.

Dr. Aruna Broota- Is it a reflex action. When you are judging in your court of law then who are you.

Participant Judge-It is a person who has to listen to both the parties and give judgment on it.

Dr. Aruna Broota-So there is lot of responsibility on you and therefore, you are thinking that you are going to give a judgment based on the problem that has come to you based on the evidence that has been given to you. Is it anything more, anything else.

Participant Judge- Judge cannot go by the emotions

Dr. Aruna Broota- Prof. Menon used a word and thank you for making that foundation stone for me. What about our biases (Participant Judge-we carry a baggage) Mam great, this is what Prof. Menon is saying, we carry a baggage with us. God knows what that baggage is whether it is about the topic that is in question in the High Court or in the Sessions Court wherever you are or whether it is coming from your own besides the evidence your own unconscious mind from your

personality, what passed experiences you have had. Therefore, a judge is not just a judge but he is a person, a person with thoughts, ideas, his own perceptions, thank you for reminding me that word. Lots of experience, passed experience. So we'll do a little bit of an exercise in order to recapitulate who am I. may we take the first sheet of your letter pad or your notepad and I say give the title please , WHO AM I, give the title, what am I. Give that as a title and I will give you 5 minutes to continuously write WHO AM I, WHAT AM . Your time begins now. If you write continuously, shows that you are not censoring yourself which you should not. Don't hesitate to pen down anything because nobody is going to read your paper, this is your personal diary WHO AM I, WHAT AM I. This is your personal diary, nobody is going to read it. So without any hesitation 5 minutes just continuously write, WHO AM I, WHAT AM I. far from the madding crowd, this is a golden opportunity to touch yourself and ask yourself WHO AM I, WHAT AM I. Nobody is going to read this paper, it's yours and only yours. WHO AM I, WHAT AM I, continue to write in continuity without censoring your thoughts. WHO AM I, WHAT AM I. This is your personal dairy from the hassle and Buss ell and the hurry of life here is time that you can touch your inner self and not share it with anyone WHO AM I, WHAT AM I. It's your personal dairy, no one is going to peep into it. WHO AM I, WHAT AM I. it's a beautiful realization WHO AM I, WHAT AM I. Very personal dairy. No need to share it with anybody. If you are writing still let this be your last sentence. Done? Done? WHO AM I, WHAT AM I. Done? we'll move to the next page a fresh page and you will give the title WHAT I AM NOT, don't use the same page, use a fresh page, WHAT I AM NOT and your time begins now.5 minutes WHAT I AM NOT. Precious moments, far from the hassle and the Buss all , sit down and think WHAT I AM NOT. Peep into yourself WHAT I AM NOT. It's a very very personal dialogue with your own self, you are reflecting your inner self, a very very confidential, intimate personal document, never had the time to realize WHAT I AM NOT. WHAT I AM NOT continuously for 5 minutes. Without censoring spontaneously, WHAT I AM NOT, WHAT I AM NOT. A personal dairy, you will never like to share it with anybody, it's too intimate, WHAT I AM NOT. So those of you who are still writing let that be your last line. Let's complete it, 5 minutes WHAT I AM NOT over. We go to the last item on a new page, last, on a new page. WHAT I WANT TO BE that is the title please give that on the top WHAT I WANT TO BE, your time starts now 5 minutes, please don't censor your thoughts. Whatever comes to your mind keep writing that more and more WHAT I WANT TO BE. WHAT I WANT TO BE, WHAT I WANT TO BE, whether you are or whether you are

not, WHAT I WANT TO BE, whether you are whether you are not, is not the concern, concern is what WHAT I WANT TO BE continuously write, WHAT I WANT TO BE. WHAT I WANT TO BE, WHAT ALL I WANT TO BE. It's your personal document, you can save it or tear if you are so scared by it but it's your document, you will cherish it because you have never going to show it to anybody WHAT I WANT TO BE. Whatever you are writing let that be your last sentence, WHAT I WANT TO BE. Ji done? Everybody done? Okay.. WHAT I WANT TO BE let that be the last sentence? So what was the experience of writing all this? How did you feel? Sir. What did you feel? What did you think? Would you like to share your thoughts? Don't tell me WHO AM I, WHAT AM I, WHAT I WANT TO BE but what was the experience. It woke up your heart and mind, you had a catalysis. Do you get time to think like that? About yourself?

Participant Judge- An introspection on self.

Dr. Aruna Broota- So you try to scrutinize your personality, did you ever get an opportunity to think like this?

Participant Judge- it was an introspection on self.

Dr. Aruna Broota- Have you done it before? Self-appraisal.... it's a constant aaaa wao , you are very lucky if you are doing it, you are very disciplined if you are doing it. Sir, what was your experience? Anyone wants to join in sir. What was your personal experience when you were thinking, who am I what I am not.

Participant Judge-There is a difference between what you are and what your profession is

Dr. Aruna Broota- I am glad, can you can you hear him? He is saying that there is a difference between what you are and what your profession is, please let me link the two. There is a gap there is a difference between who you are and what your profession is. Now aa okay, and what did you discover. It's personal, you know, you don't have to give me just give me in a jest, what were your thoughts at that time , marvelous I must say

Participant Judge- if we talk to like a musician,[Dr. Aruna Broota- Ji] you think of musician, he loves his job, it is the best thing he does [Dr. Aruna Broota- Ji] they are very popular but *unse baat*

karengey to bolengey ke arrey hum to isse try karty rehtey hain, it's my job [Dr. Aruna Broota- That means I am too much of a musician all the time I want to get away from it] you have aa you have some aaa it is not just a profession it is something more , more to it.

Dr. Aruna Broota- What it is that is more to it?

Participant Judge-Your individuality

Dr. Aruna Broota-Your individuality, what is it something more to it sir? You want to unlearn, what is it that is more to it? What it is that the gap that he has so brilliantly brought out, your profession is one thing and you are another thing. Let me, before you say, let me tell you something , share with you rather, I am nobody to tell aaaa my father in law was once very critically ill so I used to get a cardiologist home from the university health center. So, obviously, I would drive him and bring him back home and I would drive him back to the health center sir and aaa on the way I making polite talk while dropping him back home and aaaa I am asking him sir now you have become the chief medical officer so there is a lot of administrative work going on , you won't get time enough to practice and don't you miss that ? and he says that " Broota Ji, you are a Psychologist, I want to make a confession, you will not share it with anybody, I am a cardiologist because my grandfather and my father wanted me to be a cardiologist, I am not a cardiologist at heart", and I will say something quote in Hindi, if you don't understand raise your hand, don't feel embarrassed, he said "*mujhe darr lagta hai, dawai ki dose prescribe karne main. agar reaction huwa to kya hoga? isliye main under- prescribe karta hoon*" and then I realized why dad was not improving because he was not getting the full dose. You look at the harm, you look at the harm that the profession is something else then what you are as a person or what you wanted to be, what your nature is, what your temperament is. So he is performing, he knows how to read an ECG, he knows how to read an eco-cardiograph, he knows how to read a TMT, he knows what medicine to prescribe but his fears are like this. So if he has to give a 1000 ml gm in a day, he will only give 500. So the profession is something else and you are something else. So I asked him I said sir, had there not been a pressure from your grandparent and your father what would you have done? *kuch bhi karta , guitar bajata, pan waaley ki dukaan chalata doctor nahi banta aur kabhi cardiologist nahi banta*. I said why? And he said, pardon my language no, *saaala ye to most important organ hai humko darr lagta hai*. It's true , it's true, it's very true so sometimes you are

on a chair how you have reached because your G factor that is your general ability factor is good, you are a hard working person, so when you were in school, your physics, chemistry, math's was very high, your biology was very high, you cracked all the entrance exams etc. But you were not having a personality for it. The S factor. So you have a G factor which is the general ability factor but didn't have the S factor for it. The aptitude, the special ability factor. Ji sir.

Participant Judge- Now aaa we face challenges every day in life but is it fair for a person to run away from the challenge or to face it because if we run away from the challenge then they'll be no end to it but if we face the challenge which is there whatever you have to face, if you face that , I think you can overcome that and become a better Human being and do better in whatever you are in.

Dr. Aruna Broota-So sir you spoke of the word personality, you have to face the challenge. Everybody does not have that personality to face a challenge. People have a personality to escape the challenge also and he narrowed it down for me by saying S factor *bhi to chahiye naa*

Participant Judge-No No I am not saying that even I am saying that I got this insight only recently, and therefore what I would like to share is that instead of saying *ke* I would have become anything except a *panwaaala*, I don't want to prescribe the proper medication , would it not be more appropriate that he overcomes his fears and faces whatever his fears are and take steps to do that thing that he is doing properly.

Dr. Aruna Broota-How will he overcome the fear till he doesn't go to a psychologist, doesn't make a confession, doesn't go through personality analysis, doesn't go through personality development and that was the reason why Prof. Menon asked Aruna Broota to come in, that law and medicine, law and psychology aaaa law and psychology cannot be disassociated. [What about destiny?] It's a belief, I am coming to that in my next session, we talk about beliefs but largely, the the onus on destiny, the refuge to talk about destiny, yes destiny is a part of our belief system which comes in our personality. Here is A who says I will change my destiny, I will change your destiny as a judge and I am a personality I'll say, I'll try to change my destiny if it works or not. Here is another person who says, destiny is I can't change it, why try? There are personalities, let me say , without any accusation , ill meanings to anybody, a High Court Judge confided in me in a session, singular

session, I gave the same judgement as the lower court I didn't want to differ because the judge in the lower court is a very good friend of mine and didn't want to go against him. This is what sir was talking about in the morning bias. And this why I congratulate Dr Geeta Oberoi, that art, science and craft in judging is so meaningful. Who is a judge and what does he judge. Judgement is the re-creation of the reality around you through the evidences and arguments that are presented to you, which you think but your interpretation of those evidences are your perceptions and perceptions are what you were talking about. Belief system. *Nirbhaya ki destiny thi usne aaise hi marna tha*. Mam. That seventeen and a half year old, sixteen or seventeen and a half year old juvenile in the *Nirbhaya* case was destined to go back to the remand home. That shows that we have not done enough homework for giving that judgement, for passing that judgement, for pronouncing that judgement. But yes, you are right, we do talk about destiny. That doctor was destined to be a doctor, yeah I am coming to that point. You are destined to be a doctor. If destiny wanted me to be psychologist fair enough, but I love being a psychologist, loved being specializing in the subject, will add motivation to wherever I go. For example, when I read whatever you are, passing as judgements, pronouncing as judgements, I analyze them. Was that right? How many of you remember that case of Patna, the IG of Patna, *jiske ander devi aagayii thi*. Do you remember that case? And he was putting lipstick and he was dancing and media was earning out of it. Patna sir, *nahi?* Patna *main* posted *tha*, he was from Orissa. [Participant Judge-maybe we have one in Patna and one in Orissa] one episode in Patna and one in Orissa yeah okay alright *ye bhi ho sakta hai*. Could be wherever he was from, it is not the issue, but at that time he was IG Patna right and everybody followed him *usmain devi aagayii*, our belief. There were educated people following him at that time [Participant Judge- because he was posing himself as *Radha*] yes because everybody loves *Radha* because she is not the wife, she is not going to tell you come back home on time, she is going to tell you dance with me. So everybody loves *Radha*, nobody loves wife. *Mere ko batadena* wherever I am wrong, I am half mad. *Mere main bhi hai sure sir*, I have not denied that fact. But, but but, I am talking about, I am talking about the IGs wife, she threw him out of the house because he said *mere main radha hai* and he was already in love with imaginary love with a girl called *Parvati*. He was having an affair. So we are we are deteriorating from the topic. But what I aa why I brought this topic was, I was analyzing him psychologically and he was suffering from bi-polar depressive disorder and he was in mania, that is one whole of depression, mania. So mania means you are high. You talk more, you behave more, and you start believing that there is

some extra territorial or mythological or religious character inside of you. You eat more, you talk more, you walk more, you romance more, you sex more, you sing more, you break norms more, and you drink more. But at that time if Prof. Menon and Geeta had been there they would have said, Dr. Broota *ko bulao*. Imagine the police not having a psychiatrist and imagine the police having a psychiatrist and saying he is perfectly fine. Yes, there is *Radha* in him. He was married, had they medicated him so much of social shame would have not come to his family. So much of social shame would have not come to his family. He had grown up son who was going to work at various offices. And Zee News and everybody was enjoying at his cost. So when, when you are working as a judge as a person with law as his background and has qualified examination of judiciary. You say I am a judge whether High Court, Supreme Court wherever you have come and aa they say I am a judge, who are you judging an on what basis are you judging, on what basis, on what basis? [Participant Judge- Societal norms] Societal norms, laws, readings from past. Sir, circumstantial evidence whatever. Really is that the only way you do it. Common sense, is that the only way you do it. How can you be unbiased? You are a person, you are a personality. You have grown up with that personality, hearing about believes, developing attitudes, developing values, developing inter community profiles, stereo types and they are then components of your perception.

Participant Judge- Ones a person becomes unbiased, at that point of time what you are talking. These, these, these the biases . These are the different channels and he is above them all and from there he has to judge the factors under which what are the things which are to be separated and thereafter it is the judgment on the basis of the factor which is to be distributed to the society.

Dr. Aruna Broota- *I want your fraternity to react. Are you? Are you what he says? I am not?*

Participant Judge- he says that you don't have bias. Bias in the sense that, you have certain perception about a certain situation.

Dr. Aruna Broota- Thank You for saying that. You know there are lawyers, who come to your court, who plead for and against, who plead for against. There are both side councils. The first thing you will say is "*madrasi hai, sidha hai bahut sweet hai*" where is it coming from? Your believe, your attitude, your stereo type right? And you say, so whatever he says, you believe it

there is an inclination to believe it. Whether you believe it or not but the first action or action is one of a positive attitude. *"Madrasi hai achcha hai". Andhra ka hai Kerala ka hai, Madrasi sedhey hoty hain.* It's a stereo type. And I will say it freely to my community so that no one else get offended. So I'll say I am a council and I say *"Saala Punjabi hai, jhootha hai, ladaka hai, pagal hai ghatiya hai,* its your stereo type. So what evidence he is creating for you, you make it convince with it later but first your attitude towards that council is one of negativity. *Aap sir haan kar rahe ho bol kya rahey they pehele, ab haan kar rahey ho.* See we all are human beings, we are brought up like that and as we little children, we say [Participant Judge- madam here lies the difference, what I say I'll do and I practice it] *Koti koti pranaam aapko, main mana nahi kar rahi hoon.* I am not denying it I am only making you aware of it. That it can happen to us and let it not happen to us because then your judgement becomes an art then it becomes a craft to Worlds destruction and not construction. If it is an art and craft towards humanity like part of the personality is values. Ji sir. That what the whole issue is today yes there is and he says no.

Participant Judge- We all have biases and I think our biases are input of the law.

Dr. Aruna Broota- absolutely Sir

Participant Judge- madam I think it is a theoretical question which I think I grappled with and others grappled with [Dr. Aruna Broota- absolutely Sir] now the question is how is this stereo type? Like the jokes on Sardar. Do they they

Dr. Aruna Broota- absolutely Sir, what is stereotype if there is a truth and you cannot talk about the truth about the whole community there are individual differences there are individual differences. But unfortunately, with the quest for the truth our own biases interfere. I am telling you that it is not only in India it is abroad. My husband who should have come did not come he is a psychologist and does research in this area with 7 international Nations, we have done a project. And how protestians look at Catholics and how Catholics looks at protestians. How do Arya Samaji look at the Sanathan Dharm and how do Sanathan Dharma looks at Arya Samajhi . How do we look at Bihar and how do we look at Gujarat and how to look at Sindhis. We have our stereo types. May be true may not be true but we deal with that gender. When there is a woman lawyer, if I am allowed to make a comment on what I have heard or seen in person. One very senior judges

said "*aaj ke liye argument enough hai jaaneke aapne bachchon ko khana khilao*". Sir, they are all, aaa what were you telling me about Jammu and Kashmir, are they not aberrations are we not living in aberrations, are we not expecting the judges to become conscious today and rise above the aberrations. That is what we are talking about. That is what you think sir. Should, should, are there should. This is meta-cognition, if you can peep into yourself before giving the judgement and say is my judgement evidence based or is it stereo type base, is it based on my believes, is it based on my bias because I am against rape because I have 2 daughters at home. Rarest of the rare, who will decide what is rarest of the rare? We were having breakfast with certain justices, elite people with me and I asked who will decide rarest of the rare, heinous crime, who will decide and believe me sir I was quoting a judge, believe me sir I was quoting a judge, with whom I was having dinner and he said, "if rape is evident why don't women enjoy it. I am not embarrassed in saying this before you it's an aberration. Absolutely, sir, *kahah naa*, you may say it shameful and I am beginning to wonder does he have women at home, does he have 2 daughters at home, or one daughter at home and he is more sensitive to the issue and there is aa guy who has 3 sons who is not sensitive to the issue. So your bias comes in, who is going to decide, rarest of the rare, who? You? Me? Let me now just drop all this. Let me tell you something, A very senior advocate, very very senior respectable advocate, he is no more, was a kid at that time, would appear only in Supreme Court with his books into the lower court in Delhi. The judge stood up sir, sir "*aap kyun aaye hain aap kyun aayen hain?*" And the judgement was given in the favour of who got him. It could be me I was the beneficiary. But today when I grow up, I realize was that not a bias was that a advantage that I had? Ji mam. [It doesn't happen now] I pray to god, I pray to god *ke ye ghalat hi ho saara*.

Participant Judge- Mam, as it is a little different because when you are in the trial court or in the sessions court there suppose if Ram Jethmalani has to appear in my court, naturally, I mean I am a junior judge and he is a very senior lawyer, so if you being a little extra respectful to him that doesn't mean that you are giving an order in his favour. I don't think. At least I joined in aaa judiciary in 1985, and I had so many cases that were very important otherwise, I don't think that it has ever happened, I mean talking to myself. Not seen it also, may be in 60s or 70s maybe 1 % yes.

Dr. Aruna Broota- Mam *main budhhi zarurr hoon par main bahut uthti beithti hoon seminars main aur main dekhti hoon kya ho raha hai , main bolti nahi hoon*, I am quite because I am not the speaker all the time but I do observe in courts what is happening. Now let me say, here is an example, I am going to give you out of a marital discord. So a husband and wife were arguing and they were shouting and screaming now the women had a female council and that female council is known to be notorious so she create hungama. havoc blah blah blah in the court and the judge dis this and said not in the court I have had enough of it at home *uske muh se nikla ye*, sorry mam that was on 2013[Participant Judge - that could be in the lighter tone also] sorry I did not see the lighter tone, and he told the lawyers [Participant Judge- no because the person] if the more you shout the more I am not going to decide in your favour, better you don't shout. So that means that evidence or no evidence he did not like shouting because he had enough of it at home. Bias *hai ki nahi hai?* Why did he say said? I think he will decide in her favour.

Participant Judge- No No Mam, I think he was only managing the lady because not to shout, I think.

Dr. Aruna Broota- But she can't but shout, and she wins all her cases on the basis of shouting. So is there a bias? If you say, I think so, then there is a bias. Sorry sir, sorry

Participant Judge - A judge who is sitting on the chair is the master of his own circumstances. How to take up and how to handle the situation. It is not that the person who is observing from the outside is always a correct

Participant Judge - Mam, with the permission for a small example [Dr. Aruna Broota- Sir] yesterday there was a case before me where after hearing both the sides, I disagreed with the petitioner, he would not stop and persisted in arguing and arguing even after I had dictated the judgement. Now how do I stop him? The only way what I found out was okay fine, if you don't stop now I am going to impose cost and I did dictate that but I told my reader just strike that off later on, don't impose that. [Dr. Aruna Broota- when you said strike that off, that is your fairness, then I will believe mam, yes you were only trying to handle him. But here she has agreed that when there are certain councils who shout and scream have their way] No maybe the judge concerned has said it with a view to stop her.

Dr. Aruna Broota- No mam, I mean when he said that I have had enough of it at home, he only meant that please don't do this. This is what I think, It didn't mean that actually his wife had shouted at him because those persons who take shouting's at home they don't come and tell outside, this is also psychologies. [Dr. Aruna Broota- it is just the slip of the tongue mam] this is also psychologies [Dr. Aruna Broota- it is just the slip of the tongue mam admitted before me, *ke mere muh se nikal gaya main itna tang aaya huwa tha*. And he said to me that, *Aurtain chilla chilla ke aapni baat manwaati hain*, he said this. Those who don't understand Hindi ask me, I'll translate for you. Did you understand what I said? He said, women use this as a technique to shout and they get an agreement from us. So I said the weakness is yours naa? Why do you give in to shouting's, let her shout for some time there is evidence, why don't you look at the evidence, why are you looking at the shouting's? He says I can't take it. And that is how the Karkardooma Court had asked me to talk about counselling skills in which one of the most important skill was a listening skill. It could be well said but sometimes it is not, that is what I am talking about, sometimes it is not because we are all human beings, you are not a judge always. Who is a judge? First a human being yaar, first a human being and then he is training to become a judge.

Participant Judge- Mam, judges are also to live in the same society so he also has to aa have some restrictions and so many other problems.

Dr. Aruna Broota- We are here only to polish our powers, how to get out of those restrictions and become more scientific in our judgments and we cannot do that without meta-cognition. And we will discuss this in our in our next session, what is meta-cognition but you were going to say something sir.

Participant Judge - Why is it is that when a human being sits in the judge's chair, he affects himself first? Afraid of him. This is the main difference between that human beings and judge sitting on that judgment chair[Dr. Aruna Broota- means who is afraid of it?] means the judge afraid of the human being though the person is same. His human instinct may say something but as a judge he cannot accept it [Dr. Aruna Broota- but he still does, is a human being] no no no I don't agree that a judge always does his work according to his human instinct. [What is an instinct? it is not an evidence. Instinct is the art and the craft, instinct is your emotion, instinct is your developing into stereo type into something like that, into value, so instinct determine a component which is the

larger component of that perception.] But there is [Gut feeling is that he has not done it. My gut feeling is that he has done it, my gut feeling is that he not a man like that. How do you develop these looks?] But there is [how do you develop these kind of feelings. Instinct, so instinct is personal, instinct is not evidence based] but there is no tinker of law, legal provisions which is in the case of a judge] 100% correct there is no teaching of that, looking into the instinct but, that the psychologists sessions sometimes make you conscious that, the we look inside me and say, am I totally evidence based or am I getting biased. That is meta-cognition. That's very very important to understand. If the judge does that he is a marvelous judge. I know a judge, someone said chronic cases, someone said unresolved cases for a very long time, someone said that , so one of the judges said, today I will put an end to this case, it's 50 years we are fighting a case over a house. The claimants have died. Their grandchildren have come up whether it goes in your favour or doesn't go in your favour today I am going to close the case. Is that the way? You can't close a case, open a case, give a judgement on the basis of your determination that , today it is it and not anymore and you are telling yourself whether I am right or whether I am wrong but this case needs to be closed because you have reached your saturation level. Should we be reaching our saturation levels? Have we developed enough patience to get into the case, into the nitty gritty of the case. As a woman, let me give you another example, men judges, male judges get very carried away when women cry before them in their closed chambers, you know this is my house, I am *Abla*, I don't know how to get out of this case, she will cry, I have nowhere to go, and the judge gets carried away. He says okay, I'll manage whatever I can for you. What are you? Are you a judge or a father? And women are very good at giving that drama. I have to be fair. I have to be fair, I cannot say to you that you be fair and I will be unfair to my gender. NO. Aberrations as sir pointed out. Aberrations are everywhere, everywhere. One of the best stereo types you will have, if a girl and a boy decide to marry on their own, you use a word in Hindi "*wo bhaag ke shaadi ki*", what is *Bhaag ke shaadi ki*? They got married they decided to get married. You mean your ego is hurt as a father you should have been involved in the decision making. Since you were against the marriage so, they decided to get married on their own. Aren't we brought up with these stereo types? Marriage should be a socially sanctioned marriage, agreed I am not against it, but is a girl or a boy decide to get wherever they married. *Unhone Bhaag ke shaadi ki*, what is *bhaag ke*? They just got married on their own, the decision making was not there in your hands. So as a judge when you say, *Tumne bhaag ke shaadi ki thi , chchachchcha*, this is a judge saying that *chchcha*, what

is it? He is putting values in his hearing, forget the judgment. You are using the word honour killing, what else can I talk about? Even killings can be honour? hahahah. I think I'll give you a little time to think, we can break for tea and I think we'll come back. You'll have to bear with me for one more session, if you are fed up of me. But we'll practice something more which is a little more practical. I'll give you a case study from the court itself and ask you what should be done. Thank You very much lets break for tea. What time do we get back? At 12 thik hai. Thank You very much for this much. Thank You!

SESSION 2

Continue....

Art, science, craft of judging

Dr Aroona Broota- So I hope everybody enjoyed tea. So everybody enjoyed tea. So it was a nice break. I wondered what you talked, must have cursed me while I was sitting there because psychology has such a different angle [participant Judge-no, it's part of our life] thank you sir, may god bless you for accepting me. I was in the middle bringing it to your conscious mind that a judge is not just a judge for that moment when he is judging and he is not just a person who is looking at the evidence coming to him from the 2 different councils but he is also a personality. He is also a personality and I think the personality comprises of beliefs and superstitious. If we were to function without these beliefs and superstitious, without attitudes towards life, I think we will become robots. Agreed or disagreed? We'll become robots, so we are talking, walking, singing, chatting, sleeping, thinking always through beliefs and our superstitious. Superstition is something that cannot be verified but is passed on from 1 generation to another. Don't eat mat on Tuesday, it's a belief. Don't drink on Friday, it's a belief, don't drink on Navratri's, it's a belief, don't eat eggs and meat in Navratri's, is a belief. Superstition, *billi raasta katt gayi ruk jao*, wait a cat has crossed your way your passage. I know a marital discord, and I was amazed the mother in law threw a ruckus in the house. It was the couple's first wedding anniversary, so the girl very nicely went to the beauty parlor and got her hair shampooed and re-done and the father in law and the mother in law created a ruckus that today is Tuesday why did you get it your hair

shampooed, you have disbelieved in our religion, Tuesday, Thursday, Saturday, you cannot shampoo your hair. So these are superstitious, my son will dye that is what the mother in law said and she sent the gild back home, there was no anniversary. And mind you this is not in India, this is in California and these NRIs are living there, this is a belief, it's a belief so anyone who aaa cuts into this belief you get irritated, you get anxious, you get tensed, you get fearful, you get phobic. I remember, by now you know me who I am, so I remember my mother in law telling me, dont buy loha, iron on Saturday, both of us are working so if we have to buy a car , we'll only buy it on a Saturday because kids have *chutti we have chutti*. Afternoon to you sir, please *baitho baitho*, with your permission may I please. So, aaaa we rang up our mother in law and her Biji we have bought a new car and we are coming to you for your blessings and she said, stupid, idiot, Saturday you bought *loha*, this car will meet with an accident, so we said okay we will deal with that but now we have bought it, right so aa as young kids are, mother is there to pay all the EMI so, since then we have changed 10 or 11 cars all bought on Saturdays , no accidents, nothing, till one Saturday we wanted to buy a small car zen and we said to our mother in law Biji we are coming with a new car, again a Saturday, and the car couldn't roll out of the showroom, so we called her up that the car couldn't move , see I told you it's a Saturday, out of the 10 cars I was a bad omen, whatever, but all of us have these believes , these attitudes and they form a very important part of our cognitive structure. What is a cognitive structure? Something which is a very important word in law as well as in psychology. We all have a backdrop, we all have aa we used the word perception, yes perception, it's also called backdrop. The backdrop includes all these believes, superstitious, attitudes. Now believes are not very fable, so there is no evidence that you can collect about them. Say, I have belief in god, belief in life after death, I believe that there is a soul, I believe that there is a Karma, I believe in so many things. These are believes. Can you say that judges don't have believes? They have, they are human beings, and they are not robots. However, attitudes are very fable. If you are losing your temper towards a Bihari, you know that you are biased towards Bihari's. If you don't invite a Sindhi colleague and you have invited the whole department for a party at your place, you have an attitude that Sindh's are like this so I am not going to invite him. So it's very fable. And from these attitudes we develop stereo types. Landlord functions in Delhi, function on the basis of stereo types. In even if you have that 11 month agreement and everything drawn out, even that is flouted. *Haan ki naa* that is flouted, it is so full proved but it is flouted right? And aa and what happens the landlord will say don't give the house to a Punjabi, give the

house to the south Indian. Now I am not using the word *madrasi*, it's a typical word used in north India earlier but it is undergoing a change now. But from attitudes when we develop these stereotypes, they govern our behavior. You can't say, that we rely only on very flimsy evidence, we look at the evidence through our backdrop and our backdrop is our values, our beliefs, our superstitions, our attitudes, this is what we have towards others even when we are receiving the evidence. It is just that we are not conscious about it. It becomes so automatic in us. We take ourselves so much for granted that's why I had asked you, sit and write who am I, sit and write what I am not, sit and write what I want to be. I didn't ask you a question at all, are you far from being what you want to be? Where you are, are you. So your idealized self is what I want to be. When sir said, sometimes you are in a profession but you really wanted to be something else sir. And that was, what I want to be is your idealized self. Who am I, what am I? What I am not is your real self. *Usmain bhi jab aap likhney ho*, when you are writing about yourself, you can cheat yourself sometimes and say *nahi* I am not like that. What I am not? I am not a cheat, no no, I am very honest. Ohh I don't tell lies, I am straight to the point. So why were you not start when you said I want a working woman as my wife because I thought she will submit her salary to me, then you were not straight. No no I don't want a working wife because a working wives are very outspoken, loud, independent. I want an independent woman. We have our choices. So when there is a female lawyer, the evidence is being received with an attitude. So there are gender biases like that. Any comments up to here. Any comments do you agree with me. *Haan ki naa*, Ji ji sir, say that again. A good question I'll answer that sir.

Participant Judge- aaaa the first point of the talk I want to ask by belief you mean religion or? [Dr Aroona Broota- everything, beliefs are superstitions] larger superstitions

Dr Aroona Broota- absolutely, absolutely, we correct sir, very correct. Any comments sir, any any comment. Do you agree or do you disagree. That we are a combination of all this. So what will happen then, beliefs, attitude and values they will predispose us to act in a particular way. A, as a human being and they will spill into B as a judge. You are real sanyasi. [Participant Judge- not always] yeah not always. You are real sanyasi, if you say I won't let my belief system come into this. But do you have the time to even think like this. Therefore, my premise is, that judgments are based on perceptions which are already governed by beliefs and values. We were aaa talking about the POCSO Act, and this was at Patiala at the sports college, where we meet some working

groups and one case study of mine said that, a senior student sodomized a junior student. The body reaction of some of the judges was haaaaan!!!! the eyebrows up, that is not a listening skill. You may speak nothing but your body language speaks a lot. Right? The next case study was, the coach flogs the students with his belt if they lose a tournament and the judges said flog in return. Spontaneous reaction, will the court allow that, whether they can pass a judgement that he should be flogged? Say that again sir, that is a deterrent theory but that does not convert it not an evidence, into an act and therefore there is no penal code that will tell you that you have to flog in return the judge. But what did the judge speak from? Spontaneously he spoke from his belief, from his attitude, from his concept. How can you beat a child if he has lost a tournament? What you said instinct, yes, yes, it is a human instinct response but as a judge, you have your emotions, you have your this thing. You may not pen it down as as a final punishment. But it is your attitude that has been depicted. And also while I'll give you the 2 different case studies, you will prioritize when a child sodomised a child they were simply aghast and did not react so hardly so brutally, so punishingly. But when I said that the coach flogs the children if they lose a tournament, you could not take it. That was more aghast then the first case study. And look at the next case study. One coach sodomised a student and he had to be hospitalized. The judge said the coach should be castrated, this was his comment. Belief, attitude, stereo type, humanistic, instinctual? Yes!!! Reaction to *hai naa*, thank you for saying this that is what I am talking about. That who is a judge? A judge is human being first. I now, circulate a case study, it is with you the first one Mam. And I will read it with you... Which is the first one? Is this the first one, just a minute, just a minute. What was the wrong that I did that is... so WHAT WAS SO WRONG THAT I DID, isn't it? Okay, you have got that. Right now, may I aaa I just, this is the comment I took from the child. So, this is the title I gave to the case study, may I be allowed to read it with you. Naresh (name changed) is 21 years old. He is a B.Com. 1st Semester student. He is studying at the School of Open learning, University of Delhi.. One day he was standing outside the school and he saw a girl. He started staring at her. The girl felt uncomfortable and left for the metro station. Naresh started following her. She turned around at one point and shouted at him. Lot of people gathered. She slapped Naresh and he slapped her back and then he started crying. Naresh said that she slapped so hard that his jaw was paining. Suddenly there was a police van. The police took both Naresh and the girl to the police station. The girl complained and the police beat up Naresh with their *lathis*. He fainted. The girl escaped to make a phone call. The girl's parents came to the police station and lodged an FIR.

So Naresh was arrested in an unconscious state. Meantime Naresh' brothers lodged an FIR saying that their brother was missing. Eventually Naresh was hospitalized with multiple fractures. Naresh one day reported that he suspected that it was that girl which had instigated his sister to commit suicide and so he started to follow her with the idea that he may beg her to return his sister. Naresh's sister had died under suspicious circumstances though it was declared that she had committed suicide and since then he was very disturbed. The girl said Naresh has cooked this story to avoid punishment as she was sure that he had dirty lusty looks towards her. What should be the ways to prove what? Comments...who should have conducted the enquiry? Who should have conducted the enquiry? [Participant Judge- investigating officer] investigating officer, the IO okay, so when the IO conducts the inquiry. Alright so you want first point, you want to know whether they knew each other, alright, second point inquiry, third point IOs role. What if everything was collected and sent to one of you. What if the IO had collected all the evidence and presented the case to you, then, then, then, it has come to you sir[Participant Judge- charge sheet has to be seen] then charge sheet has to be seen then, charge sheeted who? [Participant Judge- Charge sheeted] agreed then then what? Naresh is arrested, he has not been granted bail, then? [Participant Judge- Police hurriedly, I think slapped Naresh without detailed inquiry. there they start aaa the route is changed] okay the route is changed what will you do? It is with you, the case. [participant Judge- how could Naresh say that he was following so as to return his sister, when his sister has already committed suicide] see now you are talking about reality, then you are not thinking that Naresh could have been a psychiatric case [participant Judge- there is no provision in the CrPC, no provision at all? (another participant Judge- there is 328) where is the provision] this is the gap. So one provision has to be created. Ji sir, [participant Judge- his evidence cannot be believed] so if his evidence cannot be believed then what will you do? You will again get him beaten up that tell the truth. [Participant Judge- no issue I will refer him to a psychiatrist] *woh to aap keh rahe ho* because I am there [participant Judge- you cannot send him directly to psychiatrist] mam for whatever reasons the procedure has been followed and it has come to your court. [Participant Judge- he is not the person who appears to be mentally challenged before the court] have you recognized that he is mentally challenged. [participant Judge- fact is that he is stating certain facts for example he is following the lady to ask him to return his sister who has already committed suicide, so this would lead to a presumption that he is not in the right frame of mind] how many of us recognize this? How many? How many of us send our clients or our petitioners or our whatever criminals or

whatever offenders, I would like to use a word to a psychiatrist for evaluation, how many? no one[participant Judge- man there is a provision 328 of the CrPC which provides for that] *aap use kartey ho main ye puch rahi honn* [Participant Judge- *maine aaj nahi 15 saal pehele* when I argued a case I got a life sentence set aside , I was acting as a Amicus Curia] be a little louder Mam [Participant Judge- it is in the initial stage] [Another Participant Judge- Mental Health Act also] [Another Participant Judge- Lacuna hai madam *lekin*, psychiatrist, psychologists *ka use age jo humare system main kam hai, ya nahi ke barabar hai*] *main yahi puch rahi hun aapko*, main I am drawing your attention to this that we have sent a lot of offenders let met not use the word criminals to physical hospitals where there is a physical disease. he is down with pneumonia, he has infection, he has urinary infection, he has a kidney failure, he has a chest infection, he has phenoimonia, but if he is talking irrelevant nobody wants to assess him psychically, your evidence on whatever case you have is incomplete without a psychiatric evaluation because your judgment will change. If the psychiatrist is going to say that Naresh was havi9ng hallucinations and Naresh was having delusions. It's always sent to a physician [Participant Judge- if it is complainant] [Another Participant Judge- mam in this case everybody is working under hallucination. The investigation officer, the parents of the girl, everybody was under hallucination.] Because no one accepts that there can be a psychiatric or a psychological disorder. People say *ye drama hai ye natak hai, jhooth bal raha hai*. [Participant Judge- so far as the matter is concerned the matter is that the gilr is being starred by a boy and this much culminating to a lot of things] this is what is happening, girls are using their gender to incriminate boys, this is happening [Participant Judge- and so far as law is applicable in the case, it was the girl who first assaulted the boy. She had got no occasion to slap the boy] this is what they are saying naa. But what happens in general. So you will first address the girl [Participant Judge- Yes, yes] address the girl, okay , now when the girl has been addressed and then Naresh is asked a question, he says I thought that she can still return me my sister. If he says that he, aa she can still return me my sister, how are you going to react to this statement. [Participant Judge- this may be a cooked up story and this may have some base at least] absolutely, this could be a cooked up story by Naresh and this could be a tutored story by his parents or the counsel or it could be genuinely that he has a psychological disorder. How are you going to evaluate it? [Participant Judge- we therefore, have to send him to psychiatrist so that the evaluation can be done, as to whether it is a genuine statement or it is a cooked up story] that is what I wanted to bring it to your notice , that people are not sent to a psychiatrist or a

psychologist, I don't know, south India is very well equipped. [Participant Judge- I had a case the other day , in a session aa there was some family dispute aaa with that guy and his wife, then in that matter, when the matter was in, when the proceedings were going on , he has thrown the footwear to the presiding officer in the court, so the matter aaa when the criminal contempt was taken, Suo Moto criminal contempt was taken against that person in the High Court, we have referred the matter to a psychiatrist, we have sent him for the remarks, he has been recently sent, that guy to aaa] and how many such cases do you do, that I am very happy to hear it but in how many such cases and why are they not sent to psychiatrist and psychologist , why? the reason is because our perceptions do not accept mental trouble, we don't because we say, he is fine, he is not *pagal*, look at it in my clinical practice, I get a referral from a school okay, here is a 7 year old child, who is in class 2 and that child, he has broken the windows of the school, he has beaten up a girl, he has followed a girl to the toilet and so many things have happened and they have asked the parents to take away the child from the school and not send him to school at all. They don't want to use the word rusticated because he is just 7 years old right. Now I tell the mother that you need an evaluation and it is better that you don't get it done from me, you get it done from this particular hospital because this particular hospital certificate will be recognized by NCERT, the organization that runs the the aaa sorry, sorry not NCERT, CBSE, sorry sorry, CBSE okay, Central Board of Secondary Education, and they recognize that hospitals 'certificates and they say , the parents, why should we get this person 7 year old, poor 7 poor 7 , this is your your stereo type, your attitude your belief, the poor 7 year old aaa he is not *pagal* he is a nice child, eats well, walk well, talks well, *thoda gussa aata hai, thoda aggressive hai, thoda violent hai, thoda*, so no testing. But if a child is born to a family were the doctor says that he has a minor leakage in his heart so he has a hole in his heart, which is too small but he has a hole in his heart, you will run from pillar to post to get it treated. But when you say that he is aggressive, *thodasa gussa aata hai, thoda sa violent hai, thoda sa ye hai, kya testing karani hai, kya huwa hai, why????? ohh iska baap bhi aaisa hai, iska dada bhi aaisa hai*, so it's genetic, its hereditary. But you don't want to get it evaluated because you are so afraid of personality disorders psychological disorders, behavior disorders, psychiatric disorders that you don't want to address the issue because you club them in and say, *pagal thodey hi hai*, he is not *pagal*. But without taking a medical degree you know what is flu, what is viral, what is pneumonia, or what is appendicitis, what is jaundice , what is cancer, what is diphtheria, you know all that. But the moment we say that the child had delayed speech,

so there is going to be an impact on his IQ, *aap evalaute kara lo. IQ test kyun rehna hai hoshiyaar hai, khaana mangta hai susu karta hai, potty karta hai, school jaat a hai, bas colours nahi identify karsakta. Jo aap isko padhati hain alphabets nahi recognise karta* , he is 7 years old. This is another case that I am giving you but, you don't want that evaluation because in your own mind you have this stereo type *pagal thodey hi hai*. So if he has a hole in his heart he is not a cardiac patient, is he? That you believe he is. Do you see that? So we need to change as a judge our mind set. The moment you see that there is some behavioral problem, you have to refer to a psychiatrist, it is for the psychiatrist to say, will he get the work done for his own self or a psychologist. I hope you know the difference. I hope you know the difference, ask now, it doesn't matter if you don't know. A psychiatrist is a guy who is largely from medicine, he has done MBBS and for his higher studies MD, does he come into psychology, so he knows what medicines to prescribe. A guy like me, I am not a Psychiatrist, I am not from medicine, I do clinical psychology, where I study behavior, I do behavior analysis and I do behavior modification and I develop personalities where I reduce aggression, where I reduce fear, where I reduce depression. And if the psychiatrist think he is perfect and superior, he is stupid and if a psychologist thinks he is superior he is equally stupid. They have to work hand in hand. Wherever the medicine is required. Naresh need to be medicated because it is a hallucination, if it is true that there is something wrong with him. If he is concocting it will come out in the testing, it will come in then testing. Agreed to this? Now this you could apply to so many of your cases. So we need to change our mindset that the person is not pagal. Are you aware of the research that shows that even criminal are psychiatric cases? All terrorists are psychiatric cases. [Participant Judge- they are psychopathic] one of them, they could be Psychopaths, they could be criminals. There is a difference between the 2, you know what the difference is? A psychopath is not letting you know that he has done some harm, he'll be pleasant to you- Hi uncle, how are you uncle, can I help you uncle, may I carry your goods and take you home uncle, uncle I can get a certificate for you if you want to, uncle should I buy you that railway ticket uncle. But a criminal will say, *kya hai? haan kiya hai ky akaregi*. So they have no ethical awareness that they have done something wrong. I went to to aaa Tihar Jail, to interview, if you remember, you are all very young aaa Billa Ranga, you know the Geeta Chopra case okay, so I went aaa to aaa Mam to study the personality profile of Billa Ranga, so see even within the crimonals the personality difference, RAnga said, *Akhbaar main degi, aapni mashuri karaegi, kya karegi? Right, Billa said, kya karne aayi hai, tamasha dekhne aayi hai, haan mara tha maza aaya*

tha, Billa. Do you see that, so if they were a psychopath that will be Charls Shobraj. You see the difference between Charles Shobraj and that. How many of you have referred Charles Shobraj for psychological evaluation, how many of you did refer Billa Ranga for psychological evaluation, no one? No one? For that that juvenile case, at Nirbahya, even bone age was detected, nobody gave a psychological analysis to that boy. And may I refer to you, I forgotten which state it was in the US, they don't generally prescribe death sentence to Juveniles but the Governor of that state said, yes we all decided to give him a death sentence because he is not recoverable. This going to be my next session, come for someone else here aaa on the 28th or 29th somewhere. And and some juveniles are not recoverable after counselling why? Psychopathic traits? Criminal traits and genetically now, the research shows shows there is a genetic difference in the genetic layout of a normal human being and a criminal. ab ye studies *aarahi hain*. Sir

Participant Judge- You said all terrorist are [yeah they are not normal, someone said they are psychopath, someone said they can be criminals] and all terrorist are psychopaths [criminals] aaa criminal you said, okay.

Dr. Aroona Broota- They are criminals. Look at their genetic layouts and their rearing. AAAA I don't know what do you call that aaa was that Mohan Lal Sukhadia University at Udaipur. Okay, they asked me for an international conference to speak on terrorism and to conduct a seminar there and I very nicely said *haan haaan haaan*, I'll do I'll do it, I thought professors *hongey*, students *hongey*, so it will not going to be difficult. So when I went there I found the army chief, the naval chief main to *darr gayii*, I got scared, what am i going to talk. But, I opened my big mouth, all I said was, Osama Bin Laden, *bhi kissi ka bachcha tha*, mam Osama Bin Laden, *bhi kissi ka bachcha tha, kya huwa?* It's either the genetic criminality or it's the environment? So there are chapters and chapters on heredity versus environment, even for criminal law. We need to understand that. But you need to become psychologist from judges, all you have to do is to create a referral, that is what I am talking about. That's very very important. May I be allowed to move to the second case study aaa who is the one who is going to circulate it for me, I can do it myself, *milgayii aapko* okay, now, let me read this with you and I titled it I CAME TO MAKE A PHONE CALL, because that was what was at the end. Sunidhi (name changed) 24 years old, went to make a phone call at her neighbor's house. Rima aged 14 opened the door and welcomed Sunidhi. Rima's father was sitting in the drawing room and drinking whisky. His eyes were red. He did not greet Sunidhi but asked

her, "*kya chahiye?*" Sunidhi smiled and said "*Aunty se kaam hai.*" The matter finished there. Sunidhi met Rima's mother and asked if she could make a phone call from their land line. The mother gave Sunidhi the cordless and very apologetically Sunidhi said that she had left her mobile phone at her friend's house. Rima's father came into the bedroom. He beat up his wife and daughter and threw them out of the bedroom. He bolted the door from inside and tried to rape Sunidhi. The telephone was still on and her friend could hear it all. Her friend called the police. Sunidhi knew judo and Karate. So when the father tried to tear Sunidhi's clothes, she also tried to hit the father. She is a black belt holder. The father hit Sunidhi on the head and she fainted with a head injury. The father tried to molest her then. He could not rape her. The police came and broke open the door. Rima and her mother in one of their statements denied that their father did anything wrong. They both said that Sunidhi was responsible for the whole incident as she was wearing provocative clothes. Whereas Sunidhi was wearing a long top and loose long pajamas. Rima denied that her father bolted the door from inside. Some other neighbors arrived on hearing so many shrieks and crying which Rima denied vehemently. Rima was very upset and incoherent. She had to be sedated for a while by a medical doctor. The mother said it was Sunidhi's fault as girls should not come to people houses where the man drinks. Sunidhi's parents when returned home beat up Sunidhi as to what was the need to go to neighbor's house. They told the police that their daughter was too independent and fearless which a girl should never be. Rima's father was arrested because Sunidhi lodged an FIR. But her parents withdrew the complaint. Sunidhi never took back her complaint. The police gave a clear chit to Rima's father that there was no alcohol consumed. Trying to save the father under any circumstance so, not only turning hostile but not telling the truth. Vast stereo type is *ladkiyan jhooth nahi boltin*. The judge can be carried away, *ladkiyan jhooth nahi boltin*. A prevalent practice in society, blame the girl always that is Sunidhi's parents. These parents, a girl should not be independent, a girl should not be aggressive, a girl should not be violent, a girl should not go to people's houses like this, a girl should be you know under the four walls, stereo type [Participant Judge- Rima and her mother none of them admitted that their father did anything wrong. They both said that Sunidhi was responsible for what has happened as she was wearing] provocative clothes, which she was not [Participant Judge- which signifies that] so you are looking at the incident but are you looking at how it is getting colored and how even the judge can get colored. But at the end are you also saying that the police declared him without any alcohol because they took a lot of money, I didn't write that, *usko bhi paise diye*

gaye the sir [Participant Judge- so then this aspect can be taken care of by the court that there will be medical examination and that will be corroborative evidence of the friend who was hearing on the telephone. he hears the girl when she was being attacked by the father, that can be taken into account] sir do the judges do that, is the police ever taken into account? [Participant Judge- this whole statement will go so after upraising the evidence] Ji Ji , [Participant Judge- why didn't Rima and her mother did not say anything] because they are protecting their husband [Participant Judge- yes , yes] husband and father [Participant Judge- yes so this signifies...] now, let me take this narrative, it is a fit case for conviction, for conviction [Participant Judge-- conviction] did you search your heart, whether you are talking from the evidence or you are also reacting in anger, how dare you do that [Participant Judge- if we go by the version of the girl] which girl? Rima is also a girl and Sunidhi is also a girl [Participant Judge- the victim] so the victim, okay. No one has said the father should be send to an alcohol rehab, *wahan nazar hi nahi jaati aapki*. You want to convict him and *aapki naar hi nahi gayi ke he is an alcoholic and uska treatment hona chahiye* [Participant Judge- it is only to reform him, it's not about that] will he? will he be reformed, will he be reformed by conviction or will he be reformed by conviction and therapeutic process. [Participant Judge- Mam, why to send him for reformation because police has given a statement a clear statement that he has not consumed alcohol] you said instinctual, didn't you use the word instinctual, so if he was drunk. [Participant Judge- so if he was under the influence of the liquor, he should have committed something wrong with his daughter] [Another Participant Judge- that means the judge aaa it is the duty of the judge to do everything, what is the wife going to do] wife is only going to protect him and get beaten up in the process, which has not come in the case study but you know what generally happens. Women are beaten up by men who are alcoholic, even women who are alcoholic beat up their man, vice versa, but I am not saying that the judge will do everything, part of his judgement should be rehabilitation. Conviction *karke haath jhad liya bas, mera role khatam, is it khatam?* No it's not finish. His his conviction will be over and he will come back home and he will start drinking again, *phir kya hoga* he will get convicted and he'll keep molesting. Have you thought of that? [Participant Judge- but there has to be an evidence that yes he is drunkard] exactly, can't he be referred to another organization [Participant Judge- before the court it is not so] can he be referred to another organization for revaluation[Participant Judge- that every case need to be referred to] because aaa because aaa to to a medical place because an alcoholic over a period of time accumulates more than 10% of alcohol in th e blood permanently. But if you are a new

alcoholic, I am a new alcoholic, it will not be seen in the blood, but if I am a cronic alcoholic, the concentration of alcohol, if it is more than 10%, you are an alcoholic. *Ye waali workshops aapko karani chahiye, time and again ki aasi baaton ka agar knowledge ho thoda sa* you can refer back to another hospital. Ji sir

Participant Judge- I want share an example, in Chandigarh there is lot of drunken driving. Now it was earlier that only some fine being imposed of around Rs 1000 or so. Thereafter, the practice was started to make the person stay in court, standing in court for the duration of the day and that had the desired results and to a great extent it has been curbed. Drunken driving has been curbed to a great extent now. So now in this case, if a person voluntarily drinks, and then commits an offence, he has to be punished for that, though at the same time I would agree with whatever you are saying, that he should be sent for rehabilitation so that he does not commit the crime again by becoming drunk. That should be in your personality to look at the rehabilitation part, not just the conviction or the punishment, that is what I am talking about. That if we have the personality, the cognitive structure, our stereo types, then whenever we are taking a case when we come back home, we must peep into our personality, our cognitive structure, our backdrop. What was my perception, what was my attitude, did I get carried away, and have I done the half done task. That will bring art into your judgment, not just science of your judgement. You will make a humanistic society. If you send rima's father for another evaluation and if you send Rima's father for after that evaluation to rehab through the jail aa whatever, fine. You have Rajesh Talwar, Dr. Rajesh TALwar, and practicing dentistry in Tihar Jail. He has set up a clinic and he is offering those services to everybody. *Ye thoda thoda services, aapni awareness, meta-cognition.* Peeping into your inner self has to happen but unfortunately what happens is *jaldi kar jaldi kar, jaldi kar*, let's go home. *Khaana do bahut bhuk lagi hai* , let me sleep I am very tired, the next day *jaldi kar jaldi kar jaldi kar jaldi kar* , this is what our life is. It's not just you, it's me too, and please I am not accusing you of anything. I am here only to apprise you. That there are lots of issues coming out from this opening session. Judges should be more, court should be more, cases should be less per judge and you need to awaken your inner persona and make it humanistic and more evidence. Then your evidence, then your judgment is scientific as well as artistic because you coming into the humanistic model. Have I done aa have I missed out, am I over reacting, this is very important to search your inner self. With this I do come to a close. Forgive me if I have lived up to your

expectations, this is me accept me as I am , but I always wanted to share things with you. You look at the behavior from one angel , I look at behavior from another angel and I say can we converge and meet , can you look at a criminal from a humanistic angel and see, am I pushing him more into what he deserves or doesn't deserves, can he be helped in any way or can he not be helped in any way. If you peep into that, I think your entering meta-cognitive land. You should be aware of your own weaknesses, we are aware of our strengths, but we never want to face our weaknesses. How biased we can be, if I go back to Prof. Menon's words. Thank you very much. May God bless you all. Thank you for your patient listening and I am sure it is not an easy task to address the aghast, elite audience that I have. Please forgive me if I have hurt you in any way I never meant to hurt you. Thank you very much. God bless you.

Dr. Geeta Oberoi- Thank you mam. [claps] mam deserves claps at least because from different disciplines people come and we can all discuss like what perceptions are there what aa like this meta-cognition is there all about because that all aa this is all about science of reasoning and therefore, we had this session. Now we aa break for aaa we may aaa sir aaa Prof. Menon or Justice Reddi has some comments then.

Prof. Madhava Menon- Yes having listened to aaa Aruna for the last three hours aaaa I felt aaa you know she impressed us that judging is not an easy job. An advocate when he is appointed as a judge, as he become a judge by that appointment, what is the difference between an advocate and a judge, if they are 2 distinct roles which require different attributes, different attitudes, different approaches to problem, how would aaa this about the training part of it, can the training convert an advocate into a judge? If that training is 1 month, 2 month, 1 year whatever or is there any other process of judge making from an advocate to a judge, how do you do that because if these are the complexities of judging, where so many disciplines other than law need to get into the psych of the person appointed as judge. How do we accomplish it, it need to be thought about I am not aaa. another aspect which I would like to , which perhaps Aruna would like to respond to that, you know there is a system at least in criminal proceedings in the United Sates, in England and other countries which follow the Anglo American jurisprudence where, part of the judging on facts is decided by 123 men of the jury and aa they are judging, they are judging on the evidence produced, whether the accused is guilty or not and their judgement is a binding on the professional judge. The professional judge duty is then to apply the law to what was proved by the judgement

of the jury or the opinion of the jury and pass the sentence. So, therefore the question is what is the difference between, judging by a jury and judging by a single professional judge.

Dr. Broota- I think we unload the responsibility of one judge if he has there are members of the jury and get a wider perspective of how people are interpreting the evidence in terms of stereo types and attitudes. But I would I think it can be good and bad I can't say which one is better because in India members of the jury can be influenced and bought off, so you will have a larger majority against for something or what, I don't know. But, I must bring to your notice and you are aware of that, that there are mental health courts in the US. I recently, met a clinical psychologist from Hawaii and I asked him what are you doing are you teaching, are you practicing, what are you doing? He said I am part of the clinical psychologist set up in the mental health court. So I said what do you get, do you get adults, do you get JJs or what do you do? You know. So he said, everything, everything, sometimes there are only cases for evaluation and send back to the other court but sometimes if you do find that there is a person who is suffering from a psychiatric disorder or a psychological disorder then he is looked upon by the mental health court and not by the other court at all and there too they will have jury and that jury will be comprising of psychologist a lot. So there will be one sociologist and three psychologist and one psychiatric, there are 6 members to that and they rely heavily on that jury but then they are professionals from the same field. It's like you having a 3 judge bench you know in the Supreme Court so that they come into agreement or they come into disagreement. like that and in India one is so pessimistic people like me, you can criticize me for saying that, that corruption is so much that I am scared that will the jury also be bought off. I am a little wary of that. Yes a judge can be bought off I didn't want to say it because I don't want to hurt anyone, I know you are lovely people but we have met and seen this thing. Just to end it all up, I must say sir, I was standing at a shop, and a car came with a red light. Mam, don't get angry with me please, so the judge entered the judge's wife entered the shop and he said she said *ye kitne ka hai , ye kitne ka hai*, how much is this, how much is this and how much is that and how much is that and the owner said mam I really don't know because we are still unpacking and this is years back, so he said that the VAT issue is not clear to me so I haven't re-priced it, I have to add VAT, have I not to add VAT on which item so I have to clarify that and the wife said, *Tujhe pata hai main kiski biwi hoon, falaney session judge ki biwi hoon, kal tujhe andar kara dungi, tamiz se baat kar mere saath*, tell

me how much this is. So he said, mam I'll do something wrong please I, *aap kal aana* I'll tell you everything, so she went back and the very next day police came and took the man away and he was asked to wait outside the gentleman's court and *khada reh tu aaj yahan*, that was a judge. So, there are aberrations as you were talking about, that there are aberrations and aberrations , to *mujhe jury form kartey dilli main to bahut darr lagta, bahut darr lagat*. [Prof- Menon- So you blame the judge or the wife] Sir I don't accuse anyone, I accuse the police how dare they come at the behest of the judge and take anybody away and the judge is totally immature , it's like telling a child, put your figures on your lips and stand outside the class, this is what the judge did with the owner, so he was very immature to become a judge. Passing the judicial examination is not enough. There has to be psychological evaluation before a judge is appointed judge. That's very very important. *Ab maine nahi kaha ke usko test karogey wo pagal hai* please, I didn't mean that, personality should be assessed [Justice P.V.Reddi- as you said they are some aberrations] there are aberrations before you came we were discussing aberrations. [Justice P.V.Reddi - the institutions are very rare, it aa exposes the judiciary in whole light] *main to nahi bolungi ke* whether they are rare or not but *hain* [Participant Judge- so that sought of impression if there is] *kisko point out karun woh mujhe hi pakad ke le jaeyga*, I am scared, sir I am scared, I am admitting before you, I am scared *ke wo mere ko hi pakad ke le jayega* [Participant Judge- no no no not that , it's not so easy] ohh that's what you think that was so easy to take this shopkeeper away [Participant Judge- not at all so easy. that very session judge, a complaint ought to have been referred to the inspection, vigilance or inspection. The court could be placed before the Honorable court committee and then he could be hucked] *phir saara kaam chod ke roz chakkar hi katey raho, aaj date, kal date, parson date, 50 years ki date* [Participant Judge- is she referring to the High Court judges] no sir session judge, *Ji walia saab* [Participant Judge- Prof. Menon has said that aaaa abroad there is a jury system, whereas here we have the individual judges. Now there are certain advantages to the jury system in the sense that we have more than one person that may include a psychologist, may include a common man and therefore the collective wisdom of those people by taking into account the societal norms won't be a determinant factor for taking a decision as to whether in the given set of circumstances that person should be sentenced or not by applying the law. So, therefore the advantage of the jury system. But unfortunately we don't have now] [Another Participant Judge- we had that in Calcutta High Court, jury system, Vikas Mundra last case which was tried in Calcutta High Court] Ji sir, [Participant Judge- we have I have seen when i was a student of law]

Prof. Madhava Menon- The jury was last there in Nanawati, 1951, so it was it was very much there and what you are saying is a case that Nirbhaya, if it was tried by jury in which there may be a clinical psychologist in the jury because just across the cross section, and I don't think that you can buy out all the 12 people, you know you may buy 1,2,3,4 whatever, but there must be unanimous decision on the jury, not for 1 aa 9:1 things like that. Till they come with a unanimous decision, they are confined in their jury room and therefore, there could be differences but ultimately, through rational exercise of their power, their reasoning power, they come aa this is more likely and gives a unanimous verdict. So the argument that the jury men can be bought over or they are immature is a reflection of the whole society. In which psychologist is also a member? The psychologist can also be bought over [Dr, Broota- sure sure absolutely, absolutely] [Participant Judge- and no witness protection, that is the main concern] [Dr. Broota- no witness protection] [Participant Judge- drawback what we are facing] [Another Participant Judge- If I am permitted to cite a story relating to jury trial, one very poor class boy, he was implicated in a murder case. His mother approached one local leader said that *baba tume humare chiley ki bacahao, wo apradh kare ni*, please help me and save my son, he has not committed any wrong, then he thought that leader that no, mother I don't have any connection with any judge I cannot influence them, I have reach to every authority but I cannot reach the judges, I cannot dare this. Then second time also she is praying that in the same manner. Ultimately, he said that alright let me think, then he got some connection that yes the jury is my friend, my class friend, he is headmaster. So he approached him and he managed too that through him, the majority of the jury and the judge was sitting to deliver the judgement of acquittal, what the lady has said, in Bengali I say- *baba tumi dekho humare cheley jano mirtu dand na huwey*. She mean to say that, you see to it that my son is, if son is aa put behind the bar for transportation it's okay but he should not be hanged to death. This was the reflection given to head jury, head jury managed, then he aa all the judge said , that we are in agreement aa he should be put behind the bar, he should be go for transportation of life but he should not be hanged to death. Then the judge was surprised, he was about to deliver the judgement of acquittal, he is a innocent boy, then he changed his decision. On the next day he changed his judgement, passed the judgement of conviction, sentencing him to life imprisonment. So in those days transportation of life. So this was the reason why the jury trial was [Dr. Broota- why did the judge not address the jury all over again that what made you say that] that I can't say but this is the story which was told by our own professor and the Professor was nobody else but

he was ex-chief Justice of Rajasthan High Court, Justice Mukherji, he was our professor once upon a time. He is no more now.

Dr. Geeta Oberoi- Thank you so much now we aaa take 1 hour break for lunch and re-assemble at 2 O'clock. That's alright for you all of you or 2:11, 2 is alright. 2 O'clock okay. So see you at 2 O'clock.

SESSION 3

Appellate Judging

Paiker Nasir- Welcome back everybody. We have with us Honorable Justice P.V. Reddi and he'll be taking up the session on Appellate Judging. Sir, over to you sir.

Justice P.V.Reddi- Dear brothers and sisters greeting to you all and I am so happy to be in your midst today. The topic of appellate judging, involves various facets and dimensions. It is so comprehensive that aaa most of the following session deal with the specific aspect of the same topic. Starting from Social context judging which is very important and aaa various other session also tomorrow- reasoning, rationality, precedents, everything is all related to appellate judging. appellate judging, is the judging be the constitutional courts in general, which act as appellate courts with aa and with very little jurisdiction, accepting write petitions. Of course I am not here to summarize much on the virtues and essentials of a judgement. You have immense experience as aa lawyers or heads of the district judiciary. Your competence and capacity to write judgements of expected quality cannot be doubted. However there is always scope to refine and tab the potential in you to to rise greater heights. This is indeed a great unique forum, unique forum to sit together, share your experiences and thoughts on the subject with your colleagues and the resource persons. A judgement be it of the appellate court or trail court or constitutional court is aa the heart of judicial function. A judge speaks through the judgement in the best possible way after weighing the prose and corns of the problem with which aaa she or he is confronted. I am happy that special attention for highlighting certain dilemmas in judging are taken up or set on the agenda and they will they have triggered and they will continue to trigger interesting discussion. The occasion remind us of the famous words, A wise judge is one who is pliable, every ready to learn and courageous enough to acknowledge mistakes. The ultimate goal of the judiciary is to march

forward with a mission and vision to deliver timely and quality justice, qualitative justice and to earn confidence of public as best as they can. As said by, Justice Marshall, United States Supreme Court, very aptly, you must never forget that only real source of power that we as judges can tap is respect of the people, that respect is generated not by the show of authority but by the judges performing their functions as humble servants of justice in accordance to the oath they have taken under the constitution. The quality of the judgements delivered by the judges' especially of the constitutional courts will go a long way on earning that respect and public confidence in the judiciary. Of course, Dr. Madhava Menon lecture talk in the next session will throw much of light on the whole of the judges in learning that public confidence. Of course perfect justice is not possible to achieve, it is the attribute of the divine, but to strive at achieving realizable justice will heighten the glory of the judges. At the end of the programme I am sure you will go to your seat of justice with greater determination to improve your skills in the art of judgement writing and the approaches to be adopted in rendering the judgement. The first thing which a judge of constitutional court or the appellate court should always bear in mind is that, she or he is laying down or declaring the law which is bound to be followed by all the courts and authorities within the state and has persuasive value in other jurisdictions as well. By declaring the law the judge creates the law as well by the exposition of law, there is no anti-thesis between the declaration of creation of law. Justice Barrack, you know his aa retired Chief Justice of Israel and aaa was an eminent judge and aa jurist as well as written on very important topics so he this is what he said- judges do create law, no common, that is he is trying to substantiate that, aa to say that judges do not create law is a myth, that is what he points out and he goes on to say - no common law system is the same today as it was 50 years ago and judges are responsible for these changes, this change involves creation. The meaning of law after judicial , after a judicial decision is not the same before the ruling there were in the hard cases several possible solutions. After the ruling the law is what the ruling says it is, the meaning of law has changed. New law has been created. Then he poses himself the the question, what is the role of the judge in this creative process. So that is very important for you to introspect. So the the creation of creativity , the creative abilities of the judge will ultimately promote the public good and strengthen the justice delivery system. In that sense the judge is creative. Whether law can be so interpreted has to secure the ends of justice and to make it accomplish it's objective is therefore an important part of the judicial exercise. The judge has to balance various apparently conflicting considerations to arrive at a just result. Of course in

conformity with with law. Dilemmas in legal exercise confront the judges day in and day out in the in the this honors task the judge is of course aaa the judge is expected to remain within the bounds of law. The interpretation and application of law cannot be according to the whims and wishes of the judge. A balance and rational approach is expected from the judge. The judge has to steer clear of dogmas, preconceived notions, predilections and in the process of aaa judging a case. Still it is well known and in fact have been hearing in the previous session in the talk during previous sessions. It is well know that the judge's philosophy, attitude toward life and society, he enter into a verdict consciously or unwantingly, it is therefore difficult to standardize the processes of judging or approaches in judging and evolves some straight jacket for bullock. We can only think of some broad guidelines and norms. Interpretation of law or a legal text often becomes the most difficult part of judging on the appellate side. It is a formidable change. The difficulty is heighten by the fact that there are so many diverse rules of interpretation that there is no clear norm or principle in a given situation. The varieties of interpretative theories present so to say a confusing palate. It has been said in desperation by one writer. The golden rule is that there is no rule of interpretation. There are so many rules of interpretation which, which cannot be reconciled with each other. The dilemma of a judge is heighten when he would like to mold the law to reach a desired result which in the judges opinion will be just and fair and serves the larger purpose of the the law. The question of construction of statute would would not normally arise if the law is clear and does not bear more than one meaning. If it is susceptible of more than one meaning then, we have to adopt a process of interpretation, which you consider most appropriate, just and reasonable. There is an interesting book on aaa interpretation by American jurist Atonia Scalia, who later became a Supreme Court judge, reading the law and interpretation of legal text and Brian Garner an eminent jurist. The theme of the book is not to think with the language beyond permissible limits. They go by the parliamentary enactments but not intentions. The purpose of this text has to be gathered from the text itself. They advocated the principle of what is known as fair reading method, which says in aaaa I just quote that- "we endorse that of the fair reading method, fair reading interpretation, interpreting approach, determining the application of governing text to given facts on the basis of how a reasonable reader fully competent in the language would have understood the text at the time it was issued. It also requires an ability to comprehend the purpose of the text which is a vital part of its context but the purpose is to be gathered only from the text itself consistently with the other aspects of its context", that is how this

fair reading method has been advocated by them. And aa interestingly, the authors have enumerated 13 false notions some of which, that is there , if you want they will give that, 13 false notions they have enumerated, some of which may not be acceptable to us and may go against our interpretive , interpreted jurisprudence reflected in various judgements of the Supreme Court. The authors have started the introductory chapter with a title, "Why of this book", in that the flood control case of, the flood control case has been referred to. It has gone up to the US Supreme Court. That was a case in which there were deaths as a result of aa opening the flood gates to let out the water from the reservoirs, though there was no need to drain any water at that stage, Then, the aa it was the tort claim, you can give that case so that, the claim aaa it was aa the claim for torts, torts , an action based on tort was laid under the parallel tort claims act. But it aa that, that Act expressly excluded actions prohibited by the 1928, Flood control Act, which said that no liability of any kind shall attach to or rest upon the United State's for any damage from or by floods or flood waters at any place. The issue was whether this statutory immunity embraces the loss of human life? That is a question of interpretation. Then the arguments for and against have been given, have been set out by the learned authors that, that is being passed on to you, then he, they pose the question. You are 2 appellate colleagues are split and you have the deciding vote. How should you decide and more important why? What you should consider? These are the type of questions which are proposed to be answered in this book. I would request you to go through this judgement. I am sorry, aa to go through these 3 pages from the that book and you give thought to it. And what would be your view of interpretation, whether that immunity clause in the flood control Act would apply the aa the federal Part claims will apply or not and it has gone up to the Supreme Court, how it has been decided by the Supreme Court that aa, I will reveal it later. Because tomorrow session is also there. See, as I said these are all over lapping sessions that about reasoning and aaa writing in that session probably some time we can devote for this, instead of going into the details. But you may just have it. You thought to this. Then, the question arise and it is an ongoing debate also, whether the judge is or ought to be too restrained or whether he is aa the judge is too active. Whether by a aa particular interpretation or a particular instance of interpretation amounts to judicial overreach. Whether in a particular case, what is known as judicial surgery is required or it should to legislative therapy? these are the questions which continuously arise and here again a balanced and rational view has to be adopted by the judges. Of course keeping in view the paramount consideration of promoting the public good. Then, I would like to highlight certain

other salient, uncontroversial points to be borne in mind in the context of judgement writing on the appellate side, which are often forgotten. Given in the Apex Court judgements, I find this deficiencies. these are well know to you but on occasion like this they need to be recapitulated very briefly. See as you know the , the art of judging begins with the partial of facts that is, the summing of the facts and pleadings without reproducing the whole lot from the record is necessary. It is an art and this rule applies more forcefully to appellate judges. The the art of summing up and the clarity to summing up the facts and pleadings that is very important. Then, the presentation and sequences of discussion is another important aspects. rendering from one point to another indiscriminately, and even without prepares for discussion, this has to be avoided and we do find it in many judgements. As I said even of the apex court, though he may not be able to say that, I can say that. And there is no need to go on citing for citing cases , citing case law for obvious or settled propositions. If need be cite for, cite 1 case as an example. Regarding controversial or debatable legal issues, for which conclusions can be backed up by reference to precedents, the practice of extracting passages at length without indicating their relevance and application to the issue on hand, that has to be avoided. When precedents are cited, it is not merely just quoting the passages at length but you must try to indicate what is the relevance, what is the ratio of the judgement and how it applies to the given fact situation or in the light of it, in the light of it what view of law has to be taken. Cut and paste job as they call it, need to be , I am it is not desirable. Giving headlines or brief description of point under consideration is a good practice , it imparts clarity to the judgement. Another point regarding the case law is, distinguishing a case needs some care, just give thought to it and indicate in unmissable terms, how the judgement, a particular judgement has to be distinguished, simply saying that the case is different is not sufficient, it's not good practice. Then, plagiarism, as they call it. Plagiarism shall be avoided. Copying from a judgement or article without quoting and citing the source is to the least is an unhealthy practice. Then the judge having declared and applied the law may have to mold the relief in appropriate cases instead of going the whole hock, and carrying the findings to their logical conclusions, with a view to relieve aa hardships to the parties in a given case. illustratively I draw your attention in this regard to 2 cases of the Supreme Court which furnish instances of such molding the relief, even aaa I mean without invoking the power under Article 142, Article 142, the Supreme Court has the power to pass orders to meet the ends of justice aa . The Supreme Court resorted to molding the relief in 2 cases I just give that citation you can go through it, if you want, that is aa 2005 11

SCC 73, in the last page , the last paras you can read, page 108 that was a case under the company's act, raster of share, raster of transfer of shares and so on. And then there is case under specific relief act, that is 2002, 5 SCC page 383, at page 396, only last paras you can read how the relief has been molded in these 2 cases, of course I was, I was one of the judge in that 2 matters. See reasoning and clarity in discussion and recording findings is of course the most important element of the judgement making. We will discuss this topic in more detail tomorrow perhaps. It includes dealing with the reasoning given by the trial judge. The trial judge has given his own reasons after devoting time, attention and exercise. So, it is necessary to advert to that reasoning and record your opinion, even when affirming the judgement, you can still correct the reason given by the judge, you can improve on it, you can say, your reasons are different. For different reasons the court comes to this conclusion but never the less, it is important that the reasons given by the trial court need to be referred to, apart from the contentions advanced by the council, in any case. Then, good diction and elegant style of course enhances the esthetic quality and precedential value of the judgement, but the judge has to choose appropriate expressions, avoid using, high sounding artificial physiology, just to demonstrate the knowledge of the language. The verbosity has to be a statute. these are the some of the important aspects which I thought we could we could recapitulate as I said, it's not aaa they are not aaaa unknown to you are they are not something new but , needs to be recapitulated on an occasion like this. So I think we'll aaa we'll have some interactive exercise, some on this process of judgment rendering by appellate courts and aaa out of aa you can narrate your experiences and any problems or dilemmas are places I mean faced by you in aaa you have any aaa and you give. Can you express your views or any particular concrete instances which will have aa

Participant Judge- Lord Denning in Seaford State case pointed out that, you as a court interpret the law as suited and you iron out the cases when you find that legislative intent is not clear. This principle has been considered by the Honorable Supreme Court as well in aaa ruling. [Prof. Menon- there might be occasion where you have to go beyond these interpretations] like aa I had to deal with a case aaa of Municipal Act, there was order of demolition by board of counselors, that demolish this building, so the petitioner moved aa writ application, the Honorable Court in writ jurisdiction said that, no this court has no jurisdiction to entertain in a writ jurisdiction because the provision under section2 (18) aa provide aaa sub- section 3 provide that , who is the appellate

authority. Against the order of demolition the appeal has to be preferred to civil court of competent jurisdiction not before the writ jurisdiction. So actually, aa accordingly the honorable court advised and passed the order and disposed the matter. Then, the petitioner moved the district judge, the district judge said no, this is not the appellate court, within the meaning of that section, so you move the Munsif court, that means civil judge of a junior division in that case, matter against that order the matter was referred to the honorable court in civil order and I had to decide it. It is a reported judgement right now, so I pointed out since aa, had there been an intention of legislature to mean the district judges as the appellate court, in that case the legislature must have aaa inserted the word principle court of aa civil court. [Prof. Menon- so how that interpretation been reached?] yes I interpreted that case I applied this aaa proposition which was observed by Lord Denning. One of the lawyer actually referred to and I applied it. So district judge is one who is principle court of a district is a district judge. But in this section this I snot the provision aaa this is not the word, word is not that of principle court. It is pointed out and second point was, that board of counselors cannot be equated with a civil court. Therefore, appeal directly cannot come to the district judge. This is my aaa

Justice P.V.Reddi-And one more aspect I just missed to mention to you about the what the proportionality of punishment, that is another important aspect that appellate court shave to bestow attention. It should not be we are mechanical exercise, but punishment is called for as per the circumstances of the case. A too liberal approach, here again some balance have to struck, too liberal approach or a harsh view is not desirable. Of course there were some aberrations in that regard, i'll probably I am aaa some 100 of cases came up to the Supreme Court, they were all again reminded and sent back because on merits the judge will not interfere. In regard to punishment, irrespective of what is prescribed in the, what is prescribed in the relevant provision of the section Penal code or Criminal laws, the judge used to say, he is already under the long sentence, he comes from a poor illiterate background, so even cases 376, rape cases and the 304 cases, culpable homicide not amounting to murder cases , grievous hurt cases, they hardly under gone 6 months, or 9 months or 18 months imprisonment. Hundreds of cases, there is some delay for condemned and the Supreme Court send them, nothing, nothing is said about the merits. And there is also this category of what is what is remand judges [Participant Judge- that has to be avoided] the case is , aaa you see this this sort of mere statistical disposal is not conducive to the health of teh justice

delivery system. A type of remand judges have been there in the justice delivery system, From time to time we have been noticing, so, the best way is keep the case pending for years together and even when the civil appeal comes up , alright some point is not considered, and especially of you see that, the file is quite heavy, the record is quite heavy, you find some way out to remand it, that's all that tendency has to be aaa got against aaa. Otherwise in in sitting in aaa writ petitions under Article 226, the learned judges used to say, file a representation, or if the representation is already there, consider it and dispose of. Whether that representation, what is the faith of that representation? Has it received attention or it has already been disposed off or whether it lies, that representation lies under that statute, I thing is adverted. But I think, there is disposal of cases, those , that way the quality of justice cannot suffer by such type of summary disposal [Participant Judge- with your permission] yeah, [Participant Judge- the the disposal of writ petition and by directing representation and by deciding it may be in accordance with the provisions of law applicable, it sometimes so happens that a stale claim, get considered and the delay aspect on the basis on which the matter ought to have been dismissed on account of delay latches, that get ignored. So, therefore, there are judgements of the honorable Supreme Court that such like, situation should be avoided, so that stale claims do not get decided and a person get the advantage on the bias of a direction which is given ex-parte to decide the representation.] Taking advantage of such directives in those stale claims. There are matters in which pay fixation has been done. If the government is accommodative and too willing to carry out the directions. You see that, the the aaa lot of harm could be done to the to the public avenues and public interest. [Participant Judge- that is right my Lordship] [Another Participant Judge- But far as pay fixation is concerned, the Supreme Court has held that, it is a continuing cause of action aaa that can be settled at any point of time. [Another Participant Judge- pardon]in so far as pay fixation is concerned, it is a continuing cause of action] A person who retired long back, who retired long back and aaa and who did not aa and who was promoted hahaha, it is an instance, it is not just pay fixation that I am saying. So, in such cases you aaa you will lay your hands on some rule and you realize, you discover after some decades that, the principle has not been correctly applied and you move the court and innocuous direction like this is given, okay, you consider it and that gives the aa leave your handle to the, to the accommodated executive of shells to carry out the directives if it is convenient to them. So, on the appellate side, on the judgement writing of course, you have to grapple with this problem of see you have aaa, tremendous pressure on your time and aa heavy the arrears,

pendency and constraints on your time and at the same time rendering qualitative justice is a change for the judges. And you may have to devote lot of extra time for it, do some homework. And the high court judges work do not end in the court room itself. Ultimately, the people or the public are concerned with what comes out of the court not what is happening in the court rooms.

Prof. Madhava Menon-From that point of view may I. Sir, can there be a limit to the length of appellate judgements? can aa particularly what about the concurring judgements aaaa if you are concurring to the judgement, is it necessary for you to write a separate aaa I mean I don't find many cases aaa separate reasoning, but still aaa judgement is written aaa what is the necessity when you are over work, you want to avoid delay and you want to aaa, ones you concur it in the, the spirit of the reasoning as well as the conclusion that should be the end of it. The length wise I am told by one of the judges, who was trained in the continental system, he is from France, aa he was aaa practicing in Pondicherry and later became a session's judge and eventually became the judge of Madras High Court and he said aaa and he during his 9 years in the madras High Court, has never written a judgement which is more than 10 pages, and he publically conversed that particularly when you are writing appellate judgements, why should it be so lengthy quoting from all sorts of privy council, down judgements etc. and repeating the same matter contained in the pleadings or in learned writing of aa jurists. You know for all the judgement, 1000 pages judgement, for example, take this aaaaa this collegium judgement. What is this that you ultimately get out of this 1200 pages judgement? You know I just try to see as to whether, aaa this was necessary, did it contribute to any aaa addition to the knowledge or the jurisprudence or to the purpose for which you are writing. Aaaa I was therefore, asking myself a question, taking the view from Justice Devidena Swami, the judge who I am referring to- can we have a limit to the length of the judgment. You know it is arbitrarily , you cannot decide I know that but even then, to be writing more than about 100 pages, in constitutional aa from constitution, accepting some the aaa you know the landmark judgments aaaa Keshavananda Bharti and all that . But on the ordinary run of way do we are so prolific, because I don't see any other country which on the usual run of cases writing judgements of 100 or 120 pages aaa which is becoming impossible to read and literary people do not read, for whom are you writing the judgements? A litigant needs to understand what is the relief I am getting and whether it is properly reasoned and aaa beneficiaries are the law publishers, who publish it and then impose it on the lawyers and make money and the

lawyers waste the time of the court by quoting this judgement, that judgement, all conflicting, this passage and the judges reiterate those passage, which are already there in the Supreme Court's judgements, earlier judgements, quoting all that. How do we bring a discipline in the matter of writing judgements in terms of concurring opinion? Dissenting I understand, he has to reason against it and aaaa about concurring judgements sir it's aaaaaa

Justice P.V.Reddi-Prof. Menon has just pointed out in concurrent judgements, different yardstick has to be applied that is aaa, you can be much more brief, we can only say. But at the same time you cannot avoid giving reasons especially when contentions are raised by the council. Of course, if you are rejecting the case like in writ petitions or in aaa second appeals and you are confirming the affirming the judgement with no reasons perhaps that you may accept reasons that it does not involve any substantial question of law or in a particular aspect of it, instead of all or whatever is stated in the pleadings etc. you can simply say for what has weighed in your mind for confirming the judgement, that you can indicate in a few sentences but when some contentions are raised by the council even if it is in a affirming or concurring judgements aaa still you have to refer to them briefly and if it is aa a settled law is there you can say, it is the law is settled and there is no need to further discussion but, some application of mind may be is expected because the party aggrieved should also know that his case has received due consideration in the High Court.

Participant Judge- In second appeal, aaa specially in Supreme Court, the Supreme Court says a judgement should give reasoning. What was the reasoning before the trial court, what was the reasoning before the appellate court.

Justice P.V.Reddi- All those cases are remanded back for fresh disposal to the High Courts. So aa these remand s have become very difficult especially in the civil litigation and it is aaa no substantial question of law , it is dismissed in one line, that is stated by aaa. You see, in the Supreme Court also, you see in the Special Leave Petitions, Special Leave Petitions, of course there is no hardly, no reasons are given aaa in exceptional cases , where you reject. But aaa see a practice is developed during aaa the tenure of at least one particular judge, when after admitting the case, after granting leave, appeal comes up for hearing and you just dismiss it by a cryptic order, there is no reason to aaaa defer with the view expressed by the High Court, there is no merit in this appeal. That way during that period aaa Supreme Court had maximum number of disposals,

average per judge because it was hahahaha, it was unheard of. Ones, SLP, aaa leave is granted, appeal is registered and appeal comes up for final hearing, some discussion has to be there. So that practice was given up by that particular judge. So, hahaha

Participant Judge- In Calcutta High Court appeals are admitted by a division bench and thereafter, it is pressed before, aa it is assigned to aaa single bench

Justice P.V.Reddi- hann that is one thing, where I wanted to aaa you see, appeals aaa first appeals, only if there is merit in the appeal the first appeals aa you can admit otherwise you can leave it, that provision is there under 41 Rule 11, aaa at the admission stage itself, the appeals can be rejected aaa but that is not followed, all the admissions, first appeals are automatically admitted by the list because there are some civil rules of practice under the Civil Rules of practice framed by the High Courts, how far they prevail over Order 41 Rule I, is one question. Apart from it, admission, the , the if you apply Order 41 Rule 11 and get the aaa first appeals are posted for admission before the judges probably, it will add to your work load that is another. What is your view about that, I think is it necessary to strictly comply with the provisions of Order 41 Rule 11. Then again the arguments will aaa because the first appeal is there on the question of facts as well as law and in the first appeal they have aaa evidence can also be re-appreciated so in such a situation, there is always scope for some more argument, so aaaa then Order 41 Rule 11 will become a dead letter.

Participant Judge- Sir, Order 41 Rule 33, say CPC, appellate court can give reasoning Order 41 Rule 33, CPC says appellate court while reversing the judgement given by the trial court should give independent reasoning.

Justice P.V.Reddi- That is that is hmm, so how do you cope up with the aaaaa. I think Now it is time we must start your session. If possible we can resume the discussion tomorrow in the aaa tomorrow session. CLAPS

Dr. Geeta Oberoi- can we come back at 3:30, I think it is better to have a cup of coffee, a good coffee, so that all of us are alive for Prof. Menon's session on Social Context Judging. Yes,

Participant Judge- aaa 2:30 to 4:30 we can continue

No today aaa today you have aaa you had tight schdule today not tomorrow hahaha, only rarely, the programmes go on up to 5:30. We started today at 10 O'Clock. 10 to 5 today.

Dr. Geeta Oberoi- yeah today 10 to 5

Justice P.V.Reddi- So you need not have to go to the library and the computer room for hahahah that formality can be dispensed with hahaha today. So after the coffee we can

SESSION 4

Social Context Adjudication

Prof. Madhava Menon- Obviously you all are tired as I am tired and you were wanting to refresh yourself by taking a walk around the campus and aa she has to go and collect you back for the session. So therefore,

Justice P. V. Reddi- he is the most respected and most eminent legal academician and jurist in the country. He is most sought after and not only that now, is he dedicated to socio-legal service. And his social context adjudication, which was authored by him some years just on the year of the first conference of the Supreme Court Judges here, I was also there and I had the occasion and he was the director and I had and aa from that day onwards we have been reading and re-reading that article. That is so very relevant and important for the judges of the constitutional courts especially.

Thank you sir, honorable Justice Reddi aaa we have been working together in aa the National mission on aaa justice delivery while he was the chairman of the law commi9ssion of India. And aa during my tenure as a director of the judicial academy, he had several times comes as a resource person to assist the conduct of the trainings programmes. Thank you very much for that kind introduction. AAA I don't know in what manner I could aaa present to you some aaa desperate talks on aaa the role of aa judges and aa the process of judging in a country like India, I am talking about judging process in the constitutional courts, it may have some resembles here in there to the trial court judges but I am particularly addressing this theme of social context adjudication to the constitutional courts. aaa of which you are very proud members. AAA I would like to submit my aaa presentation in 4 parts and the linkages among these 4 parts will be aa evident in the 5th part

where I attempt to present the relevance of social context judging in the constitutional court. To my mind as judges and judging happened in this this country for years together, long before the independence, and if you ask me as to what is the big difference that has come about in the role of an appellate judge, after independence that difference is the the constitution of India. Where appellate judges who are deciding and writing very learned judgements which have found their approval of the privy councils, several other forums but the entire philosophy of judging in a constitutional court has undergone radical changes after the adoption of the Indian constitution, which has a philosophy, which has a bias, let me put it like that, which constitution take sides, when it a matter between the status of the status of parties or the issues relating to diversity in this country, diversity on the basis of language, religion, income. There is philosophy in the constitution which is ordinary expressed as social justice, affirmative action, trying to provide equal justice to an unequal society, based on the principle that are contained in Article 14 to 18 of the constitution of India, further elaborated in the directive principles of the state policy. So what I would like to tell you is that there is a bias within the Indian constitution, eloquently expressed in the constituent assembly and in some of the speeches of Dr. Ambedkar, as to what an Indian Judge should be doing, after the adoption of the constitution, when you have issues which affects pluralism, which affect fundamental rights, minority rights, which affect the issues relating to the poor, to the issues relating to the labor or employees, issues relating to women, issue relating to schedule castes , schedule tribes, definitive positions are taken up by the constitution. So I don't know if you agree if I use these word that the constitution is a biased document and that bias is in favor of some of those values of the constitution, which are expressed in the preamble, in the fundamental rights, in the directive principles which the Supreme Court says the basic structure of the constitution, unamendable even by a majoritarian parliament. If that is so, then as judges of the High court, you have to take a position in the matter involving the poor, involving the marginalized, involving the disabled people, involving the workers, involving migrants, involving women, you cannot be neutral, you have to take sides and you take under the constitution saying that I uphold in later spirit the constitution and make available, justice according to the constitution. It is in that context I am submitting my proposals in 4 parts. My first part which is the short part is to why it is so material. I take an Australian case, High court of Australia, which is the Supreme Court of Australia has decided a very sensational case which some of you might have read, is the Mabo judgement relating to aborigines of Australia. This is pertaining to

reasoning, which you are going to be discussing, partly, today you have and tomorrow you are going to be discussing it in greater detail. How do you reason, if you were to take a position on matters relating to the poor, the weaker sections of the community, if you were to be biased, you cannot simply say that the constitution says so that I should be biased? No! You have to reason. Now how do you construct that legal reasoning is the judicial craftsmanship, and I take this case to illustrate that particular point. This is because judging in a unequal society and ours is an unequal society, we have all sorts of inequalities, in order to give equal justice under law, which is the promise of the constitution. Equal justice in a unequal society through the judicial process is the key function and how does one appellate judge does is what is illustrated in this particular case. The conventional function of legal reasoning is complicate to the situation of inbuilt discrimination prevailing in unjust, unequal societies. There are number of examples how do we treat women, irrespective of religion, how do we treat the schedule castes, schedule tribes, our society has been treating for long. You know they are all unjust, dowry, untouchability, and sati. You name it and number of it which has some legal sanctions behind it. That was the norm, the legal norm, it has assumed some legitimacy. So when we started the constitutional journey, we started with principles, precedents, which has assumed legitimacy even though they are totally unjust, based on the new philosophy of bill of rights and things like that. So discrimination was in built and suddenly, Article 14 15 16 says - discrimination, unfair discrimination prohibited under the constitution and you shall not adopt it. Constitution has gone to such an extent that this discrimination called untouchability is prohibited and is punishable. No constitution in the Bill of Rights say that create a crime. But we create a crime of untouchability in the constitution itself. So the inbuilt, conventional prevailing pre-existing injustices, with that we have adopted a constitutional philosophy which has gone to the other extreme and said this shall not be, and who is to make this transition is social reality, the judges, because these will be questioned and for different reasons the politician will take one side, this side, that side. When it comes for questioning in the Supreme Court, High Court. The Supreme Court will say, look this is what the constitution has said, it may be legitimate till the other day but no more and we will have to be inclusive, we will have to adopting a different standard of interpretation. We have to declare certain things as unconstitutional all this baggage comes to your ground. The very assumption in which legal reasoning has taken place before is stands undermined. The legal reasoning that was adopted by a appellate judge till 1950, no more relevant as legal reasoning after 1950. That's it. Therefore

some sense in quoting this privy council or some other council, we have to quote from the constitution or the debates in the constituent assembly as to what is the meaning to be given to non-discrimination and this is where the biased and other things which we discussed in morning also comes into play. We have all those biases, we have been brought and born and brought up in aa a many of you born before independence. So many of you born after independence may not understand what was the level of inequality and injustices that were perpetrated by our society or to the communities with which we belong and that will have to be discarded and aa new philosophy adopted . So therefore, you are trying to balance in your interpretation with the help of the constitution from existing social reality, to a new social reality, very difficult. Look at the decisions of the Supreme Court from Chapakam Durairajan down to Indira Sani or later, what a transition it has been on the principle of equality. Because it was very eminent judges, immediately after the constitution said you cannot stand anymore. You can't deny a Brahmin because he happen to be a Brahmin, no admission because you have to reserve seats and the less mark scoring Schedule caste should come over you, this is discrimination on the basis of religion therefore, Champak Durrairajan said the Madras communal geo is unconstitutional. But very soon the other cases came and the position has changed, yes if you are a Brahmin and you are not given admission on merit that is because of these reasons, the less privileged people who who your forefathers did not allow to go to school, they have to be given preferential discrimination in order to compensate the earlier injustices. Therefore, my lord should I suffer, yes you should suffer. Is this equality, this may not be equality but this is treating unequal's equally requires this discrimination, reversed discrimination, that was alright. How many of us can reconcile to that situation? My son have argued with me look, this reservation is so bad, and how could this be justified because my forefathers have done some injustice. But how will you interpret Article 14, in a situation like this and try to reason. Reason on what? Is this reason? Good reason, that your forefather had discriminated aa schedule caste from going to school. Is it a reason that I should suffer? That is what the constitution says. Legal reasoning in a different social context, has to take its lessons from passed history from constitutional promises and constitution we have to uphold. Therefore, you reasoning and if you read the reasoning all through right upto Mandal judgement, Indira Sahani, why is it, many of us including me , why not this preferential treatment to those who are economically deprived rather than been born into a yadav caste or a Meena caste or this caste or that caste. Are you perpetrating caste? So, therefore legal reasoning in this context, let us not go

into jurisprudence of western countries, it is the new jurisprudence we are requiring, legal reasoning in High Courts because constitution is your bible, your gita and if that constitution has right or wrong reasons it has adopted, a preferential discrimination, giving reservation to certain classes and ignoring merits of some people who ought to be treated as unequal's and to be denied their meritorious claims, how do you reason it? I don't want to go in all those constitutional judgements but I am trying to drive how the point of legal reasoning. Very quickly what has happened in Australia, Australia was occupied by the British, how did they claim? there is a principle of jurisprudence called Rationalias, nobody's land, so the first occupant will claim that and they aa British crown became the owner of the Australian continent and they said that there are no inhabitants there , therefore, we are occupying, later on they found that in some parts, some islands of Australia, there are some inhabitants, some tribes. One tribe is that Babo tribe, and when they were not given any rights or duties , no claim to their land was allowed by Australian law, the case was taken up like, aaa PIL before the Australian Supreme Court and the judges were told at that time an argument was advanced very interesting. The Australian court was asked to adjudicate the claim on behalf of the Marian people, living on the Murry islands , that they have a native title to the land which survived the acquisition of sovereignty by the British crown. Chief Justice, Branden saw the prevailing common law principle unjust. What was the prevailing common law principle, if it is nobody's land and if there are no claimants, whoever occupies it and claims it, he will own the land, that was the principle. He said while judging the issue the court has to make a choice of a legal principle, to decide the matter, and said, this court can either apply the existing authorities, precedents and proceed to enquire whether the Marian people are higher in the scale of social organization. That was the reasoning advanced by the court, that it will be recognized if there are no occupants or if those occupants are there some tribal here and there, if they do not have a proper social organization, to claim political action or political authority that will not be recognized at all, legitimate occupation. So, the Australian High Court were trying to dismiss teh case, saying that you are no man tribe, uncivilized people, no rights, no duties, no political organization, no social organization , nomadic therefore, we cannot take you as citizen of a organized society to be able to claim this island , that was one argument. That is the reasoning the court was asked to accept. So there was no social organization apart the aborigines whose claims are utterly disregarded by the existing authorities that was one choice, so the case could have been dismissed on that. The other alternate choice is, the court can overrule the existing

authorities, pre-existing law, precedents, discarding the distinction between inhabitant colonies that were territorial and those which were not. According to Chief Justice, Branden, overruling the precedent cases was necessary, since otherwise their authority would destroy the quality of all Australian citizens before the law. After all they are now Australian citizens, they are part of the Australian and living before the British came to occupy it. Simply because they do not have the social and political organization, you are going to dismiss them as nobody, no, all Australian citizens have the right to claim equality and if you were to claim then your claim has to be legitimized, what will be the reasoning that you will give to legitimize that, this is what he said. The common law of this country will perpetuate injustice if it were to continue to embrace the law notion as territorial and to persist in characterizing the indigenous tribes of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interest in land. Therefore, he declared their claim as legitimate ownership, so Australia has to concede that these people have ownership of their island and it cannot be acquired by the Australian government. One more important judgement on the importance of reasoning, overruling the precedents, the pre-existing common law by invoking the principle of equality. It's a very sensational case, not only in Australian but internationally of the rights of the tribes. We have also similar thing in our constitution. So the Mabo judgement was the full recognition of humanity, that is either to be denied to indigenous people by the law of Australia, which legitimated the political and social racism, legitimated racism, it brought indigenous Australians into the constituency within which they could intelligibly press claims for unfair treatment. Now you will in similar things of denying pre-existing laws, even statutory law, to be able to adjust the existing law to the constitutional mandate. A simple example, look at Locus Standi, which is an existing law that you cannot come to the court unless you have a cause of action to appeal, you must yourself come, whereas very easily our Supreme Court in appropriate cases in a PIL jurisdiction have denied or stretched it, even a public spirited citizen can represent people who are not before the court on a cause in which their rights are being violated and we have stretched it to such an extent that Locus Standi principle has become irrelevant in constitutional court. If there is an important constitutional matter to be adjudicated. I will give you another example, which often Justice Krishna Iyer used to say, the law of bail, what a change through judicial interpretation has been brought about. Both on arrest as well as on bail. Bail on the bases of security, on the bases of surety, is a principle, those who cannot afford to give, they go to jail. And when Justice Krishna

Iyer pointed out, this means that the poor in this country will be jailed and the rich can be out even if they commit horrendous crimes, is this what the constitution intended? So, he reverse the principle. Bail is the rule and jail is the exception and if you cannot afford to give surety, one's own surety can be released, he even went to the extent of trespass. If you sleep you know in public spaces, you are a criminal trespasser, you can be prosecuted. But big real estate builders, they occupying government land, corrupting and all that and they are making money and they are respected in this country. Why not criminal trespass be applicable to them. If you look into the many pre-independence legislations, you will find this bias in favor of the rich, the upper classes whereas the constitution requires the reverse philosophy and this transition has to be accomplished by the constitutional courts. Of course the legislature also, but the legislature for various reasons will try to balance political advantage or disadvantage by making a play change whereas court has no inhibition, accepting the dignity that is guaranteed by the fundamental rights. So that's my first part. Any question on the first part. Do you think that is a compelling reason for reasoning? Judicial reasoning on the basis of precedent has to go in matter relating to fundamental rights of different classes of people and sometimes those rights require affirmative action on the part of the court to be brought about because the pre-existing law, precedent has been unfair, unjust, it was evolved for the purposes of the advantage of the rich and the feudal classes. Okay, if this is done let me go to the second thing, again this is a disadvantageous thing, and I have the authority of an American Scholar who has written a book on adversarial legalism, this is unrelated to by constitutional proposition. The adversarial method of adjudication, that we have adopted in this country, that the 21 parties will be in a fight, the judge will be an umpire and on bases of whatever is adduced whichever party could convince him on the bases of evidence, facts etc., give the judgement. Now a party which is educated, which is powerful, which is rich, which can sustain a long drawn litigation, at the appellate stage, second appeal, WRIT appeal, SLP, you name it and what about the common man, in this country who cannot afford to even go the civil court, he doesn't know. One thing you are transacting everything in English, it is a technical procedure, he doesn't know who is a lawyer and the lawyer if he is a cheat, he is doubly victimized, he doesn't have the money to engage that lawyer, giving a lawyer is not relief, it was not there earlier also. The adversarial adjudication can assist in the dispensation of justice only when both the parties are equally placed in terms of information, in terms of access to documents, in terms of advocacy skills, in terms of reasoning, if it is deficient then the party who is not able to withstand that will forego it's just

claims. So, the person who has written this article by aaa which in you volume please read it. He says in Civil and criminal proceedings how the adversarial system axe against the interest of the poor, the marginalized, the dispossessed etc. The adversarial process and I quote, from the American study, "the adversarial operates to that to the disadvantaged or the weaker party, you will quickly understand it because you are facing. If the Ram Jethmalani on one side and an APP on the other side, do you really want to know the outcome? However pro-active the judge be, it is aa totally aaa. So in some of the leading lawyers of the country on one hand and an average lawyer on the other, the adversarial process, after all the judge will have to go by whatever is produced in court, he cannot go beyond a point, to put in his own reasoning, to decide. So therefore, it is said that the delay in the opportunity cost, the more the delay the more the advantages to the manipulating lawyer. Adversarial process is a lawyer dominated profession, the complexity and unpredictability of its processes often deter, the assertion of meritorious claims. It impeded a socially active cooperation alienating many citizens from the court itself, the system is often unjust. How it is unjust? it's procedural tools exuberate it's potential for inconsistency and unequal treatment. The outcome in criminal justice are shaped by the shifting and often unequal balance of competence and resources between prosecuting attorneys on side and defense lawyers on the other. In a regime of adversarial legalism the quality of justice is especially dependent upon the quality of the opposing lawyers. Is therefore, far less affective, for achieving equal justice in criminal legal processes. On the civil side adversarial legalism is expensive and dilatory, it thereby become an engine of injustice compelling litigants to abandon their just claims and defenses. It encourages and reward manipulating lawyering and extortive demands. Sophisticated litigants have advantage in withstanding its cost and it's uncertainties. Every word of it, to my mind as I understand the administration of justice is true to Indian situation and those few pages you read, I don't want to aaa in the discussion if there is any we can. So I want to tell you, first of all, the reasoning, legal reasoning, precedent, how it has to be taken a constitutional context. Second thing I want to tell you th every legal system, which is adversarial is militating against the interest of the weaker sections of our society and you know who they are- the women, the children, the disabled , the schedule tribes, schedule castes people like that. Who are still not in courts. An American study against that only 20% of Indian population have ant stake in the court system. Does it mean that 80% do not have claim for justice? they are are not, they are either going for what you call it Haryana Courts aaa what is it called, Khaap Panchayats or some local settlement processes or

whatever elder etc. Whatever they can avail or they commit suicide. Farmers are committing suicide why are they committing? They don't know whether law provided them any relieves or women committing suicide in matrimonial relationships, why are they doing it because they think that law cannot offer them relieves. There are many situations obtaining in India even today 67 years after freedom, where people have no hope of accessing justice. Not that they don't have faith in court but no way to fight the system and wait for justice aa . Therefore, the adversarial system is impeccable for social justice which is the philosophy of the constitution. That is my second point. Again if there is any question, comment, you can raise it. I am going to third point [Now we have the legal aid lawyers] ohh my God the least said is best. Whom are we appointing, what are they doing is is satisfying our guilt, okay we have felt a guilt of. It aa took several years before the Supreme Court said that a criminal trial without a lawyer on the defense is unconstitutional, null and void, therefore, you have to have a lawyer and how that lawyer conducts and what happens in a case is a forgone conclusion but legal aid is appellative , it is not a solution. Therefore, we said okay let us go to a mediator, or a conciliator. Some people think that it is second class justice. Why rich people alone go to litigation, poor people should settle with mediators is another discrimination. You can try to see what, you know because these are all admissions on the part of us that look the system is not serving to the interest of the Aam Admi, how do we respond? come-on let us through away this Locus Standi, let us accept, letter petitions, let us act Suo Moto. Proactive role for the judges or we adopt this legal aid or we try to give legal literacy and aaa encourage people to have , aaa or you know just ask the question like, legal aid. Parliament has thought that you know people do not have access to justice and they enacted a legislation in 2009 called Gram Nyayalaya Act, I believe that most states in India do not have any Gram Nayalaya, even when the government of India said that for 5 years the entire cost will be met by us, but no takers. Judiciary has not started, they refused to appoint judges to Gram Nayalaya wherever the executive have set up the courts because that is, there is no adjournment, the lawyer is panel lawyer so they aa the legal aid, it has to be decided in the day on the spot, sometimes you will have to be mobile to the village to settle it, quick relief, no appeal. If at all if there is an appeal in certain cases only to the district court no, appeal to the High Court. Matters have to be so that some sense of justice will come. But Gram Nayalalay ask it why it is not coming to your state. So this I san attitude which we have to take cognizance of [Justice P. V. Reddi- Even the lawyers do not come pared yes then the court will have to be more vigilant and then you will have to supplement the

efforts then] You know as a matter of principle, when the issue of bail only led to lawyers getting more rich, because it's a matter which could be settled in the police station also. The parliament has come up with an amendment in 2006, where arrest has to be avoided. You issue a notice, for appearance which would be enough, you know this is a linked thing. Police reform, judicial reform, these are all linked, it is taking its own time [Justice P. V. Reddi- there is an interesting amendment to that, Delhi Lawyers agitated. Then you know the amendment was for granting the bail also the reasons have to be given] I know the lawyers are resisting all reforms, that is why the judge has to be more pro-active [Justice P. V. Reddi - for arresting reasons, for non-arresting reasons, so that is the amendment which has been brought about to the] You know that the strategy that the parliament seem to have adopted is that arrest can be considerably reduced. Long ago that the Dharan Veera Report that the Police Commission, has said that 65% of all arrests are unnecessary in the country. If arrest is avoided , you will save a lot of human rights, in a way how it will affect the crime rate and things like that is a different question which we need to. But arrest is not the solution [Justice P. V. Reddi - Police thinks that once he arrest his duty is over] it is money. You know if somebody asks , if somebody else to be arrested, the police officer collects money for that and in order to release bail he again collects money. So, it is corruption in the deep roots for which the law has been made and the lawyers are siding on both sides they are becoming rich. In US and UK I am told that arrest comes at the end of investigation whereas here it is the beginning of investigation. Supreme Court has often asked as to why can't you ask them to come, why do you want to arrest, custodial interrogation, why do you want to have it , you don't have to have custody in order to interrogate a person. This is the question of reform that police have their own way, the court have their own way, and the lawyers have their own way. So at the cost of people at misery and lot of unnecessary arrest is already conceded. So if 65% of arrest making lawyers rich and the poor more poor and affecting the whole family and all that you can imagine as to how, our justice system is operating to the detriment to the working of the poor classes, disabled people. That is my effort here is to drive how do you reason judgment, how do you mitigate the accesses of adversarial trial, which is inhabiting the poor people making their claims. That is what I am leading to. So my third point here is, on equality, there is a lot to be said, I have written also a lot about understanding the right to equality, I don't know how you understand the right to equality. First of all concede the point that we are unequal society, unequal in many respects. Parliament is to legislate to bring about equality, parliament has brought in many legislations, but still equality

doesn't prevail in society, but when equality breeds in to bring injustices in society, people brings in claims to the court and the court has to prepare a jurisprudence of equality based on sound reasoning, for the executive to follow, for the legislative to follow etc. And you will find that as I said from Champakan Durrairajan onwards, m1951 onwards how the concept of equality has been judicially reasoned. What was the first reasoning let me give you a quick example, reasonable classification- equality among equals, equality among unequal's is violation of the right to equality, you understand that it's aaa. Therefore, rich people to be treated differently, poor people to be treated differently is one rule of equality. If you want to keep equality among equals as what is meant by Article 14. But if you want equality to prevail across all types of inequalities based on caste religion language , region, domicile, incomes status etc. You have to hold the jurisprudence which can reason it that look no no that is reasonable classification theory which the Supreme Court has adopted to interpret Article 14 in the first 25 years or 30 years or even today, is formal equality. You know when the Hostesses were asked to retire, when they get married and conceive the first child, to they have to retire when they cross the age of 35 or 40, they went to the Supreme Court and said what is this principle it violates the general equality. Air India has filed an affidavit to say what is the purpose of air hostesses? the person has to be attractive, the person has to be active, which cannot be , so there are so plan in saying that look this is our role, the Supreme Court has to say no nothing doing. The foreign secretary, when a lady was to be appointed as foreign secretary or ambassador elsewhere, she was married to a foreigner under the rules she was disqualified, Mutamma's case. You find case after case gender discrimination was brought in and the court has to change the rule of reasonable classification because they said that look what we want is substantive equality, equality in outcome, equality in result, not formal equality, that this i s a reasonable formula. So what is a reasonable formula, in Thomas case, I am not giving the citation, he you need you can have it, it is all there in constitutional books. Thomas case the question was if the schedule caste has come into the services , on the basis of reservation at the time of his promotion, he has to pass certain departmental tests etc. This fellow has tried the test but he could not pass and he was to be be given another chance to aa which was contested. At that time the Supreme Court writing the judgement, what is the spirt of the equality class Vis-a Vis the schedule caste? If the spirit has to be there, he has to be promoted and allowed time to clear the examination after promotion. What is this rule? This affirmative action, this substantive outcome, result oriented decision. But in the process yes, you are denying certain, so called rights of the

advanced group. But they have to be done to bring about a result which we all aspire for. Therefore, in education, in public services, you have had all types of things, though the politicians abuse it. That is the different question altogether. But we are struggling to develop an egalitarian social order in an totally in egalitarian social order by the rule of law, and if you have to accomplish that, the rule of law and the interpretative logic, will have to adopt some innovative practices, some approaches, which on the face of it, you think abhorrent but need to adopt, if you do not adopt, we will several years after independence you will carry on with the same iniquitous precedent. You know legal reasoning is sound but that is not the legal reasoning that the constitution demands, you want to be transition agent, you want to be a transformational leader as a judge of a constitutional court, to bring about that what is promised in the preamble to the constitution. And reasoning will have to be direct into that and not the precedent. Precedent will have to be given a go by, provided your reasoning is constitutionally sound nobody can disallow. That is what, all the PIL cases the Supreme Court has attempted to do, and the High Courts have attempted to do. When it has got into abuse, it is very sad PIL has also been abused but that is a different matter. But why it has come this must, get into your mind please remember, another story which I am fond of telling. At the time of independence, all of you know we have 7 fundamental rights, today we have only 6, where did that 7th right go? The right to property, why did it go out from the fundamental rights because of the irrational treatment of our courts. How did the V interpret, the Zamindari Abolition Act, when it was challenged in the Supreme Court and when Palkiwaala argued, that the word compensation means, market value and you do not give market value to the zamindars the Zamindari Abolition Act cannot be justified and the court said yes, it is market value. Many people in the parliament said, where are the judges leaving in the ivory towers do they not know the freedom movement and what was promised and where are the Zamindars, how do they claim market value? who are they, did they get this land, this was a concession given by the British to look after certain villages, collect the taxes and share with them and they are to be given market value for what? Constitutional amendment was brought about saying look we will give the compensation but the quantum of the compensation cannot be tested in a court of law, that was the amendment. Palkiwaala went again to the court again and said my lord, what did they say? They say they will give the compensation but that cannot be challenged in court, this is fraud on the constitution, struck down the constitutional amendment. 25 years 4 amendments to the constitution, the war between the parliament and the judiciary, ultimately after

the emergency 42nd amendment or 43rd amendment, fundamental right to property has gone out of the aa a this must be a lesson to the judges of the higher court, the constitutional courts. If you exceed in the time of interpretation, which is not in tune with the social justice philosophy of the constitution, please say an appropriate time will come, we'll be losing more of the rights. This is the history that has to be taught to the judges also, they have to take lessons. Otherwise the right to property is a very valuable right, which is part of dignity. But we created a situation, and judges create that situation, wherein you had to pay a price. Therefore, interpretation passed on precedent, interpretation based on some reasoning of some aaa will not be appropriate in social justice issues where you are facing the problem of an unequal society, where people can claim and if they do not have access to right to equality even after 7 decades of freedom, and what are you administering? Is it justice or injustice? so the equality jurisprudence has to aa I can quote what Ambedkar said, at the time when he presented the draft constitution, look justice social, economic and political are what you promised under preamble. We have now achieved political justice. Each person 1 value irrespective of class religion etc. and this is democracy which is most welcomed. But if we do not bring about justice in our social and economic relationships, the point will come we might we will lose our political justice again. And the entire effort of the Directive Principles of State Policy, which is declared by Article 37 as fundamental in governance, even binding the judiciary, fundamental in governance, that is given go by., Supreme Court said also in the early stages the Supreme Court said no no, we are not concerned with the part 4 of the constitution, it is not justiciable. The same Supreme Court has evoked a different principle of interpretation called harmonious construction, reading the directive principles into fundamental rights and create the right to health, right to education, right to housing. You name it, any number of rights, this is social context interpretation, social context adjudication. So therefore, this is nothing alien but since you are newly appointed High Court judges, you need to understand this dynamics of the constitution, interacting with the pre-existing legal system, colonial in its character and trying to dispense justice under the constitution to which you have taken oath, you need to take lessons from the judicial history in this context. This is what my equality jurisprudence is. I have many things to say about it but the time is running out so I close that and I come to my last part. My last part is what is the social context judging and how do we bring it about. I will just talk to you in the context of an experiment which was done in the Canadian courts at the instance of the Canadian Supreme Court. The Canadian judges, because that is also a plural society like ours, so

many immigrants from all sorts of countries, all sorts of discrimination where they traces this that and other and they wanted the equality principle to be aa so they this decided that this can come about only by a cerebral reorientation of their entire judiciary. So the Supreme Court of Canada and aa lady Chief Justice was aa there at that time, she said that we will try to instill and inculcate this constitutional philosophy of the equality jurisprudence and make the judges take sides, take sides, you know we were earlier trying to keep biases away and taking side of the aaa not to take sides on the principle of equality and enable them, give them the capabilities, to be able to reason it because law is reason. So in order to do that they have decided on a 10 year plan, that all the judges right from chief justice down will under go 2 week long training programme on social context adjudication. And they have run it through, which is as recent to 2000-2010. At the end of that programme, there was a revolutionary change in the attitudes, I would even say the value system and I was a visitor at that time when these judges are at different levels, the trial level, appellate level, the Supreme Court, were telling their experiences of social context adjudication. And I would like to tell you aaa read out to you some of their experiences, which is there in the article which is quoted, but this what they said- Judges become better judges, which you wanted to become, you mentioned in the introduction, as to what are your expectation from this course, you want to be better judges. If you want to be better judges, social context adjudication must be your religion, your philosophy. In order to be social context adjudication, how do you become? aa judges become better judges, when they are more knowledgeable of the society. On one hand we try to keep our social relationships at bay, judges will be secluded, isolated but on the other hand , if you do not know the social reality, many of you know that because , many of us come from villages, rural areas, conservative family types, our friends etc we have an understanding but not to the whole society. How much do we know of the northeast, or of Rajasthan or of aaa Tamil Nadu, we are so diverse. Even within our state we do not know, the customs and relationship etc etc. Long ago, when I was in the US aa 1974, you know I was given a request by a lawyer from British Columbia, the request was that I am supposed to testify, as an expert witness, that there is a custom in India, whereby a person can marry another, without being physically present, at the marriage ceremony, that he or she can take the photograph of the spouse and go around the fire 7 times and marriage just completed. Is that, valid marriage, that was the question because some Indian went there, made lot of money in Vancouver and in that phase of his life he decide to marry and marry from India because he was an Indian, Married from India, he

did not come here but got his aa spouse over there and poor lady she went there, within a year he died. The state of Vancouver claimed that because there is no legal claimant, the whole property is being given to the state. This was being contested by this lady and this lady has to give this sort of evidence that she is legally married. So I was asked to go and testify, I checked up, she was from Punjab area and said that yes, this is a practice in that part of Punjab, I don't know the result of that aa case how finally it was decided. But look at the wide variations which we do not know about several things. Marrying close relatives, which is prohibited in aaa in some parts but in Andhra Pradesh sir, I think that one of my colleague in Delhi University, he married his elder sister's daughter, so therefore, it is the customs with a valid law, so diverse, so to be able to understand, the context. Suppose you are judge taking evidence of the victim of a rape and the victim is a tribal girl, 14 years old and that prosecution evidence has been taken, the types of questions that the lawyer will be putting in and the type of responses that you get, you can find all sort of disparities, and contradictions and this and that. How much credential you give that evidence to another victim of rape who is an educated urban Delhi citizen. The appreciation of evidence is so critical in social context judging, which will be evident in the cross examination, how do you allow what questions, what questions you disallow and whatever is allowed, how do you interpret that evidence which is in your domain as a trial judge. This is aaaa, I say this because I have a judgement of a session judge in Rajasthan, is there a Rajasthan judge here, who might perhaps know a sessions judge, who in a rape case of tribal girl, the rapist was a upper class Brahmin, and after the evidence the judge has acquitted the rapist, on the ground that, one of the ground that in Rajasthan it is inconceivable that a Brahmins can go anywhere near a Tribal girl and you are talking about that he has raped the girl, it's a judgement it is not a story. So, if that is the perception with which the judge is appreciating the evidence, what do you do? That is the lady is trying to say, your perception, your believes, your attitudes, your value systems, which ultimately, way not only in interpretation but also the value that you gave the judgement. These judges therefore, have been trained with all these diversities, which they were astonished and after the training when they went back they became better judges, more knowledgeable about the society, it is great deal with the sensitivity of the diversity issues, no, and this is what the Americans do. They package all these things, sensitization on diversity issues, this is much more than that. Building on the insights and the determination of facts and law are both influenced by social context. Social context education attempts to expand the scope of legal analysis and is aimed to

the following, this is judges, I quote- It assists the judges to understand the nature of diversity, we take for granted we have been born and brought up in this diversity, Madrassi, Punjabi, this that all sorts of things, we take it for granted, we don't see anything. In fact Americans are surprised as how these people with so much of diversity are living together as one nation. They can't tolerate it even with aaa Negros, one group with them , whereas we have all types of people here, with all type of some people, worshipping the mountain, worshipping the trees, some other is worshipping something else, some are worshipping the film actress aa there is a temple in Tamil Nadu for a film actress I told. Daily Poojas are being done, so this is aaa. To assist judges to understand the nature of diversity, the interest of the disadvantaged and the social economic issues that shape the person, who appear before them. This training has given them, how to appreciate diversity in aa adjudicative process. Secondly, they said that it encourages the judges to explore their own assumptions, biases, believes and views of the world, with a view to reflecting how these may interact with their judicial decision making processes. It is very clear, if time permits I could give examples. Three, the judges said that it helps to examine the relevant research and community experience in order to enhance the process of judicial reasoning in the interpretation and application of evidence and legal principles and it provides the jurisprudential and analytical tools to enable the judges to examine the underlined biases of legal rules or precedents or concepts to ensure that they correspond with the social reality they are dealing with and confirm to the constitutional guarantee of equality. This is all because of the quality jurisprudence. And the dilemmas we face in a plural society, to bring about equality, there is no formula, no precedent, this is an attempt which take on, we have to have a at least half an as to come by revolutionary. and we have many number of revolutionary judgements from Justice Krishna Iyer onwards you have a number of them. So the social context adjudication, therefore argues that it is a constitutional mandate and ethical principle for judges to conduct themselves and proceedings before them so as to ensure equality according to law for this task, social context enquiry is necessary. A contextual inquiry has become an accepted step towards, judicial impartiality. You hav eto be partial to be impartial, you followed what I said. when issues are examined in context it become clear that some so called objective truth, stereo types may only be a reality of a secret group in society and it may in fact become completely inadequate to deal with the reality of other groups which we recently, realized when the Supreme Court decided on transgender does the group exists, are they human beings , are they equal, you know they are not even in the stream of things

till recently, look at the justice concept that we have been perpetrating, this is social context judging. So therefore, ladies and gentlemen, I don't want to take on we at least have to have half an hour for the discussion. I have provoked you enough, I am not been able to give you any tools or any methods by which you can accomplish the task, but the task is before you, more so when you are in the High Court. It was not so much when you were, though it is there in the appreciation of evidence etc but in the higher court it's there to correct and that is where the perceptions matter, that is where how close you are to social reality because your evidence act would not allow, the social reality to be brought in through research, this is hearsay evidence, you are keeping it out and you are wanting the eye witnesses and the witnesses will be chosen by the parties to tell all the falsehood and falsehood and falsehood only. So, therefore, you are in a dilemma as to how to knowing the story first and applying the constitutional philosophy to that story to bring out a just result based on sound reasoning, which is expected of the court, is a challenge but the challenge can be captured how quickly you become a social context judging. Yes yes, there is some question. The reasonable classification theory asked on intelligible differentia and connecting it to the object, it still hold good, provided that intelligible differentia can be reasoned out in a manner that is helpful to the weaker party. This is where that Article 14, with people treated distractingly, whether it is unfair discrimination or is a for discrimination based on that formula but the application of that formula is a very very difficult process.

Participant Judge- On positive discrimination is permissible to help the disadvantaged in the society, so that is what the guarantees are enshrined in the constitution itself, they are not something alien to .

Prof. Menon- I'll read out a passage from Justice Anand, our former chief justice, this is what he has said about gender inequality, in our so what a judge should be, to be able to give equal justice to women- A socially sensitized judge is a better statutory armor in cases of crime against women than long clauses of penal provisions containing complex exceptions and proviso. You may create new jurisprudence out of Nirbhaya case, but if that statutory changes to rape law, the Criminal Procedure Code, Evidence not going to make any headway unless you get a sensitized judge. A sensitized judge is a superior armor than a statutory amendment. The objective of judicial education is therefore, is to to change one's awareness, one's knowledge, one's skills, one's behavior in relation to gender issues and to provide an opportunity to evaluate and discuss the issue against

existing understanding and social context. Gender sensitive judges can take a more pro-active role in the proceedings, rather than simply responding to the material presented by the lawyers. They can exercise their discretion to assist the process in favor of women, wherever, appropriate, they can recognize the need to obtain the best equality evidence from witnesses particularly women in criminal trials, who have been subjected to violence and women litigants in civil cases. In their appreciation of evidence, they can be aware of the gender context and take care to avoid stereotyping. Judges determine, what evidence can be given and how under the rules of evidence. An important factor in this behalf is changing the outlook and perception of the judge himself. There are many number of cases to show how individual judges have been trying to eliminate gender bias in courts with varying degrees of success. To encourage such judges and to sensitize other judges regular training courses are required. That is what chief justice Anand says. I mean I will conclude with some validation of aa this approach as Justice aa Reddi has mentioned. This was an article, which I wrote in 2004, and aa since then, I found in 2013, aa bench of a Supreme Court, in which Justice Ranjana Prakash Desai and Justice A. K. Sikri, in aaaa case of *Badshah Vs. Urmila Badshah Godse*, has quoted extensively from my article, and said that Prof. Madhava menon describes it eloquently, “It is, therefore, respectfully submitted that “social context judging” is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the social-economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication.” So the Supreme Court has approvingly quoted this, so you have an authority, which can be adopted if you want to adopt in your.

Participant Judge- Do you have a website

Prof. Menon- No No, that is all in the article that you have, she has included that article the last article in the volume you have. but I suppose you know. The any number of judgement, the high courts also, of going beyond the precedent based reasoning or reasonable classification based

equality interpretation have all been modified, as the judge said, in the affirmative action approach. But this creates your ingenuity based on facts as to how can you take it and put the blame on the constitution. And I have seen, any number of, even district judges and aa not below. District judges have taken the initiative, thanks to the trainings in the judicial academies adopting this approach. But unfortunately, some High Court judges were not been sensitized on social context judging, reverse the district judge. So, unless like the Canadian Supreme Court said that everyone in the next 5 years, will be trained in social context judging, that's the judicial policy. If that were to come nothing like that but we are such a a large country, 20,000 judges, how could they, very poor legal education. They do not understand, many of them at the time of aaa, a judge from Calcutta has conceded when he was appointed as civil judge junior, he just did not know what to do, how to go about it

Justice P.V. Reddi- The constitutional development in our country, by the explanation of law by the judiciary is remarkable

Prof. Menon- yes remarkable, because the type of problems that the Supreme Court faced when we became independent, adopted such a progressive constitution. Bulk of environmental jurisprudence, is a creation of the courts. You now but this question of aa family law, this is one thing which aaa unfortunately, despite the fact that we have a family court act which has adopted this philosophy. None of the states except Maharashtra, aa the family court act, what it has prescribed is adopted. Delhi resisted the act for a long time, they did not allow the family court to come to delhi but it was a matrimonial courts continuing. But you know now, slowly Delhi has also adopted. But Maharashtra, you have aaa it's a new philosophy. The adversarial process is mitigated to a large extent by a more conciliatory process. And you have participant psychologists or psychiatrists or social workers, all participants, who do not find an appropriate settlement where family is ready and the children future is taken care of ,. Which is the strength of our society. But today if you go to a city like Bangalore , 40,000 petitions for divorce among married couple who are in the age group of 30-35.

Participant Judge- With the enactment of this family court, more litigation

Prof. Menon- More litigation and more aa you know aa family break down and aaa children going astray and all that , which is against the very philosophy of the family. Unfortunately, you know when sitting in the adversarial and I tell you again, I blame the judiciary for that. We arrange the family court training court programme for 2 weeks here , this was 2006 or 2005 and we wrote to the, look the family court act has come, the philosophy is very different, you have to train people before they are posted to the family court, so kindly, send the judges of family courts. We had found that excepting 2 or 3 High Courts all others have sent people who have never sat in the matrimonial jurisdiction. And when they went back, they went into accident compensations cases. This judicial policy of human resource management. What do you do this?

Justice P.V. Reddi- Now things have improved in family courts

Prof. Menon- Sir this is a slightly different issue, I believe that we are living in a need of specialization and a family court judge will have to learn a whole lot of phycology, whole lot of sociology, whole lot of anthropology, history, so many things to be able to perpetuate that family court philosophy. If he or she has an aptitude for that and gets training and posted there and odes that. Why should he be dispossessed from that position for next 10 years 15 years.

Justice Reddi - But that raises a separate question whether, separate cadre of family court judges should be aaa

Prof. Menon- That is that is possible. I have I have presented before the Chief Justice, which he thought that I am crazy about it. I said that even if the family court judge is elevated, let him be given all the facilities of the High Court judge and be in the family division of the High Court. Because it is very difficult to get the right aptitude trained and all that biases and adopting the philosophy, gender equality and all that and then if you lose that asset and that capability, you can't give to everybody training in family court, in contract court , in IPR and this that and everything. And those days are gone, if you want to be sitting in the patent case or a copyright case, how much of a learning you have to do. Can any judge can sit in the patent court and aa dispose it off, that will be a bad day. Every other place there is specialization. Now there are talking about that aaa perhaps Justice Reddi's commission has recommended a contract bench for commercial bench in High Courts. Where judges sit only to dispose of contract cases because the the business lobby has

aaa I mean because they have a lobby, they have been successfully creating and the government wants investment, quick decision of contract cases. Okay we create aaa. But family is more important than contract. But I am just making out a case because you are High Court judges, you will be deciding the posting, transfers, promotions of sub-ordinate judiciary. And good judges who are very good in criminal law adjudication, please don't transfer then from here there everywhere, keep them there. Unless you know lawyers will always complain and things like that but you know man of integrity, competent in criminal law. Even in criminal law, if you have to deal with a matter of economic crimes, organized crimes which is another specialty, he is not dealing with murder and rapes etc. He has become extremely complicated and the lawyers are taking more time to educate these judge who are not aware of it. So system is breeding all these delays and the lawyers complaint is look the judge doesn't understand what is transfer pricing, what is money laundering and this that and other. So I spent hours together, all my papers does understand, he asks very silly questions, I go from lessons after lessons.

Participant Judge- Sir, it is happening, especially in Karnataka High Court, every 2 months the roaster will change

Prof. Menon- No there must be a policy of human resource management

Justice P.V. Reddi- In High Court Of course. One view point is aa the judges specialized in that let them be there in the same bench and another view point is you see how long they should be continued , they would be monotonous and aa they will get bored and aa let there be some change. SO we have been in between these 2 alternatives

Participant Judge- Now under the Income Tax Act sir, there is a great dispute and that too arm's length price that the how to arrive at the competitive price, that is also a major problem

Prof. Menon- In fact that is why the regulatory bodies are coming, when the judges even under Supreme Court said, look many of these environmental issues are too complicated we can't handle it. The Green Tribunal came, the competition commission came, because many of those are so intricate problems which cannot be resolved at the adversarial process. So, they created the competition. The Securities and Exchange Board. They are all adjudicative bodies. You know we are living in a different world and we are wanting to be first grade country, our legal system is

resisting it. Our lawyers are resisting, one can understand because they are not able to handle the computer, so they don't want to come up with all those cases etc. But, you have in Delhi a paperless court. At least I have seen a couple of courts in Delhi, which is paper less. So you can't deceive the judge by citing some case because it might have been overruled and the judge will soon realize by the click of the mouse that look nit is aaa. So this is coming, so why it is that other judges are not adopting. So suppose if you decide my court I will not allow any paper to be brought in etc. If you are incompetent in that, it's a hell with you, I don't care.

Participant Judge- in the interpretation of double taxation awarding sentence centered with the other penalties also

Justice P.V. Reddi- it is it is double taxation avoidance agreements, they are more relevant in the context of international taxation.

Participant Judge- But normally income tax act all those double taxation avoidance agreements will be there. Now. It is now common. Especially with the royalty matters

Prof. Menon- I would only suggest you, all of you in your jurisdiction you will be aa portfolio judge, in charge of some district etc. Please inculcate this philosophy into your district judges and ask him to transfer him to the Munsif's and magistrates and others. Let there be some thought about it, because the constitution must permeate to every judge in this country. And unfortunately, you know the district judges who are, who can avoid many of those contentious issues going in appeal, if he is little sensitive to it but not in all types of cases. But cases which are atrocities cases. There is evidence to show by empirical studies that atrocities cases the judges do not convict because atrocities against Schedule castes I am telling. The parliament has a legislation to that and has created courts. But when it comes, people either avoid hearing the matter, prolong it, ultimately, you know evidence is lost this that and acquittal and the complaint is that despite atrocities being committed against harijans, the judiciary is not responding to the aspirations of the legislation and is try to aa the conviction rate is so low, less than 10%. When this question was discussed among sessions judge s in this academy, the judges said sir, the same thing, the false cases, this is to harass, so he called me by my caste name and therefore you know filed this thing and the punishment is very heavy and if you are a government servant, it will involve so many things,

judges knew about it. SO there is a bias because we know that it may be abuse of process. So therefore, we try to, not decide it, delay or things like that. But justice is being denied to the fellow, who has suffered, if he has suffered. So therefore, there is a feeling that look these atrocities cases, you must have a schedule caste judge sitting and then see the difference. So there is argument, in parliament it is being said

Justice P.V. Reddi- one thing is that you should not be branded as a convicting judge or a acquitting judge.

Prof. Menon- But but, you colleague justice aaa Justice Desai, said I am happy to be a tenant judge and a landlord judge. Any other question in this aa. This academy share it's expertise both by material as well as what all faculty is available to them. The trainers of state judicial academies are trained here. Through video conferencing and some of the materials like that. It all depends on your chief justice, you know the hierarchy, unless the chief justice is sensitive to it, nothing happens. I know how many times Honorable Justice P.V. Reddi as member of the national mission have gone to various chief justices in different high courts to tell them there is money for the model court. Please set up a model court, you can claim up to 25 crores and no high court is interested. I don't know, you all are High Court judges, you have long career in the high court. [Participant Judge- sir the outcome of the research will be implemented in that court?] No not necessary, that will be fed into the, first it must come either as a statute or as a guideline. So in order to get it accepted across India, it must be processed by the Supreme Court or by the parliament. But experiments have to be done in the state of Sikkim, what kind of arrangements could be done to expedite civil litigation, which may apply partly aaa entirely to Sikkim and partly to rest of the country. But that depends on the study that you do. In that respect again it is an offer from the ministry of justice , government of India, which has a national mission , aa which is money and is offering to the various high courts, that any research that you want to do at your level, either through judicial academy or to any other individual or institution under your control, we give you the money. And they ask for research proposals. In spite of writing to various judicial academies very few they have aaa

Participant Judge-Sir is it that the research is funded

Prof. Menon-Yes, research is funded, up to 25 crores, something like that

Participant Judge-But when we begin the research are suppose to send that this is the likely amount that is going to be spent on research

Prof. Menon-Yes, yes, you have to have a budget, and that budget within the limits of that justice ministry. It has a committee, an advisory committee, which approves it and then sanction it

Participant Judge-That is the sanction committee. So

Prof. Menon-The money is disbursed by the Justice Ministry

Participant Judge-So if I chose 2 topics for my state judicial academy and they want to begin a research, they will have to give me a project and the amount that would be required for that research and then that I will forward without research having being conducted to the ministry.

Prof. Menon-And when the money comes you start the research

Participant Judge-okay, infrastructure is the judicial academy

Prof. Menon- Research again, it is the matter of the chief justice, the chief justice give it to the registrar general, who is a district judge. He has many other things to do , what research, what model code. Even I know a judge in Bombay High Court, a very progressive state wanted to set up a model family court, they have already developed many of these things. And they thought that if they can get some 30-40 crores, they will be able to develop a model family court for the whole world to see and other states to manage but that individual judge in the High Court, could not get his own colleagues to approve that, much less the chief justice. So the proposal has not yet come so far, despite a senior High Court judge interested in it that is the state of judicial administration. that is because you are now in the high court you must be able to tell these things to your chief justice and if the money is not there let him authorize a judge who is interested in it rather than put it under the carpet.

Participant Judge- In the family court we had a bitter experience, I was in the family court and because of having no training etc. but I had little bit interest and knowledge on psychology, I

somehow tackled the parties. There were more than 5000 6000 cases. There is a conciliator but he could not manage the meetings, she had no knowledge how to initiate the process so it was futile exercise

Prof. Menon- I was telling you that you have to improve yourself as a judge so that you write good judgments, dispose of efficiently, quickly etc. other thing is your responsibility towards the institution, to which you belong. And that is important. Some chief justices I know personally, if you take interest and convince him of the proposal then he says okay you take it and do it. Okay, if the chief justice authorizes you, it is well and good. It all depends how you take the initiatives. If you see some wrong things are happening then tell the chief justice and you feel consciously that the chief justice decision in this regard is wrong, why don't you tell him. I headed many institutions and I allowed everyone who is there to tell me on my face that I did a wrong judgement on this and I corrected it. I had to, if you want to run an organization. District judges I can't say this. I mean this is the purpose of you coming here to bolden you, to provoke you, to instigate you and change the institution because it is too late and we cannot afford to continue like that. Look at the way the parliament has reacted in judicial appointments and this is not going to end here. You may find out a decision through the collegium but that is not going to end the story. If you are not transparent, if you are not keeping the institution respond to the democratic spirit of the Indian constitution, you will have to pay the price. So therefore, times are changing judges are now going to be interrogated. I have been in this game for too long now, interacting with judges, I now understand aaa I have nothing to lose now, I tell the chief justice of India, so therefore some judges respond, others do not. He said that you bring the Chief Justices here for the retreat and they stayed here for 5 days in a programme like this wherein so many questions were raised. So things are changing and now nobody is aa look at the writings on the Supreme Court, some of the judgements. Judges are reading newspapers and the more intense it becomes, he reacts to it, he has to respond to it, he is accountable. Only group which is not accountable are the lawyers. How to make them accountable is a different story. Thank you very much

Paiker Nasir- Thank you so much sir, it is always a pleasure to have you at NJA and every time when you are here we learn something new every time when you are here. Sir, won't be with us, he'll be leaving tomorrow. Justice Reddi would be with us tomorrow. So aaa and I have an announcement, we have a screening of a movie Prayer for rains that will be at 7:30 in the

auditorium and that would be followed by a dinner. Sir, prayer for rains, sir it's on Bhopal Gas disaster. Prayer for rain

SESSION 5

Importance of Reasoning

Dr. Geeta Oberoi- Very good Moring to all of you .yesterday we all have, it's all about science of reasoning actually what's goes in our decision making and what does not go, we had our own everybody has their own take on, what could way of come fair judging and what could not come .aa.. today we have importance of reasoning actually whole day is dedicated to reasoning of course precedent also part, which helps actually in a tool of reasoning, so we have one session on reasoning also but majorly we thinking about like once we have taken decision as I said, hmmm I have read this idea of justice and I am sure you all have read where Amartya Sen said that is not that difficult to give decision as it is difficult to a prove to others that what kind of reason went to arrive at that decision a with that thought in our mind we have develop this today s four sessions basically two in reasoning, one off course there is other it would kind of break for you from normal judicial thinking, some other kind of thinking, then off course precedent, so we have aaa Hon'ble justice Aftab Alam former judge supreme court of India we needs no introduction of any one of you aahhh we also have former chief justice Rajasthan high court, Justice Sunil Ambvani he also needs no introduction to you ,you all of you know each other, one family and you know your elders much better than I know so I leave in the company of your elders of your family with this to Hon'ble Justice Aftab Alam thank you sir.

Hon'ble justice Aftab Alam - Very good morning to all of you ladies and gentleman, sisters and brothers it is somewhat ironical that when I receive a call from the director to come and attend the session here I am somewhat reluctant, I am reluctant because I feel intimated haa I thought I played my inning I did whatever I write weather it is good or bad and I feel don't I am competent to qualify enough to be a resource person but she mostly persuade me and when I come here and I am really very very happy just to be engage to all of you it's give me great pleasure and every time I go back I my my I go back with intention to come back this place again and one think I notice that make me happy and so glad that four ladies among twelve or thirteen judges, this is really aa aa great thing rate improvement when I was , when I became a judge in 1990 a meeting of judges

mostly didn't have ladies in 1990 there is one or two ladies judges in Delhi , Bombay high court or one or two in Delhi or all over the country may be one or two. So this gives a real pleasure the number must increase, the proportion must increase and they must be at least in the ration 50:50 so this morning I intent to speak to you in legal reasoning I see from the program that the legal reasoning has been split up into legal reasoning , component of radical reasoning and how to comprehend precedent so my talk I propose to deliver, may not actually overlap all these three topics, even though it has been split up for this program my topic is overlapping all these three sub-topics, I I will I I proposed to talk you about legal reasoning and then I will take up four, five six cases, which in my opinion may be a good example of good legal reasoning or not so good legal reasoning, I'll also tell you about some precedent how a precedent a very valuable tool and how a precedent if not used judiciously can leave to a very anonymous result, so what is legal reasoning? How is it different from reasoning generally? Or logical reasoning how is difference from logical reasoning from legal reasoning? To understand the difference a good point to start a concept of paradox the oxford advance learning dictionary which is my favorite , a bed side book define paradox as and I quote a statement containing two opposite ideas that make it seems impossible or unlikely although it's probably true, unquote we are all familiar expression conveying paradox in everyday life recall the advertisement "*garma may garam chai thanda phochatye hai*" or the illustration give in that oxford dictionary more fast less speed modern science is full of paradoxes light set to be both particles and wave at the same time a particles may be in two places at the same point of time all this scientific formulations appears paradoxes to the ordinary persons. The modern science paradox is perhaps best illustration in the idea experiment of schrodinger's cat experiment in which a cat in a box is both dead and alive at the same time and it remains in the dual stage until the box is open and it's viewed by the observer only that it became either dead or alive the very act of observer make the object change the stage, so all these there are paradoxes in life in logic also there are many instances paradox and interesting one they must illustrate the issue of legal reasoning may be found in the protégés paradox in the ancient Greek this in pre-Socratic Greek this was the philosopher Protagoras he took a student call euathlus, and euathlus say I don't have money to pay you for the instruction and the understanding was euathlus has pay the Protagoras tuition fee after the he win the first case Greek was very unlike us there was no grokal traditions there was no guru sis traditions this philosopher Protagoras would teach and instruct people only on payment of fee euathlus did not have any money so the

understanding was euathlus has pay him only when he win the first case, euathlus receive full training from Protagoras but have full training and instructions he decided not take the profession of law now Protagoras sued in a court and the case Protagoras argue that if he win the case then he receive the money on the bases of the decree of the court if the Protagoras win the case against euathlus he gets the fee on the bases of the decision of the court and if he loses the case then euathlus must pay in terms of the contract because he won the first case on contrary euathlus said If I win the case and Protagoras loses the case I am not pay in accordance with the court order and if I lose the case I am not pay because I lose the case and I am not won the case, so that's a very famous paradox in many law school and many law collages it is starting point to actually teach the legal reasoning for the logisation it is a paradox both the logisation and the scientist lives comfortably in paradox in their respective areas of knowledge paradox provide to the logisation and the scientist fertile ground for big debate for advances the frontiers the of human knowledge but the law and courts cannot afford that luxury in engagement and transformation between the people if any paradox arises as in the case of competing rights or even competing fundamental rights cases of reservations article 14 or other article but the law and the court cannot afford that luxury in engagement and transaction between people if any paradox arises as in the case of two competing rights even competing fundamental rights the paradox need to be resolve expeditiously in the interest of an orderly society take the case of Protagoras paradox if such a case or similar case came to the court of law the court cannot simply declare a paradox and wash his handoff it, if the matter ever came to court the court by the process legal reasoning would have to arrive to a judicial conclusion you can't say it is a paradox therefore I will not deal it, you have to decide ultimately and how will you decided, decided by the process legal reasoning the court would first decide if the contract at all valid, it would then decide if the implied terms read into contract that after receiving instruction training from the teacher euathlus must join the legal profession was in such a implied terms in the contract initially , whether this term in the contract that he would pay after wins the first case you have to decide whether it was valid term and whether the terms of the contract also carried the implied term after receive having full education he would join the profession of law, assuming that the contract is valid and assuming that there is no implied term perhaps Protagoras has lose the case but would such a law furnish a fresh cause of action what was happen if Protagoras has file a second suit because the condition is now been met...uh.. euathlus has won the case a fresh cause of action a fresh suit what would happen if Protagoras file a second

suit because the condition is now been met now the court must need to consider ‘Res Judicata’ the question of Res Judicata, contractive Res Judicata thus what may be a paradox in the word of logic would through the process of legal reasoning and analysis lead to outcome perhaps that conclusion has to be imperfect pure logical sense but life is full of imperfection and the law does not operate in vacuumed judge deal problems which occurs in real life situations, those problems needs answers, so by by what I describe before you we can some up legal reasoning is the process by which those problem and disputes can be objectively decided its undoubtedly has an elements of logic but it is not limited to logic alone it cannot be for that would be often insufficient to arrive to outcome, as Oliver v. Dandridge famously say the life of law has not been logic it has been experience never the less legal reasoning is a critical and enunciable part of the judicial system it is what impart legitimacy to judicial outcome how does the word “no” and how did you arrive that this conclusion it is your reasoning, it is your reasoning, legal reasoning that convinces, that satisfied the man on the street, that this the legitimate conclusion, this is the correct conclusion, one may or may not agree with you they may be cases in which conclusion arrived by the court, by..by...by..by.. some of the greatest judges one may or may not agree with the conclusion but at least there is a logic and something goes beyond logic the experience of life that support to the conclusion and that gives its legitimacy , that gives it’s respect and that gives it’s acceptance to the society. It is what impart legitimacy to the judicial outcome it is necessity to preserve the integrity of legal reasoning, it is also necessary to recognize that legal reasoning is the distinct kind of reasoning, it is form of reasoning in which lawyers caste their argument and in which judges deal actual cases, what are the key elements of legal reasoning, scholars are point out that there are three points of legal reasoning.1.reasoning by analogy, 2. Linguistic analysis and 3. Judicial discretions’. I repeat reasoning by analogy, linguistic analysis and judicial discretions, the first that is reasoning by analogy know to common law as the doctrine of precedent, analogy is precedent what happen on similar fact s on earlier the first the reasoning by analogy is known to the common law world as a doctrine of precedent the second that is linguistic analysis is what we communally refer to as the techniques of statutory interpretation the third that is judicial discretion it perhaps hardest to define therefore the area in which judges perhaps most prone to error. Volumes are written on each of the three parts of legal reasoning of any detail analysis of how legal reasoning is operate is beyond the scope of my present comments it required detail research and reflections and I could not possibly justice to do in such a short time. Therefore what I propose to do to take

up some decisions and see them as good or not so good illustration of three limbs of legal reasoning it must be made clear that the decision are picked up purely randomly and comments on those decision are absolute mine. mine.mine.mine personal views first I will take issue of judicial precedent . on the issue of judicial precedent it is important to bear in mind that every decision might be cited as a precedent is rooted certain factual and legal context and before using as precedent it is imperative to correctively to understand context in which it was delivered. following a decision as a precedent in a case arising in a different fact or legal context is quite likely to lead to erroneous result sometime quite may be grave I give you here in an illustration the illustration from the what is known as “triple *talak*” among Indian Muslim now the Muslim personal law people tell us that Muslim male has the absolute unfettered unilateral right to dissolve the marriage by just uttering the three words that is *talak, talak, talak*, it his absolute right it his unfettered right it his unilateral right he can do it in his presence of his wife behind the back of his wife he can say this on his mobile phone, he can say this through his letter, he can said someone else and in every case marriage will stand dissolve, the Muslim personal law board also tells us that this triple *talak* is the faith and part of Muslim and any interference in this will compromise the faith of the Muslim this is as per as I know this position is prevail only in India, Pakistan it is not there, Bangladesh it is not there, Indonesia it is not here, Malaysia it is not there, turkey it is not there other countries I have no personal information but I am hundred percent sure that other countries anywhere, know I was very cruises how..how..how..how this can by, how this position stand by and I could find that it got judicial recognitions in two old decisions one is *Amiruddin v. Musammad khatoon* be. A judgment of the division bench of Allahabad high court 10th February 1917 almost a hundred years ago division bench of the Allahabad high court in *Amiruddin v. Musammad khatoon* be. And another decision of my high court Patna high court *Fazlul Rehman v. Aysia musmaad khatoon* and Ors, on 18th January 1989 by Justice Fazal Ali, know what is the most curies thing ,strangest thing in this that in both these cases that court is trying to protect the women, in the Allahabad case the husband brought ac case of restitution of conjugal right and it was his wife who said that this man has divorce me...no.noo.no sorry, in the Allahabad decision the wife brought a suit against this person for recovery of his dower and for recovery of his moveable property form him saying that this man has divorce me. In the Patna decision the husband has file a case of restitution of conjugal rights and the women refuse to go and saying that this man has divorce me in both case husband took the plea that no divorce because triple talak is not a valid form of divorce but the court was

trying to protect the underdog the court was trying to protect the weaker party in the litigation and in both cases I have gone repeatedly I gone through the decisions and they chosen there very objectively speaking very weak material to hold that no... by ..by.. uttering those words three times actually talak took effect and marriage got divorced, so actually in both these cases was trying to protect the weaker part or trying to protect the underdog but whole precedent over a period of time. has been over a period of time has been put up side down and its has been these decision has been used to give the Muslim male the absolute unilateral unfetter right to perhaps these are the decision are required they need to required to prospectively overruled you all known the prospectively overruled in Golaknath case and very recently Justice Thakur going to be new chief justice of India in 2014, he has elaborately dealt with in one of his decisions the principle of prospective overruling to my mind these decisions required prospective overruling long long back but these has been used precedent quit wrongly my mind to lead to just the opposite result the two judgments very positive judgments on the fact of case in the context of the case very very positive very constructive very good judgments but these judgments were used to produce just the opposite result what the judgments truly indented this I bring to notice to be beware of the wrong use of precedent how can a precedent be employed or used just to bring about the converse what it was indented to achieve in fact such issue is not peculiar to Muslim law alone in *Ramesh Bhai the Bhai Nayak v State of Gujarat* the supreme court had to occasion to observe that it was matter of grim irony that certain 19th century privy council decision to render to safe guard the interest of Hindu widow had been relayed upon subsequently to lead to the complete in past life of Hindu women as a result of marrying in different caste again the privy council decision in a different context where intent to protect the right of Hindu widow the same decision were used to completely efface her personality there are also instances of bad precedent coming into existence as a result of personal prediction of judge am I taking too much of time anyway couple of the side and relayed in American decisions in such a case higher the court the graver is the danger of such precedent is coming instead of beacon of life and albirda rose the neck of judicial process a case in point a supreme court decisions in the Nandani Satapati, Nandani Satapati a former chief justice of Orissa was made accused in some section of prevention of corruptions act and certain section of the penal code the IO send her a long questioner and asked her to appear for PS to interrogation she does not go as required the IO then sent her summon for appearance she challenge the summon before the supreme court to me the judgment not in that in case is extraordinary the court for some reason

seems to be completely possessed and obsessed by the Miranda decision of the US Supreme Court that was delivered in 1966. Miranda, of course, you all know it is a path-breaking law in US criminal law. It mandated the police officer effecting an arrest to clearly tell the arrestee he has constitutional right to remain silent and if he chose to answer any question he must know that the statement made by him may be used in trial against him. Miranda is rendered in jurisdiction where statements made to police officers are admissible and lead to conviction and hence there is a need to protect from self-incrimination in our system. The protection against the self-incrimination is granted under Constitution Article 21, 22(2) and well embodied in statutory provision of the CrPC and the Evidence Act and is code from the judgment and the ember light from American rulings to which the court refers in Nandani's Satpati case was not the appropriate analogy for deciding the similar issue in the Indian law. Please try to understand in under the US criminal law if an accused makes a statement before the police it is actually it is admissible in evidence and court can base conviction on that statement. In Indian position is totally different Article 23 sub Article 3 of 20, 22, 120, 122 which are then reflected in CrPC in 162 Evidence Act no statement made before the police is admissible and yet the court the judgment reads more like an excellent review of Miranda. I recommend for publication for some law journal it does not look like a judgment. Like a read the court was Conesus that it cannot travel beyond the Atlantic to lay down the Indian law but the strange law put the Miranda prove too much to resist despite acknowledging that the American case need not detain the court. The court went to great lengths in discussing Miranda but in the end it difficult to find any decent able issue in the judgment and all that the decisions seems to lay down and all the articles come into operation at the stage of trial but it sweep goes right up to commencement to the police officer and in so holding it disregarded or did not take notice to earlier constitution bench decisions that expressly held to the contrary as I said these are the matter of personal predilection and some time unfortunately might be happen with me also sometime we allow our social philosophy to unduly dominate our judicial function. I am telling of you to be aware of this tendencies everyone has personal likes dislikes personal like dislikes social philosophy world outlook your responsibility and training is to achieve the balance what you consider right how far your views are acceptable to the society what are the constitutional values and what is the legislative intent I am sure you will be that is the judicial concerns to achieve this balance your own outlook know one can eliminate once like dislike everyone has world outlook everyone has social philosophy but your training your job is that you rain in that to...to..to bring in that to

intended with the legislative these are the case where the social philosophy or personal predilections of the judge unduly influence to judicial function since its coming from supreme court i know this decisions , I know four case this decision has been cited and supreme court somehow did not follow it but these decisions are yet to be overruled and therefore this decisions still create problems for high court judges , for lower court judges on the second issue on the statutory interpretations , the general techniques of all tools are familiar but notwithstanding with the availability of abandon precedent and many technique of statutory interpretations many cases ultimately involves the exercise of judicial system where the court is called upon to draw the extraneous sources perhaps public policy underlining the law to decide the given case to some extend it's only natural that the judges own perspective likes, dislikes and preferences will affect the manner in which this discretion is exercised in the word of koradji and i quote here the great tides and current which engulf the rest of men do not turn a side of a court pass by the judges. Unquote as Justice Dhananjay Chandrachud has written an excellent chapter on challenging on juggling in a volume brought out to comrade 150 years of Bombay high court he says awareness of once predilections is the first step of confronting them. a judge know must himself or yourself what are your social views how do you seek the social conflict and then only you will know where to draw the line between your social views and the constitutional values the legislative intent behind a law you must be exercising that and you must learn on more and more so that you may not commit may errors what does became vital for the judges to strike a balance as i said earlier what does it became vital for a judge is to strike balance between his and her own world outlook and social philosophy social exceptabilites of his views ,constitutional values and the legislative intent what help in achieving this delicate balance is legal reasoning subjectivity can be eliminated but it cannot be eliminated but it can be curtail by the process of reasoning the exercise of discretion must as far as possible be grounded be principle and be guided by the constructional sprit generally the Indian court have been successful in broadly maintain the balance but there are occasion the court seem to be allowed to be social philosophy to unduly dominate the judicial functions I once again cite before you two decision of the supreme court to illustrate the point , there was a case *Munee Subrot Jain v Radha Ram Vohra* this one was an eviction suit in Chandigarh the tenant was a lawyer now the tenant file and undertaking before the trail court that you have vacate the suit premises by a certain date the landlord excepted undertaking and on that bases the suit was dispose off by a consent decree now the unfortunately

for the tenant before the date mention in the consent decree before the date by which the tenant was promised to vacate the suit premises the east Punjab rent control act was made applicable to Chandigarh also and that act has a very limited ground of eviction so the question arose in the execution... the gentleman this...this.. lawyer did not keep his promise did not vacate the premises the landlord filethe put the decree of eviction ...put the decree for the execution, the execution court allowed, the high court allowed and the matter came into the supreme court and the supreme court reverses the orders of the high court and the execution court. I personally find to be a very very strange case although the tenant had undertake to vacate by a certain date and although a compromise decree has enter in terms of said undertaking the supreme court relied upon certain distinguish precedent and relied on the vide language of statue to relief the tenant of the under taking it is certainly debatable whether in such a situation the statutory language should be interpretive such that may a tenant who had already under taken to vacate by certain date and a compromise decree has already been reached should the statue intervene such that it has effect of setting undertaking and compromise decree to a not in a later decision commenting upon this *Munee Subrot Jain* decision of the supreme court the court has observed to some time devours logic of law is one thing but to devours morality is altogether from the law is quite different the other decision have been taking only negatively I have been citing cases which i don't approve of but i must conclude on a positive note the other decision I wish to place for your consideration what is commonly known as *Asiad* case to my mind the decision is an example of one of the finest pieces of legal reasoning the case arose in article 32 public interest petition banging to the notice to the court the workman employed for construction of the Asian game village where have been paid wages below the rate fixed under the minimum wages act though respondent was the union of India the workman was engaged by the contractors assign the work and there was no direct relationship of master and servant between the union of India and the workman so this article 32 petition was wasted on number of grounds a primarily objection was raised that the matter concerned only on the violation of minimum wages act where is the fundamental right violate why article 32 where is the question of why why how how and why are you entertaining this petition article 32 is enforcement of fundamental right where is the fundamental right involved at the most it is the violation of minimum wages act and the minimum wages provides remedies for that there are authority go and file a petition under the minimum wages act before the deputy collector or whatever whoever the authority under the act where is

the maintainability of this petition where is the question of fundamental right here a preliminary objection was raised that the matter concerned only violation of minimum wages act and the remedy was to found under the procedure prescribe under the act itself as no fundamental right had been violated there is occasion to invoke the jurisdiction of supreme court under article 32 of the constitution the primary objection was rejected by brilliant and innovative piece of legal reasoning the supreme court cited article 23 and 24 of the constitution which no one would have thought that ever be used the supreme court cited article 23 and 24 of the constitution which prohibited force labor also the employment of children of fourteen years in factory and also cited article 21 in which in hears the right to live with human dignity the court guided by these constitutional provision in use the labor law in question with the constitutional dimension and then found the violation of those laws did in fact amount to violation of the said fundamental rights a court is often called upon to way in balance competing fundamental rights almost called upon to decide which right is more fundamental in a given situation such matters necessarily call for the exercise for the of judicial discretions through a process of adherence to precedent application of method of statutory interpretation and the major exercise of judicial discretion the subjectivity enhance that is inherence of judiciary functions can be largely curtail as I stated earlier this is necessary to lend legitimacy to judicial process ultimately a judiciary must gain respect not by the virtue of the power that it possesses its exercises but by virtue of its legitimacy of its reasoning. Thank you very much.

Dr. Geeta Oberoi- So indeed it is very nice to hear your brilliant talk I have I can say that I don't know no no no I am really in fact I am actually confessing it it's really brilliant sir, I was thinking that aaa you have after your talk actually next publication next general in my mind with your talk on that so you have any question may we have some discussions.

Participant Judge- Doctrine of reverse burden applicable. I mean to say that there are provision under NDPS act 26 to 67 the statement of the accused taken my lord.

Justice Aftab Alam- I was speaking generally in *Nandani Satpati* case there was no issue in selfincriminations at all it was prevention of corruption act in some provision in penal code.

Participant Judge- sir in TADA act also you alsouhh..that is..ahh part of the evidence....

Justice Aftab Alam- yes yes yes your right

Participant Judge- these are the instance of doctrine of adverse uhhhh reverse

Justice Aftab Alam- yes yes you are quite right, though are the special law in which there is provision but I was talking generally of the criminal law of the Indian criminal law general in the most general sense... and to say that article 23 goes right up to the police investigation from the point of commencement of the police investigation actually there were, before that two constitutional bench decisions which had expressly rejected this submission. I must tell you discussion by Justice Krishna Iyer who is generally recognize one of the greatest judges in the country as produce and I count myself as one of his admirers but I especially site this case before you to show that even the greatest are not infallible If some of undoubtly Justice Krishna Iyer is one of the greatest judge in the country as produce but he also some time got carried away in he sometimes .

Participant Judge- in one case I came across that even in the case of rape even in the case of rape there was the compounding of offence at the apex level..

Justice Aftab Alam- I was just saying i am happy seeing four ladies among ten twelve men

Dr. Geeta Oberoi - sir there was total 19 out of four are women..haaaa.. At your time the position was quite different when you are elevated as a high court judge...hhaaaa.. the number must grow...

Participant Judge- High court, trail court it's differ to case to case,

Justice Aftab Alam- I think you are right...aaaa... a magistrate a munsif , a district judge a session judge uses the same legal reasoning on think is that coming to the high court , your are more mature your are experience the quality of reasoning may improve may get better but as a magistrate as as a munsif as subordinate judge or as a district judge also you use the same tools you use the same method it only thing that the quality may improve by experience with time with more learning with more study...

Dr. Geeta Oberoi- also sir reliance on constitution aspect also looking because how many trail court judgment, because they more in the statute, rather than on the constitution this again I think

one difference , i mean they are not finding but mostly the decisions are rather than CPC CrPC or NDPS act special jurisdiction like C.B.I court than those statute actually govern or reasoning.

Justice Aftab Alam- I think constitution definitely add the dimension to your reasoning , but take the case of trial judge who is try to an accused of murder and then he has to decide whether about the penalty whether death sentence or not that is purely legal reasoning .

Dr. Geeta Oberoi- could be like I remember a Professor Mohan Gopal over here and how he used to impress upon all trial court judges even right from civil judges , junior division up to principle district and session judge that even though maybe you now that you think constitution is not relevant to you but constitution will be relevant at least when so far as reasoning part is concern and he use to say that , he used to be favorite equations is not that law is equivalent to justice L is not equivalent to J he used to say X+J is equivalent to J and what is X and then he used to say X is FEDEF "freedom, equality, dignity, equity, fairness" and these are all constitutionals values and from every judge even if your deciding like ..aa say bail application , even there the FEDEF has some application...so..so.... I mean there have been ways of thinking what we are doing actually , that is what Cardozo's lectures are all about we are doing something but how many of us are able express what we are actually doing especially in our paper work.. It's more important we know what we are doing but can we actually reproduce in a paper were, when we are writing. That this is what we are doing and why we are doing like I don't if you are read Amartya Sen this aaa Idea of Justice there is a example of flute that three people wanted one flute even that is very interesting what kind of reasoning to be givenWill actual inform decision or libertarian or a uhhhh you must read its really aaaa interesting example as to where we all can go jurisprudentially to go for reasoning.

Justice Aftab Alam- I my time when I was in practicing Patna there were some judge who has carrier judges who come from the high court judges who are finest in writ court judges, justice Shabho Prasad Singh , whose son is Kirti Singh is known currently in the supreme court he had come to the high court from the district court , he was as good as in writ matter's. Not journalistic reading serious reading, read literature, read history read phisolphy read everything, read good fictions its help definitely helps. Its improve your personality , it's gives you point of view to look at things differently.Thank you again thank you very much.

SESSION 6

Components of Judicial Reasoning

Paiker Nasir- Shall we begin, welcome back this session is on components of judicial reasoning. Honorable Justice P.V.Reddi and Honorable Justice Sunil Ambwani will be taking up this session. Sir, over to you sir.

Justice P.V.Reddi- It is aaa a this is the continuation of the previous session. It is the traits inherent in judicial reasoning, we are trained to perceive a the reasoning, reasons have been described as the very Of life. Judicial reasoning refer to what is called the thought of the judge reaches a conclusion and to the written explanation of that process. Judicial reasoning is of course when it is always grounded on the legal material placed before the judge. And as I said the yesterday also that reasoning and clarity are the real hallmarks of a qualitative judgment. Opinion without reasoning and without meeting the core points raised in the case is anti-thesis to righteous judicial conduct, and it even raises the question of judicial accountability. The, of course the supreme court has time and again the need for aa giving reasons in spite of increase in institutions, pendency and burden on courts is no good reason to dispense with the reasons for judicial conclusion because parties have legitimate expectations for know the reasons and that they must have the assurance that their case has been duly considered by the judge. And you find some guidelines some that is for the Sahara Industries 370 AIR 170, you know the guidelines to write judgment has been laid down by the supreme court, they have been enumerated by the supreme court in the case Sahara industries, but I am not sure whether it is good practice to use guidelines to write judgments, in the I mean judicial order of the highest court. These things have to be set at the seminars, workshops like this, to how to write judgments and all that . |see this from my experience I have noticed and from your experience you have also notice by now, see this many judgments, they have this coherence, clarity and consistency will be lacking. These 3 Cs are very important coherence, clarity and consistency. And reasoning at one part of the judgment will not go contrasting to another part. It is there not in not in the district court judgments, high court judgments, and even in the apex court judgments we find in plethora of such cases where we find aaa you may not be to frank about it but still. See that aaa the ethic point in judicial reasoning that is article written by my learned brother who is here aaa he has said many particular things in this article. Before I pave way for him to say. I would like to aa I gone through that article so I just thought of giving some salient

points highlighted by him. See he draws a distinction between giving reasons and reasoning. Quite often reasons are not supported by reasoning that is how we put it. Of course reasons are the rational reasons to the conclusion, of course, broadly reasons are broad reasons to the conclusions that the judge gives but still there is a settled distinction, the real distinction is there that is what he describes. Then the inter-relation between rationality and reasoning, that is another aspect which he has dealt with in that article. Of course on this topic of rationality in judgement, I think there is one full session on that. May be tomorrow I think. Then he rightly stress that uniformity, consistency predictability are the attributes of proper judicial decision making and sub-conscious factors are at play in taking the decisions that was the theme of yesterday session, there was some psychologist. And reasons are very often based on personal believes, morality, biases and prejudices and so on. That is again, yesterday we were discussing and reasoning and feeling are deeply interrelated in all moral determination of conclusions that is one point that he left to emphasis. Then he, Justice Sunil Ambwani has very rightly pointed out that justice is not particularly enlightening, when it comes to how a decision have been reached, it is difficult to say that cognitive illusions affect them, that is one, which you have to say what is working in your mind. So the aa I think he will now say, after that we will have some discussion.

Justice Sunil Ambwani- Sisters and brother judges, I have just debited office on retirement as the Chief Justice to the high court of Rajasthan. I had a very fulfilling tenure in Allahabad for about 14 years and then went to Rajasthan. I was elevated from the bar and soon as I was elevated from the bar I needed some good material on judgment writing because those who are elevated from the district judiciary they know the writing of judgments, how to write judgements but for the members of bar it becomes very difficult., they are not cultured to that habit. So I write one article much later, to the art of writing judgement. This article by way of lecture I have delivered to almost all the young civil judges who have elevated aa appointed in the judiciary, in Judicial Academy Lucknow and Rajasthan. But later on I felt that , it needs to be further elaborated so far as reasoning is concerned and not only reasoning but ethical reasoning. It is another subject that came to my mind. Is there any ethics in giving reasoning and I was thankful to my brother judge, R.K. Agarwal who is now in the Supreme court, he gave me 11 books which I have quoted in the end, in the references and these books are to be immediately purchased, they are not very expensive books, the entire set will cost you only Rs. 3000/-. These books lays down the real philosophy of law. I will not say that I have read all of them, but I have read occasionally. And from that a small article

was culled out Ethical Reasoning in judicial process, That is page 121 of your compilation. This is one of the most difficult part of the life of a judge, giving reasons. In this academy only in 2005, I came to learn that there is difference between reason and reasoning, a very simple illustration was given that , I was a bird on my window in the morning and I skip my breakfast, that is the reason, I saw a bird I did not have my breakfast no connection in between, for a persons who speaks or listens to him it be of no meaning, what, what he want to convey. Now the connection was, I saw the bird and I wondered how freely it flies in the sky because it does not add any weight to it's body, and in order to feel light and healthy, I skipped my breakfast, now it connects. The reasoning is there. Many a times we give reasons but we forget that there is no reason between the reason and the conclusion and that is what called the reasoning. If reasoning is there then it connects, it makes it to the whole. See we do not write judgments only for the litigants, we write judgments for appellate courts, we write judgments for lawyers also, we write judgments for our colleagues, aaa you are now high court judge, you write and it is followed in the entire state, it will be a precedent to be followed by other brothers and sisters in the same high court. So the judgement should be wholesome judgment full of reasoning so that it can be followed and then if it to be differed or distinguished by anybody, there should be sufficient material to it. Now this was the whole idea of writing article on judicial reasoning. Now the topic today is components of judicial reasoning and it is divided in several forms and there are various ways to arrive at a conclusion by giving reasoning's. Now the aa in the previous seasons you may have also been given the philosophical reasons of reasoning, you will also be taken to the analytical way of reasoning. What I found from the learned authors in these books was that there are 2 distinct methods of reasoning. One is, paragraph 5 I have given one analysis, in which we try to understand it's object by looking at its component part and other is synthesis, in which we try understand the class of object by looking at the common properties of each object in that class. Now you see when you set out to write a judgment either in court or while writing judgment on your desk after hearing the case. You have the facts of the case before you, you have the issues which were raised in the aaa , you have the evidence, you have the have the principles of law which may have been elucidated by the lawyers, you have the statute and of course every statute has its laid back in the constitution and every statute has its power according to the aaa considered constitutionally valid. Now on this you have to draw a conclusion. Conclusion means a decision of the case. Now do you synthesis is material before you and arrive at the conclusion. That is the reasoning and the components of

reasoning. Now see there are 2 components of reasoning, deductive reasoning and inductive reasoning. The deductive reasoning is the argument, argument is valid, the argument's conclusion should be true when the premises are also true which we call syllogistic, syllogistic, I will give you an example, I have given a very simple example here- Dravid, Ganguly, Laxman and Dhoni, they all averaged 60 runs in the season, average, so if we draw a conclusion that with 6 players playing, the Indian team will definitely score 300 hundred runs in an inning. This is syllogistic way of deductive reasoning. Reasoning and this is the way some people sometimes try to put it but does it happen? It does not happen, somebody may get out on a duck and someone may score a century, this is one way of arriving at a reasoning. Here the reasoning is valid because there is no way to a prime is not a rule and so the conclusion cannot be doubted. But I will tell you later that it does not hold good with the judicial reasoning. Now within the field of formal logic varieties of different forms of deductive reasoning have developed. These forms are called syllogistic logic, propositional logic and predicate logic. The other form of reasoning is the inductive reasoning. One way you draw out deduction out of certain facts. The inductive reasoning which means, something which induces you to come to a reasoning, it is in contrast with deductive reasoning, even the best and strongest case of inductive reasoning, the truth, the premise does not guarantee the truth of conclusion instead, the conclusion for the inductive argument proves some degree of probability. The conclusion of the inductive argument contains more information than it is already contained in the premises. Now this inductive reasoning is also divided into 2 different parts. One is abductive reasoning and the other is reasoning by analogy. The abductive reasoning or the argument is the best explanation which involves both inductive and deductive reasoning. Abductive reasoning is the best example possible out of the reasoning and the analogy. We all know that analogy is by giving examples. It is also a form of inductive reasoning. Reasoning by analogy from particular thing or category to another particular thing or category. Even the best reasoning from analogy can only make the conclusions probable, even the truth of the premises is not certain. Now all these reasoning forms have their fallacies. The formal fallacies and informal fallacies. Sometimes a very intelligent lawyer will during the process of argument will take you out of the case and to mislead you in different direction so that it affects your reasoning in deciding the case, that we call red herring argument. Red herring is like this, red herring used to be a when an English man used to go for hunting, sometimes the local people did not want the English people to hunt in their counties, they would red herring a fish a very bad smelling fish so that they will

take the fish along and mislead the dogs who were guiding those hunters so that they will go on different direction. Many a times arguments will be advanced before you , who actually does not have any concerns. Suppose the lawyer does not have a very good case sometime, a many a times involves himself into an argument which does not arise from the case to confuse you or take you in a different direction. That we call it a red hearing argument a very aa it comes by experience that a judge will avoid that kind of an argument to decide. Then comes rationality , now unless there is rationality and objectivity, the reasoning will also go here there. The rationality is the term related to idea of reason, an idea of reason called rationality. It has dual aspects- one aspect associates it with comprehension, intelligence or inferences , the inferences are also drawn like salolisim The other aspect associates rationality with understanding and justification. But these are 2 different concepts there is one aspect which is comprehension, intelligence and inference and the other one is understanding and justification. Now there are 2 types of manners in which a judges mind work, there are some judges who like to decide the case by intuition, by aa would say precedent is also a form which helps you decide the case quickly but at the same time the intuitions also work to decide the case. Now I will give you one example, how do you differentiate between the two. Suppose the facts are before you, the accused did not liked the deceased, the accused always avoided him, the accused ones had a confrontation with the deceased. The deceased came and sat besides the accused and therefore you deduced from then logic that he must have attacked him, not the crime but he must have attacked him. Now this how we approach the topic, I'll tell you how, in a case of accident the road was wide, all this vehicles were speeding on the road, the accused had a new car, accused was a young man. What does that leads to conclusion, was he rash and negligent. It does not it cannot, there might be variety of circumstances in which the accident may have happened. But what happens with us is that in that process what we do is we involve probability, expectation, personal experience, combine it as a logic, apply him to the case and hold him guilty of rash and negligent driving, we don't like to see other things may be which are associated. He may have slow down drastically, he may be going on the right side. I'll give you example- in a busy express way where the average speed of the person is 150, between the two trucks a man crossing the road suddenly come and the man is hit. Now can you believe that, deduced from all this facts before you that he was rash and negligent, you will still have to go my circumstances. So this how importance to understand, it is only to understand. We know every case is decided on the facts before you and on the facts and evidence brought before you. But if

you understand how your mind works to decide the cases, it may become easy. Now aa rationality will be in the nest I think tomorrow sessions, but I will give you a simple idea how rationality works. It is interrelated and the reasoning is not rational then it becomes bad reasoning. Now the sociologist Max Weber has distinguished 4 types of rationality. One is the purposive or instrumental rationality, now purposive or instrumental rationality means it is the expectation from the human being, like it may happen like this- *aais ahona chahiye, aaisa hi hota hai*, this is what we while make up our decisions while giving reasoning, many a times we adopt either expressly or in our mind. The purposive or instrumental rationality. The other is the value and belief rationality, you know we all, we all are the product of our upbringing, the way we think, the way we act, the way we behave, the way we react to a situation, this all depends on the way we are being brought up. Some of us may have a very easy and good upbringing and many of the persons who are not so advantaged in life have very difficult backgrounds. Now in this very difficult background, we have lot of experience and many a times these experiences affect out method of thinking, affect out method of thinking. I'll tell you one judgment I was going through, the judgment in which the accusation was of cruelty against the wife, evidence was laid that she was disrespectful to her in laws, she will not help them in the hour of need, she will not get up in the morning take up a bath and offer tea to them. Now the judge writes *ye sab patni dharma ke anukul hai*, it is all against the values of aa traditional wife. It was unbelievable that in 2014 a judge would give such reasons. But I don't believe him , may be the believes and values in his own family, may be that is what he expected from his own wife, may be his entire background and the family thinks that is how the wife should behave. But if he decides cases like that then that is not the reason on which we can draw the conclusion that the lady was guilty of aaa or may be accused of cruelty. Now another type of rationality is affectual rationality, the cations determine by actors, specific effect, feeling or emotions which are meaningfully oriented. And the last is traditional , which is determined by inhabitations, like in our society or in this society aaa this is how the society functions. These are many elements of rationality which many a times affect our reasoning. I am not here to propagate that all this may make your judgment a bad judgment, it may still be a very good judgment but they do affect and we must have the understanding how they affect you. Now I tell you that there cannot be a judgment that does not affect you , judgements on social issues , I am not talking about the judgements on our legal issues, law or a judgment on tax matter or a judgement which is clearly flowing from a statute books. But where a judgment has an element ad

I believe that most of the judgement has an element, human element into it. And whenever it is there, the biases, predispositions, whether patent or latent, unconscious or conscious they affect the judgment. Again the object of talking on this is not say that always they affected judgment is wrong way, they can also affect the judgment in the right way. Now I tell you one example, a gentleman had bias against Sikh sardars, whenever he would see a Sikh gentleman he would have some kind of an uneasiness in him and when a Sikh gentleman would he would have a normal feeling of disbelieving. The aaa he happen to express it to his fellow judge, I don't know what happens to me when I see a Sikh gentleman, they said you better consult a psychologist. He went to a psychologist tries to retrace his memories and he found that when he was a child and used to play with a ball, a child of a non-impressionable age, on the aaa one ball came from other side and he was just handling that and one Sikh little boy came and gave him a big trashing, he was given a big trashing by a Sikh gentleman. Now that was ingrained in his mind that Sikhs are aggressive, Sikhs are abusive, Sikhs do not follow the reasons and rationality, they attack provocatively. Once he came to understand that this is the feeling in his mind, he would get out of it. And he improved the understanding of the evidence. Another example, I would give, there was one judge who had some sense of uneasiness with Bengali people, and when he went back, he realized that at one point of time, they had a Bengali tenant and they aa ahis father was the landlord and had many problems with the tenant. Every time on the dining table he would sit and say ooh that Bengali did like this and that. Now he had a pre-disposition in his mind that perhaps that Bengali gentlemen are not to be relied upon or they are the kind of people, whom you should look at suspension. Completely misconceived notion, but is in his mind. You know that in America, for new judges, who are appointed, there is this training institution that is funded by the bar, the American bar association funds that institute. There is a very important part in it and that is called desensitizing a judge. It's a very strange thing but I believe that exercise should be done in our country, to DE sanitize a judge because many a times we do not know what is in our mind, how, why we are being affected, many a times we don't even understand why we are thinking like that. So it only a qualified psychologist who can way of explanation, why way of your behavioral , by way of going back and retracing the instance find out the ways which are affecting you and he find out that you are conscious. I am not saying that they will not affect you in future but you become conscious of that , you become conscious of your biases which may be latent or subconscious biases and they will go a long way in improving your perceptions towards things. That is one more important thing

that is perception. In the recently, in the month of April there was a chief justices conference which was addressed by the prime minister also on 2nd or 3rd of April, the prime minister said one thing as a lay man, he said that I am saying as a lay man to the judiciary, that you have the facts before you, the constitution before you, the law before you, the principles before you, you have the precedents before you, even then you decide the cases on your perceptions. Then it immediately stuck to me that I am sitting as an appellate judge and in latest patent appeals, I could see, I could very well see as to how the perceptions of the judge are affecting. I will give you one example- in Rajasthan in Rajasthan administrative services examination are taken. Now in the Rajasthan administrative services examination, the principle of moderation was applied and the other principle is that in which they have somebody, though evaluators and the lenient evaluators. So in the principle of moderation, a meeting of all evaluators take place and all evaluators agree that on these questions model answers and on these model answers the range of giving marks to the students would vary between say out of 10, 6 to 8 or may be 6 to 9. But there were some examiners who would give 9 and some examiners on the same answers would give 6. Now the principle of moderation takes care of that. And another thing is that when there are different subjects. In the civil services examinations there are number of subjects. So in the evaluation of those subjects they also adopt the principle of moderation and I will just get the word. So this judge was confronted the single judge, there challenge to this examination on the ground of that these principles have been faulty applied to this. He did not take into consideration that in the past for the same examination, the division bench has upheld the appeal, the applicability of moderation and evaluation methods. In the conclusion, what he says relying upon one of the excerpts used that whatever principle you adopt difference should not be more than 10% in the marks, and then he quashes the whole examination, result of the examination, asked the reevaluation of the entire examination. Now this delayed the results for almost 1 year and put everything into suspicion . now there was absolutely no principle, no precedent to give a direction. He could either accept it or reject it . that the method was wrongly applied or that it should not have been applied but bringing from his own perception that whatever method is being used should not be more than 10%. We had to set aside the judgment which was ultimately upheld by the supreme court on the ground that it had been already upheld by earlier. The prime minister is warning against the perceptions. These perceptions arrives from your own believes. The question is as a high court judge I also felt a lot of times, sort of a that I am imprisoned ., I am unable to take the decisions

according to my own conscious because I am bound by the principles of law, because I am bound by precedents. Even if I am thinking in a particular manner which according to me should be correct but I am unable to take a decision because that decision would be wrong because it does not follow the principles laid down by law of the supreme court or the binding judgements of the supreme court. But that is what the law discipline in which we have to work because there has to be certainty of law. Certainty of laws, predictability of law is the subject for public perception. You can't have an entirely different judgement on the same sets of facts, same principles and same constitutional values and the same constitutional thinking. You have to have consistency. And our system of things as system goes whenever there is a breaking of a path it is done by the supreme court, consciously taking into consideration the relevant factors, the need of the society and the need and shift and change in the law. So we are all bound by various factors. Even after 15 years of judging, I can say that there is no freedom in judging. Freedom is only in giving reasons to coming at your conclusion. The conclusion in any given set of facts cannot vary drastically, so this is what the experience is. As it was rightly said by Justice Aftab Alam that, putting from the honorable Wentel homes, life of law is not logic but it is experience. Now again coming back to the topic of rationality, even rationality is not a fixed kind of a principle or phenomena. There is a perfect rationality, there is a super rationality and there is a bounded rationality. I'll tell you what are the difference. The perfect rationality is that some people always act in a rational way and are capable of arbitrary and super deductions at the end, they are always capable of thinking of all the possible outcomes and the best thing to do. Perfect rationality means you have several answers to a problem and you are looking for the best answer, this we call as perfect rationality. Then another thing is super rationality, super rationality is two logical thinkers are handling the same problem. Super rationality we have in mathematics. Two logical thinkers analyzing problem will come up with the same references. If two persons are good in math's and they are given a complicated sum to do, both will get the same answer. Now that is not always with the law. In our high court, Allahabad High Court there was a young student of law and problem was given to him by senior junior and senior, the problem was there he was to come out with a solution. After 2 days he comes out with a solution. He said no, I don't think it is correct, you go again and work it out. After again after 2 days he came back, he came back with the same solution and the senior applied his solution. He said your solution is perfectly correct, rational but it is not what the law is, that is not how the law works. Many a times a very perfect rational decision may be wrong in a particular case because

of variety of reasons. Rational decisions are based on thoughts rather than on emotions. A rational person is someone who is sensible and is able to make decision based on intelligent thinking. Equity, justice and good conscious are the hallmark of judging. One who seeks to relay on the principles of law and looks only for the decided cases for support of reasons to be given in a case or acts in bias or emotion loses rationality in the decision making. The blind and strict adherence to some of the principles of laws sometimes carries a judge and deviates from the objectivity of the judging in issues before him. The another way of judging is simple way of judging .mu experience shows that with the shortage of judges and with the extra burden of judicial work thrown up in the high court judges, most of the high court judges are turning aa they are juts becoming sort of factory of giving judgments and decision. E had a judge, we we had a judge in aaaa Allahabad who decided one lakh forty thousand cases in a tenure of 11 years, but the manner in which he used to decide the cases was, he was mostly sitting in criminal miscellaneous matters and he had 5 set of orders, A ,B, C, D and E. If you want A you give it to the reader, order B order \c you will fill up the blanks and the judge would sign 100 or 150 orders a day. He had a logic he said look I am not finally deciding the matter this is at the criminal miscellaneous stage, all the 5 orders which I have drafted are not prejuducial to the man, protects his interest, protects his principle of natural justice, wherever he has jumped the bail, the bail has been cancelled stereo type, whenever the charges were framed and he is taking the chargesheet and the evidence, again stereo type, he had his own logic. He said look I am disposing of the cases, these are the extra burden which the lawyers are throwing on us , how can each miscellaneous case have 5 miscellaneous matters coming up every year. But is that the dispensation of law, that is the question that we must ask ourselves because that is a very aa we all fall prey to that kind of a thing. So aa the judges have always felt tempted, to decide a bunch of cases, because bunch will be decided by a common judgment may not, there is no quota fixed for the high court judges, nobody is going to question you for that but that statistical deposition, satisfaction amongst your own colleagues. And now a days even the media is catching up that that particular judge is disposing that many cases. So that attraction comes to you that why should I not adopt the same practice. Speaking for myself I have seen a very dangerous trend, we are there compromising with justice. No two cases are similar, you may say that it is not a preliminary stage I will not interfere it is a different thing. But to put it in state jacket and give a stereo type judgment is completely subverting the process of law. And there one more thing I will tell you, it is not only because the judge not only wants to

give judgment or decide more cases but judges avoid giving reasons because then you have to study the matter, you have to understand the facts and principles laying behind the matter, the justice and injustice part of it, equity and fairness. There is a many a times you will g=find in your careers there is a conflict between equity and law. There is a conflict, there is a case, if the widow has applied 5 years later she will not get compassionate appointment, nobody looks in her circumstances, why did she not apply for 5 years and there are precedents, no no delay defeats the equity. You have to now aa a set of cases used to come that a person has been acquitted in a very petty case so he should not be denied a job and it was applied mechanically. Petty case, no affect on the character so do not deny him the job. The supreme court then relied on the principle stating that if he has written in his form, his application form that criminal case was instituted against him, even if it was a petty case , even if he has been acquitted in the case, even if no charge sheet was files or report was submitted he should not be taken in employment because it's a matter aa it reflects upon his character that he is relying upon falsehood, conduct. Now suppose a young man of 21 comes to you and says I was afraid, my father and my teachers advised me that no charge sheet has been filed against you, you are arrested and released on the same day don't mention it, you will not get a job. Will you relieve him of that conduct? Why because there are precedents, where is equity? Where is equity? Many a times you will find that there is a conflict going on between the law and human conduct, the law and equity, equity and fairness and justice. Natural justice we have we have raised it to a very high level but when it comes to actual application, natural justice is nowhere to be seen because we aa there is a case earlier decided , no person comes and says, I want a compassionate appointment, but is there any rule, sir rule no rule of the administrative department, no no rule I will not consider this matter at all. Now just the same lawyer comes and says that my lord, in the same department 2 persons have been given compassionate appointment, where is the principle, where is the equality Article 14, so one judge says no, unless there is a rule I will not consider, supreme court says unless rule I will not consider, another one says there is violation of Article 14 and 16 because several persons have been appointments on compassionate ground in the same department. There comes a difficult line to follow and there your process of understanding the law and reasoning will come to play. Now there is one aa in paragraph 11 of my article, there is another method of judging that is called the green reasoning and that is radical view and in recent times it has come. It's a new new concept which is coming in the front where decision making has emerged which has been given the label

of critical legal studies. Now this is the origin of academicians. There is always a conflict between the academicians and the judges. Academician looks at the whole picture of courts and justice and judges in a very philosophical very academic manner, analytical manner. We always tell them you are not aware of the practical and ground realities the manner in which the cases are decided. Geeta was just telling you that Prof. Mohan Gopal would always say, always keep the constitution in mind. Even the subordinate judges, a sub judge or a judge junior division should have his orders which are in consonance with the constitution. I always had a fight with Prof. Mohan Gopal, that you have not seen the realities of judging. You have 50 matters on the board, you are deciding the cases at various different stages, where is of course every law is in tune, fine tune with the constitution, the law is tested on the emblem of constitution, every law flows from the constitution and the law would include everything even the notifications and orders. But the question is where is the time for the judge, where is the occasion for the judge or where is the object of involving a constitutional provision in every order. Should you say in every bail order that no freedom of liberty, freedom of this and that and therefore I am realising on bail. I think your high court will tell you [Justice P.V. Reddi- you need not to cite the constitution in every matter] but decision making sometimes becomes mechanical, that is where we are in the academy, decision making should not be mechanical because hidden behind are the facts of the case. There may be some said story or something which needs to be remedial by judicial methods and for which the judges of our country needs special mention that we are all aware of the social realities of life. In this very academy we were called ones as high court judges on the one the aa to understand what is poverty and there were 2 national experts who were telling us that you know in this country what is poverty but it is not defied yet. Poverty you know it had to be relate to need base or right based. Whether the poverty aaa they were from aaa one from Bombay university and the other one was the member of the planning commission. Whether the poverty should be linked to the intake of calories by one person or whether is linked to aaa. So we have to get up, and say what are you saying? For an Indian judge poverty does not need an explanation and definition. By looking at the file and the facts of the case, face of the accused we can say that he is poor. And in this country economy and all financial principles run on poverty, you are not able to define poverty as yet. These are the matters we must leave for academicians, they will give us a good understanding and background of it. But when it comes to the practical application the lawyer comes and say, I'll tell you an example- my chief judicial magistrate of Allahabad, there was a small news item, next day morning

I called him and told that you need an exemplary punishment as a judge, he was so pest fallen he said sir, my wife has given me food yesterday, she told me that you are a demon. What he did was, while he was getting up a police remand case, sir this man was planning for theft so we have got him and we want his remand and at 5 O clock when he was getting up, the policeman comes and put the papers before him and he did not see that there was a lady standing behind that man, poor lady was crying and she had a baby in his hand. The child was dead and the lady was crying and telling the judge that *sarkar iika chodd do iika kriyakaram kar layii*, let me have the final rites of my child that has died in the morning and that man mechanically granted the remand, he was in a hurry , he wanted to go somewhere or one of us might have called him *ke sham ko ghar pe aajana*. So he said that I am ready to undertake any punishment I have done a great sin, I should have looked into it. But what is happening these days is that academics apart, academician apart, judging has become a vey mechanical job. I tell you of this is mechanical although I wonder how it is mechanical, when in a small court 100 people are standing, still they are discharging their duties but nonetheless we must all be reminded of the fact that behind every case there is a story. Sometimes the story is very sad and it is our ingenuity , it is our way of improving the things that we can dispense justice. I'll give you in example- in writ jurisdiction we came across cases where fair price licenses were cancelled , when the license get cancelled the person goes in appeal to the food commissioner. Now in between what is to happen, there were no defined government orders on to it. So one of our judges in the writ jurisdiction, he said that see all these kind of cases are coming everyday, saying that our license has been cancelled appeal is pending, till then I should be allowed to distribute the food grains or let there be some alternative arrangement something like that. now this judge gave an order until the appeal is decided, so many cases are coming until the appeal is decided, the shop will not be settled with someone else and it will be attached to a neighboring shop. Now the practical reality in the village is that there are 400 ration cards to a particular shop. Now if those 400 ration cards are attached to a neighboring village which is 2 or 4 km away. Until the appeal of that man is not decided the shop of that man not going to settle then what is going to happen. All the old and poor persons under the scheme will have to travel on foot to get their ration from another village where they will get step motherly treatment . the shop owner will say ohh you are from neighboring village I have not got your quota you will not get more than 2 kgs this time. So you will se streams of ladies and children's with canisters going to another village to get ration. What are you doing do you realize the practical realities that there

1.27 lacs shops in UP. Almost 5 to 10 thousand shops get cancelled every month. So you are punishing the entire village for the folly of that man. You pass an order that alternative arrangement must be made with immediate effect in the village until the appeal is decided. Now this what happens when we sometimes fall into an error of mechanical error of mind without realizing the practical realities. Have we ever realized the plight of handicapped people, what are the difficulties faced by them when they are giving examinations, when they are being appointed. See these are the things when we go in our judgment that we make a human judgment. It was lightly away from the topic. We are coming on this critical legal studies the radical way of thinking that says that all the judgments are a result of political manipulations. They say that everything that movies to some extent I believe after reading the book of Govind das there is a book of Govind Das who was the advocate general of Orissa, he later on became the senior advocate in supreme court. He has written a book, "supreme court in quest of its identity", it is published by eastern book company, please read that and please advise all law students to read that book. That book has right from 1950 has tries to establish that almost every judgment of the supreme court that touch the political issue or the social issue was the result of the political thinking of the then government. He has categorized, he said that whenever the government is very strong the supreme court has bow down and whenever the government had fluctuate the supreme court has taken the led. Well that has been proved wrong in the NJAC case. But that is his hypothesis and that hypothesis supports the academicians that almost every aa see after 1991, when we became a liberal economy the entire understanding of labor laws and contracts has changed. The supreme court said that now we are living in a capitalist arena, but in any case. Can you imagine what had happen if the government would not have opened up the economy and linked it with the market economy of the international world, we would have been cocooned in our own world. So that was a great thing that happened but then the courts followed it. So all that rationality, reasoning whatever it is the academicians say, flows from the political thinking not the government. That may or may not be correct that is a matter of research, that is a matter of understanding of law and that is a matter which and one more thing that I will tell you that, I had a discussion recently and I told the honorable supreme court judges that please leave the interpretation of local a laws to the high courts please trust them. Many a times what happens is that you have decided a particular case consistently with the law that has been understood and laid down in a particular state. Now if you interfere that judgment that opens up unwinds the entire transaction for years to come, on some

principles of tenancy laws or something. So a very good principle was laid down by the supreme court that we will not interfere or change the interpretation of local laws that have been accepted for a long period of time but many a times you have seen the different results. Now in the end I will give you just 2 examples there is some objectivity and rationality. Prof. Amartya Sen call it reasoning *urdu main kehte hain Rah-i-aqal*, it's a common man's ultimately it leads to as they say, Justice Aftab Alam, whatever may be the interpretation of the laws the agreements may be what justice Aftab Alam said about the big interpretation of the technical laws and agreements, it comes back and boils down to the common man's reasoning. The law is nothing but common man's reasoning. Common man's life, common man's understanding, common man's needs and the aspirations from the justice. It all ultimately boils down to the common man. And I do believe that we in the Indian judiciary are doing a great job in understanding the problems and in understanding the problems, the common man may not be the same in Tamil Nadu, in Andhra Pradesh or may be UP. You need to have an understanding that we have, which we all possess and by which we administer the laws. One example, I was giving you about a case, a very difficult case came to me in Allahabad on faith healing. They were doing a PIL on mal practices in medicine. An application came to me, files that a gentleman did not have any formal education or medical education is holding in a public park meetings every weekend in which nothing goes on except the chanting of name of Shiva, lord Shiva, *Om namo shivay*, whole day the whole records will run in the loud speakers in the name of *Om namo shivyah* and he would say that this is cure for all disease, if you take the name of god, if you have faith and believe in god you will be cured of all the diseases which you have and the people would go there and would spend the whole day, they will be just sitting and chanting *Om namo shivya* and some of the people as it goes on said that some miracle has happened there. The question was can the faith healing be practiced in public? We all know that the faith, the doctor also says that I can only treat it is only the god that will cure you. So it is a faith in god so if the person lives in this in getting well I don't think that anybody will get well. And doctors always say that you have hope in life and if you have trust and faith in god also. But the question was whether ones believe in a particular form of chanting or ones believe in god can be practiced in public as faith healing. So the first thing we did was we asked the chief medical officer to go there and inspect as to what exactly goes on in there is anybody charged with some entry fee to go in that park. So it was found that he was charging Rs. 5 as entry fees and on the backstage he had some medicines which all those yoga shivirs and sadhu shivirs you will find

some medicines for public in the backstage where they will be selling it. Now they are selling almost everything. So in that the question was whether faith healing should be permitted in public and right to health under article 21 was invoked , and it was said that you may have you may cure , you may stop taking medicines, you may cure by faith healing but when you go in public domain and practice it , you are inducing people to believe in your faith which may or may not cure that person. That violates the other persons right as you say. There are competing with the fundamental rights. I have a fundamental right to religion but that cannot entrench upon someone else right of health and that way we declared it to be bad in law. And you know from where did we get the comments? That judgment was given in a small courtroom in Allahabad and it got severest criticism from France and Germany on the internet. Because there they still believe that Jesus is cure for everybody. They said that Indian judge is mad he does not understand the law , it is only the faith that cures and Jesus is the cure for all. But it was that's it. Thank you. Many religions believe that faith heals. Thank you.

Claps.

Justice P.V. Reddi- very interesting topic we had today with very good examples. Now you see reverting back to yesterday's session may be it is also relevant for this. But in another 5 minutes I think we have got time. Did any of you had an occasion to go through this judgment that was given to you yesterday. That problem that flood control case, so what is your opinion having regard to the finding in that case and the relevant provisions. One way or the other what is your opinion is one thing and what is your process of reasoning. There could be more than one aspect of reasoning, so what are they. How do you interpret the relevant immunity provisions there. These are the questions that arise and foremost thing is there any way to award relief in a case of this nature. Again you have to turn to the first of all you have to turn to the process of judging. Is it the case of merit this is what enters in our subconscious mind, is there a moral strength in the claim or not? Should the relief be granted? Is it or is it not a fit case to grant relief? If you are morally convinced then the line of inquiry would be how best we can grant the relief or hold the relief in conformity with the existing provision of law. You cannot ignore the provision as my learned brother has just pointed out. Just on the own whim of judge and his own perceptions the case cannot be decided but then the process of reasoning must be there and the reasoning process should be related to the interpretation of that immunity provision contained in the that federal torts act in

the flood control act. So in this background I mean anybody has studied about it, if not only then I will mention that there was a short division in the United States supreme court also. 4 judge on one side and 3 judges on the other. Nine bench yeah 5 and 4 so the circuit court has awarded damages , which is a tort claim you know and it was reversed by the supreme court buy the majority, you can go through it. But the dissenting judges have held , both deferred on the interpretation and the legislative debates on the in the congress when the legislation was enacted they were referred to by both the judges as are supporting their point of interpretation. But how do you do it in the Indian context, how will you be awarding that a relief. But there is no time for discussion hahaha. So these are the reasoning process aaa put to test in cases of this nature and if want to answer of this, you can see the opinion of the majority and the dissenting view. That decision is reported in 490 what is it, haan 478 aa you can make a note of that citation 478 US 597. The majority has said that the starting point in the interpretation is the language itself then they go on citing such things. The immunity provisions enacted as a flood control act , outlines immunity in sleeping terms that is no liability of any kind that shall attach to or rests upon the united states from any damage or from flood waters in any place. So they say that it is sleeping you know, no kind of liability at any kind for any damage. On it's base the language covers the damage here, it is a case of gross negligence on part of the concerned officials in letting out the excess waters and two persons died. On its bases the language covers the accident here. Whether a provision like this needs a scrutiny of the constitutional provisions. Even prospective overruling is being applied to the statutes now. Hahahah oaky I think. One more aspect I forget to mention about yesterday that in civil matters the reminder of old cases should be very exceptional not been resorted as to the matter of force has to be done. Here I wanted to say that if you think that a particular aspect has not been considered then you can call for a finding and disposed of with them and set aside. Do have some time limit like may be 3 months 6 months like this rather then sending it back again after aa 10 year sor 15 years, that tendency is very much disturbing. Okay , now I take leave off.

Dr. Geeta Oberoi- can we have a big round of applause for Justice P.V.Reddi who was with us for 2 days and also honorable justice Sunil Ambwani. I think we will take a short time, no we just have 8 minutes please come back in 8 minutes because we don't have after that time.

SESSION 7

Stages of Moral Development

Prof. Parul Rishi- A very good afternoon all of you and I am sorry because of me you lunch has been delayed today more. But never-mind you'll enjoy it more. When there is a delay there is enjoyment more after that. Okay. I am so happy that you could accommodate with my schedule because I have a class later on so, they have to just re-schedule it accordingly. Today we are going to talk about Moral Development it is a difficult topic for each one of us including me. Morality no one else but you people are the aa considered to be the stall-wards of this particular area. I am just sharing with you because I am teaching formally ethics and morality and aa corporate social responsibility particularly in my institute, Indian Institute of Forest management. So I am sharing some of the conceptual frameworks of that and will do some exercise and will just try to learn together. There will be many things that I will be learning from you people. Some concepts you will like it it have it from me. So, it's a mutual learning experience which we will have together fro roughly 45 minutes if I am not wrong. So we will start with a brief exercise. You will find some of the aaa Suchitra you may aaa let me introduce my PhD scholar Suchitra Pandey, she'll be just assisting me in the exercise. You are having 6 situations in this sheet. Please start distributing that. These are simulated situations, you may find them absurd sometimes because I am not having any legal experience. I have designed little what ever best I could collect. You can correct it, you are free to do that, if you find some situation not very relevant, that will be useful for the further batches. Just read them and there are 3 blocks given in front of every statement. So please read the given simulated scenario and try to see yourself in that very situation. Whatever is your first likely response, give number 1 in the box, followed by 2 and 3. You are requested to write number in all the three boxes of each statement. If you do not understand the situation try to interpret it in your own way and modify the situation all by yourself because I accept that this i snot my area I am trying to learn from all of you. The instructions are given on the slide also you can just see. As already told you can mold the situation if you do not find it practical and write it on the sheet itself the changed version. Absolutely no issue.

Participant Judge- mam, some parts I feel, not to give any number only 1 and 2 that's all.

Prof. Parul Rishi- All of you given? Okay. So we are continuing some old lessons of ethics, revising it altogether with the help of all of you. The first question comes , Where are ethics? Whether they are written in Judiciary's code of conduct? (Nolan Principles/Bangalore Values) or Enforced by law? While you are giving your judgment, that is when somebody is doing something tht is unethical, so you are trying to enforce it or in our minds? So therefore I focus the last one, if ethics are not in our mind. Then no matter what is written people are going to find loopholes out of it and try to interpret in their own way and try to misguide the whole legal system and try to just use it the way it suits to them. Not what is actually there? So face of ethics if it is not in our minds we cannot do anything no matter whatever we do, so our Values, our Culture, our Mind set, which makes us. Suchitra please collect from there. So so our Values, our Culture, our Mind set all the three are basically trying to make us towards our ethics, towards our values. So value ethics start with aaa basic convictions about what is right or wrong on a broad range of issues. The terms "values," "morals" and "ethics, operate at three normative levels: Values are defined by oneself, we define this right for me and I value that, I keep it here no matter whatever is there in the law, whatever is there but I won't do it if it doesn't appeal to me. Morals are defined by society. Society says this should be done, this should not be done. So many times we have certain values which are not in line with what is the expectation of the society and many a times we violate our values for the sake of that. Yes

Participant Judge-Now, here in a society that is not permitting a certain situation but that is contrary to the law

Prof. Parul Rishi- Yes yes

Participant Judge-So how do we reconcile the 2

Prof. Parul Rishi- no we are not saying that we can reconcile. We are just saying that there is a line of difference, there is a principle ethical realism and ethical universalism and there is a difference between the 2. what is ethical universalism one that is applied everywhere but ethical realism may be one which is not right. Like see the terrorists the way they are operating for them it is right. So, it is ethical on their part but the whole world completely says that it is unethical. So in that way because of ethical relativism, there is a difference in law, what is right in India what is right in

European countries, what is right in gulf countries etc or the paralegal system, whatever you are talking about that kind of differentiation is there because state in the values vary according to the culture, society and the community. Yes sir

Participant Judge- madam, theses values and moral ethics they kind of invest in each other naa

Prof. Parul Rishi- Yes, you will find how the values and ethics. Ethics are designed by the organization in which you are. The whole set is values and the small part of it is the ethics. So the broader set is what we find this correct, if our value system is fine, no matter the ethical issues are in the organization, they are presented in a different way or whatever may be. But if our conscience is saying us giving us the right message we won't do anything wrong. So, STATED VALUES and OPERATIONAL VALUE. The values stated in written documents like Bangalore principles of Judicial Conduct or Nolan principles. The values that actually drive judicial decisions. There is a likeliness that there is a difference between the 2 but ultimately, the convergence should be what is right. That is what we actually believe that we all are practicing and doing it like that. Sometime there is a disconnect because of the contextual factors or which many a times we do not have any control. So when we do not know that something that we doing is unethical, the most difficult problem is that sometimes we are not aware that we are doing something that is unethical because it is presented in a context in such a way that it appears that everything is fine but actually it is not. So who will tell you when you are doing something that is unethical, it is in the general sense not to be taking a judgment or something like that. So the answer is ask yourself If you feel a minutest fear in your mind that what will happen if someone knows about it that it is done with some wrong intention? and if the voice comes that somebody knows, considering it as the voice of your conscience to save you. This is the best check to test whether a behavior is ethical or not. So there are many Threats to Morality , it is no a kind of a easy thing that we can be completely moral. Just see this cartoon what does it says- even if you are on the right track, you'll get run over if you just sit there. What does it communicates? External Pressures to threat or benefit, Humanitarian concerns, Attitudes and biases. So even if you are on right track, even if you are proceeding to take the right judgment you may get run over if you are just sitting there. You cannot completely disregard the external pressures on you that is what this cartoon is trying to communicate. But that also is not communicating that just leave you conscience and do whatever the external pressures are just forcing you to do that, that also you cannot do. But you have to find

out some safe way which is not at one side, which is saving you to do something unethical and at the same time you are able to save your skin also, that you are also not in trouble. So that kind of balancing is the most crucial task that all of you are facing in your day to day life. So why it is difficult to be ethical?? There are certain myth about it and the first one is, It is easy to be ethical. It is not at all it is a myth it is really difficult. May not be for some who are grounded in morality, right from the childhood days what sir was saying, that if moral education is there right from the childhood, engrained in each and every cell of the body, right from the beginning, then of course we can say that. But unfortunately that scenario is not there people just, children just grow up with various kind of unethical, small small unethical things cumulated together in their life and they consider it Okay, my father also does like that. My father also says that there is a phone call and he says that just tell him that I am not here, and it is Okay and it is acceptable and that limit of acceptability starts growing and increasing and increasing and by the time that poor child grows into an adult person and joins the job and he is told, now you cannot do this, you cannot do that and that poor fellow is helpless, he doesn't know what to do. Then he just looks back and say that my parents are my role model and I have been told right from the childhood and it has been written in all the religious scriptures also, so my father used to do that and this is acceptable and that limit of acceptability increases further. So this is a major barrier to aa that is why we say that it is very difficult to be ethical. The Smell Test , that is what we all could practice. It is if something stinks, don't do it. If some lawyer is coming to you for lots of witness and this and that, but you have the sense in you that will tell you that no something is wrong no matter whatever, things he is bringing in front of you, but something is there. So if there is a stinking just don't do that. There are 2 frameworks when we are taking judgments. Consequential Framework (Consequence – Benefit/Harm to society) and Deontological Framework (Justice, rights and virtue with emphasis on integrity of actor). You all think whether my judgment is going to benefit the society or it is going to harm the society in the larger perspective. Not in the perspective of just the person concerned because each and every judgment is giving the consequences to the society at large because it becomes the precedent for the other similar kind of cases. So whether you are going for Consequential Framework or Deontological Framework like justice, rights, virtue all these things should be perfectly correct as per law, as per justice. So you have to choose. I am just giving you the example- Child Labour and prostitution in developing countries. Case on Ban on Bar dance in Mumbai and later on lifting it. (The controversial law banning dance bars in Maharashtra,

which provided employment to thousands of women, was put on hold by the Supreme Court)2015. So this a situation where we have to see the society's benefits or the harm or we are just bothered about pure justice, many a times we have to balance the both. particularly in a country like India where economic conditions are very very difficult in many situations. Then Unethical Behavior another myth, Unethical Behavior is simply the result of bad apples, we all know the old idiom. SO many a times we say, it is okay that it is wrong but when everyone is doing, I can also do that. And looking at other persons we attach so many bad things to us unknowingly. We consider it as the part of the system, like the corruption in the govt. system. Everyone is faking why not me. Beyond that still there are people who are able to listen to the voice of their conscience and no matter whatever the people are doing, they will just stand aside, they will, they will put their foot down, they will suffer they will have lots of difficulties in the system, They will be transferred 47 times as Khenka was transferred in Haryana, you sir must be knowing about it, for putting the Robert Vadera case in public. So, all these are the cases.

Participant Judge- Now one question, See as an exponent of moral science, like you said that bar was imposed on the dancing bars and all that and later on it was lifted because it was affecting their right to livelihood. Now take that example in the case of prostitution, take that in the case of a person who is hungry, who steals. Now how do you reconcile this? Would you say, that it should be excused on these grounds?

No, no these are ethical dilemmas, I'll come to that. We all in our day to day life face lot of ethical dilemma like, the dilemma I use in the class room is that, A husband's wife is suffering from cancer and needs that drug for her that can just save her life and he is just kind of asking the person the kind of drug which he has developed himself but is not yet in the market and that person requested him that on some cheaper rate, he should be able to give that because, he do not have the money. And he just loan and takes some money later on and he will re-pay and that agreement also he was ready to do with that. But that person says that I have invested lot of money for designing that drug and I can't give you like that. And that person in the night just broke the store and steals the drug and gives to wife and say that I am ready to go to the jail, doesn't matter. These are the real dilemmas, for which there is no answer as to which side to go looking at the contextual situation you will have to take the judgments. That is why intention behind the crime you people consider while you are giving the judgment. So Ethics in Judiciary can be managed through Ethical Codes,

that is also a kind of a myth not just ethical codes something beyond that. Ethical behavior is linked to Ethical Leadership, not necessary although things flow from top to bottom that is correct if the person sitting at the top is ethical there is a likelihood that legal, that ethics will percolate to the bottom but not necessary because each and every person has their own values system based on which they just try to take out all these things. Then People are less ethical than they used to be, maybe that is difference of opinion on this myth that whether ethical deterioration is taking place at a faster rate or there is a kind of more explicit presentation of the ethical and unethical thing by the media because of media more unethical things are coming into picture or it is actual deterioration. There is a kind of a division of opinion about that. SO another very interesting exercise for all of you. Just open your notebook and draw these nine dots and I hope you will be able to do it very quickly, it's a childhood game we used to enjoy that and we all are just regressing to our childhood days by doing all these exercises although we are all experienced and at the top most positions in our courts but we will learn from our children, and we will learn from this exercise what we are supposed to do, draw these 9 dots and there are certain instructions that Connect all the nine dots with your pen in four consecutive lines without lifting your pen and no dot should be left unconnected, every dot should be connected with that. Four instructions only 4 instructions no fifth instructions into that, Connect all the nine dots with your pen in four consecutive lines without lifting your pen only that and you cannot make a curved line, it should be straight line. Only 4 instructions please don't ask me beyond that and do it. Time 3 minutes, 01:14, although it should be 2 minutes but, aaa one dot is left. Okay you do it whatever you are able to do, okay you have just put your foot down right from the beginning, and please don't do that you must try. Nothing is impossible until we stop trying. One is left that is the poor story. But I hope some of you will definitely would be able to do that. Please do it individually, if you have done it please keep it to yourself. That is an old story. You can't lift the pen that is one of the instruction. You'll be able to do it you still have 2 more minutes, please try don't disclose your secret of doing it till 2 minutes are over aa a one minute is left now. Last one minute please keep it with yourself sir, your secret. You all are having so many pressures when you work so I wanted you to bring you out of that and enjoy something over here and learn along that enjoyment. [Participant Judge- and we should be tactful] that is like that only, that's why we are doing it but we'll be able to drive some learning out of it. That's the essence. Time over, anyone could do it. You were saying you have done it, no I want to see that, I still want to see that. No one dot left, one left. Okay, so how to include that I

dot this is the answer. With 4 straight lines, Join all the 9 dots are connected, no consecutive lines, who told you, you cannot do that , see the instructions, see the instructions, see the instructions, see the instructions, have I written that you cannot extend beyond the dots, is it written, No dot should be left unconnected, Join all the 9 dots, yes you have Join all the 9 dots, Join all the 9 dots, it is not written that you cannot cross the boundaries, is it written? It is not written, that you can't cross the boundaries. There are 4 lines you are starting from here, going like this, going like this, going like this, and going like this. Please see the arrow, this one line, 2line, 3line, 4line, pen has not been lifted. Okay so let us see the learnings, the most important thing. How we can drive learning out of that fun that is the most important thing. All dots in cases are not so simple to connect. Some cases challenge our mental capacity in order to take right judgment. We have to go beyond logical sequence of events to adopt out of box thinking. See beyond what your eyes can see, Listen beyond what your ears can hear, Feel beyond what your mind says, Move from Logical to lateral thinking. These are the 6 sense that are required many times for taking judgment and you have to move from logical thinking to literal thinking, believing in, what is your voice coming from inside. Something new which no one is bringing out, still you mind says still there is something which is not coming out of box thinking which is required, which we have learn from this exercise. That we are required to have out of box thinking and we require to take the road not taken, not always that precedents give you the idea to take the further judgement otherwise there is no need otherwise no precedent judgments would have been taken. But it is not although they provide a good background to you but consider it only the background nothing beyond that and take the road not taken. Results are over aa okay. So there are ethical dilemmas which we have already talked about, I don't want to take your lunch part so I am just skipping some part. And I am taking you to this model that is basically starting with Ethical Dilemmas. All of face Ethical Dilemmas in every case in one or the other way and for that we have to cross through the stage of moral development. The topic for this session. There are certain stages of moral development. Individual Characteristics, issue intensity how strong the issue is based on that you have to decide, structural variables in which context you are taking the decision, and the culture also plays an important role and that decides whether you are taking an ethical or unethical decision. So you will power your locus of control means internal locus or External locus. Internal locus: the belief that you control your destiny. External locus: the belief that what happens to you is due to luck or chance. Then Determinants of Issue Intensity- greatness of harm, how many people will be

harm. Then concentration of effect, how concentrated is the effect of action on the victims on which you are going to take the judgment. proximity to the victims, proximity in the sense that if you are closely connected with somebody, official you cannot take that case that is fine . But defiantly it impacts if somehow it becomes like that. Immediacy of consequences, consequence of your judgment will be immediately on the people or it will be after sometime. Then probability of harm, how likely it is that this action can cause harm. So there are so many things that we take into consideration, when we are handling the ethical dilemmas. There is always right and wrong way which we have to choose and aaa. Sometime we are moral, sometimes immoral and most of the times we take the safe way which is Amoral. Amoral is I don't know , even if I know some part of the case I am silent, I am not just speaking because clear cut evidence is not there. Intentionally or unintentionally amoral. So these are 3 stages of moral development on which we operate. Stage one is pre-conventional, stage 2 is conventional and stage 3 is principled. That is was been asked in the exercise given to you. Somehow the scoring is taking a bit of a time, please give the individual scores itself. So the lowest stage is sticking to rules to avoid punishment, whatever is written in the rules I'll do that, as safe as it. If you rise a little above that, following rules only when doing so is in your immediate interest otherwise you can just postpone, stage 3 . Stage 2 , living up to what is expected by people close to you. Now if you remember the various options given in the situation, each category was basically talking about a,b,and c, so these categories are talking about different stages of moral development only. That is why I asked you to write 1, 2, 3 in all the 3 boxes, so that you can know that primarily in most of the cases, what is your choice. Second level of choice and third level of choice like that. if you have filled it, ideally of course that information will not come up but if you do in most of the cases if it is coming like that, if you can identify yourself with that particular situation then definite interesting results may come up. then maintaining the conventional order by fulfilling the obligations to which they have agreed. So it is what convention, following the precedents and taking the decisions accordingly. Then if we rise further, valuing rights of others and upholding absolute values and rights regardless of the majority's opinion. And the final one following self-chosen ethical principles even if they violate the law, what you are talking about, the parallel legal system which people design, they consider that they are at level 6 and they consider themselves beyond the law and they say I'll chose my path myself because I feel it is correct no matter whatever the legal system says. So this is the highest order many times people do lots of dharnas, people do all unethical activities but they say

that they are doing it for the larger social good. Otherwise nothing will happen. In some situations they are required also because many a times social order changes but law remain stagnant and there is a need that such social pressures should come up and they force us to re-look on various kinds of laws, rules and regulations. Lok Pal Bill and it' associated agitations and all, they are the example of that. I can't go in detail of that because there are various things associated with it. Stage 1: Fear of Punishment Not law or justice, but cost to me, Conscience = self-protection, Stage 2: Profit, Minimize the pain; maximize the pleasure, Right behavior means acting in one's own best interests. Reasoning is largely based on an attitude of "you scratch my back and I'll scratch yours." Conscience = cunning. Level Two: The Conventional Level A person's moral reasoning involves maintaining the expectations of one's family, peer group, or nation for one's own sake regardless of the immediate consequences, and a desire to respect, maintain, support, and justify the existing social order. Stage 3: Group Loyalty, Obligation to ones family, gang, etc. One earns acceptance by being "nice." Behavior is often judged by intention – "Well, they mean well." Conscience = loyalty . Stage 4: Law and Order, Without laws, society would be chaos Right behavior consists of doing one's duty and respecting authority. Flaws in the system are due to the failure of individuals who do not obey the system. Conscience = good citizenship. Level Three: Post Conventional Level-Internalized-Truth-Centered, A person reasons according to moral values and principles which are valid and applicable apart from the authority of the groups. Moral reasoning becomes more comprehensive, reflects universal principles, and is based on internalized norms. So, people proceed through the stages of moral development sequentially. There is no guarantee of continued moral development. Myth: Most adults are in principled stage ("good corporate citizen"). It is quite possible for a human being to physically mature but not morally mature. Kohlberg believed that only about 25% of persons ever grow to level six, the majority remaining at level four. -The Scriptures speak of principles of modesty, humility, and wise stewardship of money. -If Kohlberg's observations are true, then level 6 thinkers would be in the minority. In fact, they might even be misunderstood and persecuted by a level 4 majority . So, choosing a Pebble What these pebbles teach us? All balanced on each other, all are doing balancing in our systems, we are the largest stone in the system in which we are operating and we have to be balanced in such a way that the lowest order is not disturbed. So Features of Pebbles are they are of different shapes and sizes, different colors, largest at the bottom, smallest at the top, all connected and all balanced on each other. Now what we are learning out of it? Come across

cases from diverse sections of society- Caste, Class, religion, age groups Need to balance the interests of all through values for fairness and impartiality overcoming the individual attitudes and biases. Largest stone acting as a base for judiciary. Responsibility to keep all the courts down the line connected with judicial values. Responsibility to make sure that smallest one on the top is not felling down due to any imbalance. If they stand strong and connected, no one can roll them in their own way. So that is what Morality and Values Percolate from Top to Bottom. And the last cartoon, our attitudes in life are frequently the chains that binds us. Nothing else, so if you have the right attitude you will always take the right judgment no one can stop us from doing that. 2 minutes extra sorry for that and you'll be getting the scales. Okay so aaa just after the lunch you will be getting the scales and I am just giving you. So whatever is your lowest score that is your dominant style and whatever is your second lowest that is your backup style. So you will find at what stage of moral development you are at pre-conventional, conventional or post-conventional. If I am right B stands for the principled stage of moral development, A stands for the conventional stage of moral development, C stands for the pre-conventional stage of moral development. So when you'll get your scale back probably, after the lunch because it is taking a little time to do that. So you will find out whatever lowest in A B and C whatever is coming as your lowest score, consider that your dominant stage of moral development at which you are operating at most of the times. Okay so with this I thank you all for your patience listening and interactively participating in this exercise and the session. Thank You

SESSION 8

How to comprehend Precedents?

Paiker Nasir- Welcome back every body. Aaa so this is the last session for today, it's on how to comprehend precedents. First of all let me welcome Mr. Parasaran, he'll be taking up the session. Over to you sir and everybody knows sir.

Mr. Mohan Parasaran- esteemed and respected judges. How to comprehend precedents is the topic for this session. I would actually aaa I thought it was rather a simple topic but then when I started giving a thought considering as to what is really happening in the supreme court, it is a very very complex subject because of the several conflicting judgments which are being given by the supreme court. I am not going to go in that, I will come back to subject, which actually puts the

judges of high court in a various of difficulties in several matters. In fact I was also aa after hearing the morning lecture, was in a slight difficult dilemma whether I should go the whole odd before the National Judicial Academy and then I decided to be confined to my little legitimate limits. In fact aaa I was thinking why at all there should be this sort of a training but I think it is a good kind of a change for judges for all of you because performing the task of a judge is very difficult one these days and a coming over here for 3-4 days give a very refreshing change, not only for judges but also for lawyers like us because we are just reading our SLPs and preparing for final hearings, now ones we also I think do some kind of an academic exercise when we actually come for these kind of seminars. I was pointing out to you that see of late, not off late. Over the past 10-15 years there have been lots of conflicting orders all of you know what is a precedent? Precedent is ultimately the ratio decedendi in a given fact as applicable to the facts of the case, what was the reasoning, the judgment, the law laid down in a particular case. But you see some judgments of the supreme court particularly admission to medical colleges, or grant of recognition to medical colleges or in some criminal matters, in fact in 2014, the leading judgment as to how courts can permit compounding of criminal cases between private parties when the offences are not heinous and not against the society. And a when high courts actually seeks to follow those orders and it comes to the supreme court, the supreme court actually takes a strong view against the high courts. This is one area of great concern and even though the high court rightly comprehends aaa precedents, one of the judge was also saying one problem that is faced actually is how to find out an obiter, the wife how can she be treated as obiter of a public servant in a case arising out of corruption under the prevention of corruption act and the reasoning has been given by the court. So these are all such problems which makes actually this subject, rather more complex. Rather, you may rightly comprehend the ratio but still there is a possibility of this matter planning before a particular bench which might take a different view and calling the high court resorting to judicial adventures. So with tis introduction I will proceed to todays' topic. I have actually sort to divide this topic by first making a small introduction in to precedents then the rational for justifying this rule, then comparing the points to identify the ratio and also as to how to comprehend precedents, generally, how we have to exclude certain rules and I have taken the help of some legal authorities and also authors.

A crucial and major task in dispensation of corrective justice and for the purpose of reading just decision in disputes would be to comprehend precedents. The task of both the lawyers and the judges is not that simple. In adjudicating any disputes it is always essential to be sure about three factors namely, (a) the facts of the case (b) the law applicable to those facts (c) to apply the correct law applicable to those sets of facts. It is here the precedent comes to play and it predominantly involves judicial precedents, followed by statutes because they are also interpreted and according to Professor Dias, he has also taken into account customary practices and usages in that order that is why, if the adverb given to Indian constitution in Article 13 (3) law has been defined to include not only statutory law, including delegated legislation but also custom and usages which have the force of law. And that has been duly taken into account by the Honorable supreme court in Krishna Singh V. Mathura Ahir, AIR 1977 SC by Justice A.P. Sen, the term judicial precedent has at least 2 meanings, one of which is a process where the judge follow the decision of the previously decided cases and the other is called the original precedent, there is a case which applies and creates a new room. According to Dias, a precedent is a previous instance or case which furnishes an example or rule for subsequent conduct and a pattern upon which subsequent conduct is based. Salmond in a Theory of Judicial Precedent, (1900) states that the rule of precedent is a fundamentally important legal institution in common law countries: even the single judgment of a higher court speaks with a voice of authority and must be followed by lower courts. This doctrine is also known as stare decisis. In an article published in 1987, Fred Schauer made an interesting suggestion, which I think opens the prospect of a better understanding of stare decisis than we have had hitherto. He said this: An argument from precedent seems at first to look backward. The traditional perspective on precedent ... has therefore focused on the use of yesterday's precedents in today's decisions. But in an equally if not more important way, an argument from precedent looks forward as well, asking us to view today's decision as a precedent for tomorrow's decision makers. Today is not only yesterday's tomorrow; it is also tomorrow's yesterday. I say this because my esteemed audience here is not only going to use and follow precedents and but also progressively lay down precedents and in all probabilities landmark ones. Therefore, drawing from Schauer's quote above, the principles guiding precedents will not only be useful in comprehending past precedents but also making future precedents binding future courts. And all of you the origin of precedents has essentially been from the common law and Justice Raveendran, in fact has written a detailed article, which is also been published in the SCC

under the heading in his article Precedents: boon or bane? (2015) 8 SCC (J) succinctly traced the origin of precedents in the English Common Law, which grew in the absence of codified law. Judges rationalized their decisions on the ratio decidendi or the principles on which past cases were decided by superior courts. India inherited the common law system from British rule. Then, came the Indian constitution and in terms of our constitution precedents actually were treated as binding precedents which bound all courts as a law declared for instance, Article 141 of the Constitution lays down that the “law declared” by the Supreme Court is binding upon all the courts within the territory of India. The “law declared” has to be construed as a principle of law that emanates from a judgment, or an interpretation of a law or judgment by the Supreme Court, upon which, the case is decided. (See *Fida Hussain v. Moradabad Development Authority* [(2011) 12 SCC 615 : (2012) 2 SCC (Civ) 762] .) Hence, it flows from the above that the “law declared” is the principle culled out on the reading of a judgment as a whole in light of the questions raised, upon which the case is decided. [Also see *Ambica Quarry Works v. State of Gujarat* [(1987) 1 SCC 213] and *CIT v. Sun Engg. Works (P) Ltd.* [(1992) 4 SCC 363]] In other words, the “law declared” in a judgment, which is binding upon courts, is the ratio decidendi of the judgment. It is the essence of a decision and the principle upon which the case is decided which has to be ascertained in relation to the subject-matter of the decision. It is this principle which becomes part of the precedent binding on subsequent benches of co-equal strength and all subordinate courts throughout the territory of India. [Natural Resources Allocation, *In re*, Special Reference No. 1 of 2012, (2012) 10 SCC 1] . Further Article 227 of the Constitution of India vests the power of superintendence in every High Court over all Courts and Tribunals throughout the territory in relation to which it exercises jurisdiction. It is in this constitutional provision, it is implied that all the courts and tribunals throughout the territory of the State will be bound by the decisions or to be precise the ratio of the decisions of the respective State High Courts, subject to the decision of the Supreme Court on the issue. Therefore, the requirement to follow precedents is not only a common-law requirement in India but has also been elevated to the level of a constitutional mandate by virtue of Articles 141 and 227 of the Constitution. So we have seen how from common law it has been included in the constitutional mandate.

And now we should examine Rationales of justifying the rule of precedent/ doctrine of stare decisis. The various justifications of the rule of precedents include the importance of stability,

respect for established expectations, decisional efficiency, the orderly development of the law, deference to ancestral wisdom, formal or comparative justice, fairness, community, integrity, the moral importance of treating like cases alike, and the political desirability of disciplining our judges and reducing any opportunity for judicial adventurism. But as Jeremy Waldron argues in his article *STARE DECISIS AND THE RULE OF LAW: A LAYERED APPROACH*, Michigan Law Review, Volume 111 | Issue 1, 2012, I am convinced that the rule of precedents is essential for upholding the rule of law. The United States Supreme Court, in one of its most sustained discussions of stare decisis, cited the rule of law as a reason for not overturning precedents too often. And at this controversy again came to light in the case of *In Planned Parenthood v. Casey*, the case involving the abolishing of abortion law, three of the Justices in a plurality opinion addressed the prospect of overturning the abortion decision in *Roe v. Wade*. They devoted a long section of their argument to the issue of stare decisis, insisting at the outset that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." The US Supreme Court in *Planned Parenthood* further said: "There is ... a point beyond which frequent overruling would overtax the country's belief in the Court's good faith.... The legitimacy of the Court would fade with the frequency of its vacillation....".

Stare decisis is, in the words of Justice Cardozo, "the everyday working rule of our law". As stated earlier, there is a cluster of considerations commonly cited in support of the system of precedent that seems to invoke rule-of-law values. These include the importance of certainty, predictability, and respect for established expectations. By commanding that judges follow previous decisions, stare decisis is supposed to make it easier for people facing a new situation to predict how the courts will deal with it: they will deal with it in the way that they have dealt with similar situations in the past, rather than striking out unpredictably with a new approach of their own. The predictability that this fosters is supposed to make it easier for people to exercise their liberty (i.e., their autonomous powers of planning and action). The connection between liberty and law's predictability is a powerful theme in the modern rule-of-law literature. The Supreme Court put it more pithily in *Planned Parenthood v. Casey*: "Liberty finds no refuge in a jurisprudence of doubt." In *Law's Empire*, Ronald Dworkin indicates that interpretation involves choosing from among a number of possible principles. The rule of law requires generality, not in the sense that

all law must be general, courts can't do their job without issuing particular orders, such as “Petitioner is to pay the Respondent Rs.100,000/-“ but in the sense that the making of particular legal orders is supposed to be guided by general norms. One of the important tasks of Judge laying down the precedent so far as the rule of law is concerned is to leave the parties-and the public-in no doubt as to the general norm that underpinned her decision. Affirmatively then, what is the subsequent judge's responsibility? Its responsibility is to treat the ratio as a genuine legal norm to which the court that he belongs to has already committed itself. It is there now, because of what the earlier Judge did, as part of the repertoire of legal resources available for dealing with the cases that come before him. And since the case now before him is similar to the case that addressed using the ratio, then the ratio should be used by him as a basis for dealing with that case. That is what is required of him now by the rule of law. If the subsequent Judge and other subsequent judges behave in this way, then the court to which they all belong will be (and will be seen as) an institution that decides cases on a general basis, rather than just as an institutional environment in which individuals make particularized case-by-case determinations. Then I come to Identifying the Ratio: It is part of the duty of the subsequent Judge to identify the ratio of the previous similar judgment which may bind the Court as a precedent. As Waldron puts it, he has to bring it to the light of day, show it to the world, and apply it to the similar case in front of him. Secondly, distinguishing subsequent cases from precedent cases. One case may seem superficially similar to another, but the judge may be convinced that there are differences that preclude simply subjecting a subsequent case to the same rule that decided the precedent case. However, to distinguish a case, is not just to "come up with" some difference, rather there may be things about the second case that pose a distinct legal problem, which require a new and distinct principle to be laid down.

Overruling and stability:- A Judge competent to overrule decisions of its Court must bear in mind the following principles. A subsequent Bench/Judge may become convinced that the rule laid down by an earlier Bench/Judge is misconceived or harmful. This conviction may be rooted in a number of considerations. The subsequent Judge may have come to believe that the rule laid down by the earlier judge did not really reflect the background legal materials that were in existence at the time; he may claim that decision was an error per incuriam. Or the background legal materials might have changed, or it might just be that the precedent has worked out badly, leading to considerable injustice, inefficiency, and difficulty in the law. However, superior courts' decisions

are to be treated as normally binding, and the power to overturn is not to be used lightly, and it is to be used more cautiously in some areas than others. This again is what the rule of law requires: the laws should be relatively stable. If they are changed too often people will find it difficult to find out what the law is at any given moment and will be constantly in fear that the law has been changed since they last learnt what it was. Aristotle had argued that "the habit of lightly changing the laws is an evil" and based this claim on the proposition that "the law has no power to command obedience except that of habit, which can only be given by time." To summarize the justification of stare decisis on the rule of law, it is best to understand the impact of rule-of-law principles on stare decisis in layers as argued by Waldron. He says, that one principle, the principle of constancy, counsels against lightly overturning such precedents as we have. Another principle, the principle of generality, requires all judges to base their decisions on general norms and not just leave them as freestanding particulars. Another principle, the principle of institutional responsibility, requires subsequent judges not to give the lie to the use by precedent judges of certain general norms to make their decisions. And, finally, a fundamental principle of fidelity to law requires the precedent judge to approach her decision as far as she can by trying to figure out the implicit bearing of such existing law as there is on the case in front of her. She figures out the bearing of the law, she formulates it into a general norm, a subsequent judge takes note of the general norm that she has used, he plays his part in establishing the norm as something whose generality is more than merely notional, and judges try to maintain the constancy and stability of the body of law that emerges from all this by not overturning precedents lightly or too often. That is the layered way in which the rule of law bears on the question of stare decisis. Now this is all that I thought I could a general introduction, general principles. But since today's topic was dealing primarily with how to comprehend precedents, there are some settled principles which have been laid down by the Supreme Court which actually lay down how to comprehend precedents. As I said earlier, The Ratio of the decision is the precedent. Neither factual findings nor directions issued under Article 142 are to be treated as precedents. The Supreme Court in *Indian Bank v. ABS Marine Products (P.) Ltd.* (2006) 5 SCC 72 at 87 has clarified the position and held that High Courts should be careful in following the law declared by the Supreme Court by ascertaining the ratio decidendi and not follow decisions given on special facts exercised under the powers of Article 142. (power to do complete justice – *ex debito justitiae*). And Justice Raveendran in his article puts it inimitably that the Courts will do well to remember that, "Do what the Supreme Court said under Article 141

and not what the Supreme Court did in special circumstances under Article 142.” With reference to the precedential value of decisions, in *State of Orissa v. Mohd. Illiyas* [(2006) 1 SCC 275 : 2006 SCC (L&S) 122] the Supreme Court observed: (SCC p. 282, para 12) “12. ... According to the well-settled theory of precedents, every decision contains three basic postulates: (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment.” A decision cannot be relied upon in support of a proposition that it did not decide. *Mittal Engineering Works (P) Ltd. V. CCE*, 1997 (1) SCC 203. It is well settled that a precedent is an authority only for what it actually decides and not for what may remotely or even logically follow from it. See *Quinn v. Leathem* [1901 AC 495: (1900-3) All ER Rep 1: 70 LJPC 76: 17 TLR 749] and *State of Orissa v. Sudhansu Sekhar Misra* [(1968) 2 SCR 154: AIR 1968 SC 647: (1970) 1 LLJ 662]; *Goodyear India Ltd. v. State of Haryana*, (1990) 2 SCC 71 at page 92: Therefore to reiterate the above, a decision is an authority for what it decides and not that everything said therein constitutes a precedent. The courts are obliged to employ an intelligent technique in the use of precedents bearing it in mind that a decision of the court takes its colour from the questions involved in the case in which it was rendered. *State of Punjab v. Baldev Singh*, (1999) 6 SCC 172 at page 204. To elaborate upon the above principle, it does not mean that the Court is bound by the various reasons given in support of it, especially when they contain “propositions wider than the case itself required”. This was what Lord Selborne said in *Caledonian Railway Co. v. Walker's Trustees* [(1882) 7 App Cas 259 : 46 LT 826 (HL)] and Lord Halsbury in *Quinn v. Leathem* [1901 AC 495, 502 : 17 TLR 749 (HL)] . Sir Frederick Pollock has also said : “Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision.” *Krishena Kumar v. Union of India*, (1990) 4 SCC 207. Precedents are not to be read as provisions of the statute: -

In *Union of India v. Amrit Lal Manchanda* [(2004) 3 SCC 75 : 2004 SCC (Cri) 662] the Supreme Court has observed as follows: (SCC p. 83, para 15) “15. ... Observations of courts are neither to

be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.” Each case has its own peculiar facts and it is therefore always risky to appeal to precedents on questions of fact. *Gurcharan Singh v. State of Punjab*, AIR 1956 SC 460. In this regard, the following words of Lord Denning, quoted in *Haryana Financial Corpn. v. Jagdamba Oil Mills* [(2002) 3 SCC 496] , are also quite apt: (SCC p. 509, para 22) “22. ... ‘Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.’ ” There is often a judicial interdict at the end of the judgment against treating the decision as precedent. Hence, it is not proper to treat that decision as laying down any proposition of law. And this actually I have seen has of late become a sort of a fashion of some higher courts particularly supreme court, giving a lengthy judgment. In fact citing case laws, last line saying that it may not be treated as a precedent. But still I think going by the general principle, that can't be treated as a precedent.

Dismissal of SLP in limine does not furnish any ratio decidendi to be followed. *Om Prakash Gargi v. State of Punjab*, (1996) 11 SCC 399 at page 400, in this case also there have been a lot of arguments. In some cases I think as all of you know, whether there is a document of merger or not, the supreme court simply said third parties dismissed, in that the doctrine of merger will apply or not. But I think later on decisions have construed that doctrine of merger may not apply, third parties dismissed because without hearing parties, you can never dismiss an SLP. That is also in limine dismissal, unless they say SLP dismiss on merits. SLP dismissed on merits, doctrine of merger would apply, without giving reasons. The supreme court says, aaaa . no nothing we have heard the council. SLP dismissed on merits. But after Justice Lahoti's judgment, he himself say that actually ones SLP dismissed on merits, when we applied our mind, for high courts different

yardsticks. High court you must always give reasons. [Participant Judge- But in Calcutta high court the judges have the power to dismiss without citing reasons] It was a rule in fact Bombay practiced and Karnataka practiced also. Justice Chandurkar, when I was practicing in Chennai, way back in 1986, he used to actually sitting in appeal, he used to hear LPAs, he will only write on the docket LPA dismissed. But the Supreme Court actually set a test, said that will have to give reasons. Likewise in Karnataka, first appeal used to be dismissed without reasons. But when a Karnataka judges are transferred to madras high court in 1994, Justice Jaisimha Babu, started hearing some first appeals, he used to just dismissed, some matters went to the Supreme Court, Supreme Court also said that no no you'll have to give reasons. Then the practice of giving reasons actually started. If the supreme court says that the SLP dismissed on merits, [Participant Judge-so it means that if the supreme court say that dismissed on merits then the doctrine applies] yes, the doctrine applies.

Participant Judge- what about in the matter of review petitions?

Mr. Mohan Parasaran- Review petitions they say, look, if SLP dismissed, review dismissed. for the high court's aa yes. High court if you go by 114 CPC or order 47. In teh review you may not give reasons. High court is not bound to give reasons in the review application., you can always write at least I think, a 3 or 2 line order, no guns are made to maintain this review petition from the facts no error apparent, on the face of the record that is made out. If leave is granted, then it becomes a civil appeal no. But statutory appeals if they are dismissed in limine, no merger. then what they say is broadly speaking, every judgment of superior courts has three segments, namely, (i) the facts and the point at issue; (ii) the reasons for the decision; and (iii) the final order containing the decision. The reasons for the decision or the ratio decidendi is not the final order containing the decision. In fact, in a judgment of the Court, though the ratio decidendi may point to a particular result, the decision (final order relating to relief) may be different and not a natural consequence of the ratio decidendi of the judgment. This may happen either on account of any subsequent event or the need to mold the relief to do complete justice in the matter. It is the ratio decidendi of a judgment and not the final order in the judgment, which forms a precedent. Sanjay Singh v. U.P. Public Service Commission, (2007) 3 SCC 720 at page 732. Then a decision on a question which has not been argued cannot be treated as a precedent. Goodyear India Ltd. v. State of Haryana, (1990) 2 SCC 71 at page 96. Then precedential value of interim orders- [Participant

Judge- when a decision in question is not been argued then?] Yes, when a a decision in question is not been argued, so you can say that how can there be an adjudication when there was no argument [But if suppose that is the question that arises from the issue involved, probably no arguments were advanced but the court decides that issue] no no even the court cannot, that is why you see there is they say curative, now there comes natural justice, court says issue that has not been argued cannot be treated as a precedent. But suppose in the Supreme Court you file a writ petition, it will be knocked out by circulation. Then precedential value of interim order. Of course interim order cannot be treated as precedent but by and large, what Justice Venkatachala in a short order, says that in Vishnu Traders v. the state of Haryana, 1995 Suppl 1 SCC 461, suppose actually you can't again treat aa sort of a similar matter in a different way. Suppose we are granted an interim order to a particular litigant, where facts are identical, you must not actually seek to differentiate. That was in Vishnu Traders v. the state of Haryana, 1995 Suppl 1 SCC 461. But all I would like to point out is that interim orders are well settled in only prima facie findings and they are very tentative. Any interim directions issued on the basis of such prima facie findings are temporary arrangements to preserve the status quo till the matter is finally decided, to ensure that the matter does not become either infructuous or a *fait accompli* before the final hearing. But as I said it all depends on the facts of each case but it can't be treated as ratio decidendi, in that sense. But in order to maintain consistency and to avoid discrimination, you actually try follow is as a matter of practice. The tenor of an order, which is not preceded by any reasons or consideration of any principle, demonstrates that it was an order made under Article 142 of the Constitution on the peculiar facts of that case. Law declared by this Court is binding under Article 141. Any direction given on special facts, in exercise of jurisdiction under Article 142, is not a binding precedent. Ram Pravesh Singh v. State of Bihar, (2006) 8 SCC 381 at page 395. There is no such thing as a judicial precedent on facts though counsel, and even judges, are sometimes prone to argue and to act as if they were, said Bose, J., about half a century back in Willie (William) Slaney v. State of M.P. [AIR 1956 SC 116 : (1955) 2 SCR 1140 : 1956 Cri LJ 291] (SCR at p. 1169). A decision is available as a precedent only if it decides a question of law. A judgment should be understood in the light of facts of that case and no more should be read into it than what it actually says. It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court divorced from the context of the question under consideration and treat it to be complete law decided by this Court. The judgment must be read as a whole and the observations from the

judgment have to be considered in the light of the questions which were before this Court. [And this has been fooled in Mehboob Dawood Shaikh v. State of Maharashtra, (2004) 2 SCC 362 at page 368. Rule of Precedents apply to Tribunals as well that is what the Supreme Court says. Consistency, certainty and uniformity in the field of judicial decisions are considered to be the benefits arising out of the “Doctrine of Precedent”. The precedent sets a pattern upon which a future conduct may be based. One of the basic principles of administration of justice is, that the cases should be decided alike. Thus the doctrine of precedent is applicable to the Central Administrative Tribunal also. Whenever an application under Section 19 of the Act is filed and the question involved in the said application stands concluded by some earlier decision of the Tribunal, the Tribunal necessarily has to take into account the judgment rendered in the earlier case, as a precedent and decide the application accordingly. The Tribunal may either agree with the view taken in the earlier judgment or it may dissent. If it dissents, then the matter can be referred to a larger Bench/Full Bench and place the matter before the Chairman for constituting a larger Bench so that there may be no conflict upon the two Benches. The larger Bench, then, has to consider the correctness of the earlier decision in disposing of the later application. The larger Bench can overrule the view taken in the earlier judgment and declare the law, which would be binding on all the benches (see John Lucas [(1987) 3 ATC 328 (Bang) (FB)] .) K. Ajit Babu v. Union of India, (1997) 6 SCC 473 at page 477 . Then I sought to briefly highlight, the Exceptions to the doctrine of stare decisis/binding precedents . They are all well known, I will briefly deal with them because time is coming to the end. There is 2 conflicting decision in the same high court?

Participant Judge- No no no, by the Supreme Court. The one which is former in time or the one which is later in time, to the one which is suited most to the facts of the case.

Mr. Mohan Parasaran- You have to go by the later, suppose actually the later bench, is a coordinate bench, you will go by the latter’s decision, later in point of time.

Participant Judge- If the y=earlier judgment is not considered in the later judgment then

Mr. Mohan Parasaran- No no, even if it is not considered you will go by the later judgment. High court is helpless no

Participant Judge-Therefore, it is contradictory because it was not

Mr. Mohan Parasaran- Then the Supreme Court may refer it to a larger bench. High court can refer it to both the judgments, then they say we will go by the later judgment, let the Supreme Court refer it to larger bench. It is judicial adventurism. One other things see is one of the greatest contribution done by the collegium system is that high courts these days stand to follow the latest judgments. You can't refer to it in the larger bench in the high court, the high court is bound you know. See you have the option to refer it to a larger bench in the high court but the larger bench also will be in the same situation because it is the judgment of the Supreme Court.

Participant Judge- No , in case if it is a high court judge want to deviate from the high court judgment. What the best option would be.

Mr. Mohan Prasaran- Look deviate within the high court itself, if there is a conflict in the high court itself then you can refer it to a larger bench. See there have been cases which have also arose, actually this is also well settled in law. Two different high courts, the Supreme Court say that you have to follow your own high court. You know the full bench of some other high court might have taken a contrary view to the division bench of your high court, it is only persuasive value. But see if it comes to the constitution, a constitutional principle, how can it apply to the territory alone. A full bench of high court takes a particular view with regard to the interpretation of the constitution and it has not been appealed to the Supreme Court and the division bench of the same high court, of the different high court has taken a contrary view. So in this situation aaa Justice Raveendran has referred to Kerala aaa that Maharashtra judgment no, so how will that principle apply no. So these are some difficult areas. See for a tribunal it is a different thing. Income Tax Tribunal, they only operate in a particular region, but High courts they are exercising power under 226, they are constitutional courts. You can't confine high courts to territories no. There I think with great respect Justice Raveendran's 2007 judgment requires reconsideration.

Participant Judge- recently, mobile towers case, I think Allahabad High Court full bench has taken one decision and some other court has taken one decision, Madhya Pradesh, the Supreme Court has called all the cases which are pending before each and every high court, to be decided in the Supreme Court only.

Mr. Mohan Parasaran- It has sort to transfer cases from other high courts as well.

Participant Judge- Similar is the case with section 49, SARFAESI ACT, 14 Madras full bench judgment is there which we are not following in other high courts. Whether chief judicial magistrate and chief metro magistrate whether both are one and the same, because section 14 says that secure creditor can only approach only the chief metro magistrate or district magistrate for taking the assistance in execution of the [they are equal] no but what the CrPC say? CrPC section 31 D very clearly says that wherever chief judicial magistrate is there he should be treated as CM also. So CrPC will prevail, isn't it going to lead to anomaly. In metropolitan area you are called up on aa having an option as going either to CMM or district magistrate who is collector. But whereas in the neighboring district you are only called upon to go to the district magistrate.

Mr. Mohan Parasaran- there are so many anomalies no. Now you take the arbitration ordinance and the commercial court ordinance. On the same issue one ordinance says you have to go before a single judge and one says you have to go to a division bench section 9 application, so badly drafted. Arbitrators have been given time no, to decide the matter otherwise they will have to return back the fees paid. So no person will accept arbitration.

Participant Judge- even under section 34 of the Arbitration Act, to whom does the appeal lies? That is also very conflicting.

Mr. Mohan Parasaran- Yes, I don't know they should be send to national Judicial Academy or Ministry of law for aa training. In fact I was the solicitor general I suggested there should be draftsmen academy, in the lines of NJA, for proper draftsmanship no. Then I was on Consent Order, it will not apply to consent order and sub silentio decisions. You will not be able to decide anything, it will not apply as a precedent. Obiter dicta, naturally, obiter dicta binds the they said, binds the high court. But pronouncement of law which are not the ratio decidendi, Per Incuriam naturally, a decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. Sub-Silentio, dealt by Professor P.J. Fitzgerald, editor of the Salmond on Jurisprudence, 12th Edn. Explains the concept of sub silentio at p. 153 in these words: A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived

by the court or present to its mind. The court may consciously decide in favor of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favor of the particular party unless it also decided point B in his favor; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio. For example, In *Gerard v. Worth of Paris Ltd. (k)*. [(1936) 2 All ER 905 (CA)], the only point argued was on the question of priority of the claimant's debt, and, on this argument being heard, the court granted the order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When, therefore, this very point was argued in a subsequent case before the Court of Appeal in *Lancaster Motor Co. (London) Ltd. v. Bremith Ltd.* [(1941) 1 KB 675], the court held itself not bound by its previous decision. Sir Wilfrid Greene, M.R., said that he could not help thinking that the point now raised had been deliberately passed sub silentio by counsel in order that the point of substance might be decided. He went on to say that the point had to be decided by the earlier court before it could make the order which it did; nevertheless, since it was decided “without argument, without reference to the crucial words of the rule, and without any citation of authority”, it was not binding. Therefore, as I said earlier also that it is Sub-Silentio, the court decides a particular point, without hearing the parties.

The erudite Justice Benjamin Cardozo in *The Nature of the Judicial Process*, had said that “if the Judge is to pronounce it wisely, some principles of selection there must be to guide him among all the potential judgments that compete for recognition” and “almost invariably his first step is to examine and compare them;” “it is a process of search, comparison and little more” and ought not to be akin to matching “the colors of the case at hand against the colors of many sample cases” because in that case “the man who had the best card index of the cases would also be the wisest Judge”. Warning against comparing precedents with matching colors of one case with another, he summarized the process, in case the colors do not match, in the following wise words: “It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the Judge begins. He must then fashion law for the litigants before him. In fashioning it for them, he will be fashioning it for others. The classic statement is Bacon's: ‘For

many times, the things deduced to judgment may be meum and tuum, when the reason and consequence thereof may trench to point of estate. The sentence of today will make the right and wrong of tomorrow.’” They have been quoted by the Supreme Court, in 2012, (2012) 10 SCC 1. Lastly, I come to Divergent precedents, Difference of view between Co-ordinate Benches of equal strength:- Say, If the Division Bench sitting at Allahabad was of the view that the Lucknow Bench had erred in dismissing the writ petition challenging the holding of municipal elections, the matter should have been referred to a larger bench, instead of passed an order stopping the election process regardless of the judgment and order passed by the Lucknow Bench. The Supreme Court in *Anugrah Narain Singh v. State of U.P.*, (1996) 6 SCC 303 at page 307 cautioned the High Courts of this judicial discipline and adherence to the rule of precedents. Decision of larger bench will prevail over the decision of a smaller bench. Decision of a smaller bench prevails, which deals with and explains the decision of larger bench. If decision of co-ordinate benches of equal strength differ, and the later decision does not notice or consider the earlier decision, then the Court may choose to follow that decision which is closer to the facts of the case at hand and deals more directly with the legal issue. If a court considering a particular provision of law is faced with two decisions, it will follow the one, which deals with the same or identical provision rather than the decision which deals with a similar but not an identical provision, even if the latter is by a larger bench or a later judgment. When a Constitution Bench has decided an issue and subsequent smaller benches have not considered it or answered the similar issues somewhat differently, the later decisions should be construed in terms of the Constitution Bench decision as the smaller benches could not have intended a different view. Classic example of *Bachchan Singh* and *Machchi Singh*, after that the supreme court in 2014, have further expanded *Bachchan Singh*. Smaller bench trying to further in a dynamic way, interpret constitution bench. And so far the high court is concerned, one example could be Supreme Court upheld, the validity of the Central Tribunal Administrative Act, in *S. P. Sampath Kumaran*, where there was no appeal to the high court, Andhra Pradesh high court struck it down, notwithstanding *Sampath Kumaran*, they said denial of a writ petition under Article 226, while its basic feature, which is not considered by the supreme court. It was later on upheld by the Supreme Court. So even high courts have sought to dynamism, notwithstanding a Supreme Court judgment. Circumstances destroying or weakening the binding force of precedent- Abrogated decisions, affirmation or reversal on a different ground, ignorance of Statute, inconsistency with earlier decision of higher court, inconsistency with earlier

decision of same rank, precedents sub silent or not fully argued, decisions of equally divided courts, erroneous decisions. The High Court judges are required to play a dynamic role in the process of interpreting and applying the Supreme Court judgments in each case. Law is organic. But we cannot ignore the binding nature of the decisions. Justice Raveendran in his article Precedents: boon or bane? (2015) 8 SCC (J) expresses concern over the use of precedents in criminal cases with distinct factual scenario. He cautions that Judges should avoid getting bogged down by precedents in deciding questions of facts. Most of the decisions in criminal cases are rendered with reference to peculiar facts of that case and do not lay down any law of general applicability. Then in the conclusion what I say, it would not be inappropriate to part with a gentle reminder of what Senior Advocate and Jurist Fali S. Nariman in his book India's Legal System: Can it be saved? Has said, that unwittingly Article 141 has become a thief of judicial time since there are so many reported judgments, which are cited and have to be looked into and takes up vast amount of judicial time and the Judges are deterred from considering the overall justice of the case. Therefore, while precedents have wisdom and a source of great guidance, it should be used to do justice and not become a deviation from being able to do justice in a given facts of the case at hand. Therefore, Courts should use the precedents only as a tool for judicial economy because judicial economy is designed to reduce caseloads and create disincentives to re-litigation of issues previously decided. Thank you. haaan no it is Fali S. Nariman in his book India's Legal System: Can it be saved?

Dr. Geeta Oberoi- Well aaa sir, thank you so much and we now aa break for our usual things to take a rest I think so, for all of you and we assemble back, if you don't mind at 7 we are showing a movie Judge. The judge that is the movie, it's a judge, it's about a judge, it is an interesting movie about a judge only and his trial, trial of a judge, so it would be interesting and it's only one and a half hour movie, you know Hollywood movies are short movies. It's a English movie, starring Robert Brownie junior and others. It's a good movie and we meet aaa there is a special dinner also aa at auditorium, yes our favorite place. Tomorrow which movie I will show aaa I will show you good movie, it's dabba aaa well-done dabba, sorry well-done abba, it's a Shyam Benegal movie and very good movie I tell you, you must see it. Now a days we have this movie culture, I have learnt that judges do not see movies so, aa they don't have time so this is [Participant Judge- you can have the movie t 4:30 entire movie] That is really not nice because three supreme court judges

are travelling in the evening to interact with you and if you will say sorry we are seeing movie they won't appreciate it. [Participant Judge- movie of the society] yeah every human being is an actor that is what Shakespeare said, life is a stage. Yeah. [Participant Judge- Mam, special dinner does it includes non-veg] yeah non-veg you want, of course non-veg would be given we have no issues about giving non-veg, veg anything you want. I mean aa I really don't want to be please aaa drawn into such controversies, whatever you want there is a manager hospitality, there is a assistant manager hospitality, whatever your food choices are there, you can give him and he will make that for you. Yeah. [Participant Judge- Jain food] you want Jain food that will also be given to you. I know this is very diverse country and you have to. [Participant Judge- I just like to thank you Mr. Mohan Parasaran for his very scholarly and full of judgments this this presentation discourse and we hope to get the copy of the, because it is not included in the reading material] okay, you don't have to bother, if you go to the national judicial academy's website, there is a section called concluded programs, all the speeches that are delivered by Justice Aftab Alam, Mr. Mohan Parasaran, everything would be put up over there and you can at your convenience read them whenever you want, PDF files would be there.

Mr. Mohan Prasaran-I will mail it

Participant Judge- Thank you so much sir

Dr. Geeta Oberoi- Thank you so much all of you, thank you sir thank you.

SESSION 9

Importance of Rationality in a Judgment

Dr. Geeta Oberoi- very good morning to all of you. today we have with us Honorable Justice B. Gopalagowda, Judge Supreme Court of India and Honorable Justice Sharad Bobde, Judge Supreme Court of India, with us we are bless with their that they will be giving us the discourse on the importance of rationality in a judgment.

Justice Sharad Bobde- good morning! It is indeed a delight to be here, I have not been here before, I am particularly happy with the atmosphere. I hope we can aa put in some good thinking. I was aa one of the reasons I accepted and I also seems that is also the reason why am I and my learned

senior brother Justice Gowda also thinks that such occasion are really valuable not because you get opportunities to make speeches but because you can think out a problem, you can clarify confusions which we all have at some time or the other and eventually fulfil the object and purpose of our being in this job, namely to give a good decision. There are - the subject is rationality in a judgment and aa I don't think any of you needs to know what is reasonability in a judgment , we all know , we all you is. But I would like to spend some time, with you on the importance of thinking, we all think and nobody is new to thinking, it is to my mind and my humble submission the only method by which can clarify aa confusion, one can make perception clear and this is stage to priority. Thinking however, undertaken, whether you take it random with free association of thoughts or whether you start thinking of rules of logic, that this leads to this and that leads to that, and think of inferences etc., it is an important activity in fact, I would think subject to individual variations because we are all different in our approaches and no one is right and no one is wrong. We are different in our thinking. Thought. AA takes place spontaneously, it involves response to something somebody said. In fact, this aaa article which you must have all read which the learned director has circulated. This has some very interesting insights, for instance, it deals with the application of cognition, the new science, cognitive, Nero- science to aa law. So, when you say thought takes place spontaneously as response, there is such a thing as aaa thought taking place and we have this impression. At least I had this, aaa before this that, thought takes place and it has nothing to do with emotion, we are all supposed to be thinking people not emotional people. You don't feel emotional when you are deciding a case. I mean we, we believe that we are deciding the case on pure reasons. But the new science, which is what you must consider. I am sure it will not be done immediately, it will take a long time, and such thoughts take time in building up. That the new science says that thought, reason and emotion cannot be separated. Do you have this item aa this thing, reading material, do you have this reading material. There is an interesting there is this topic, it is at page 204, please come to this, do we all have it? aa it is internal, you have it? look at this thing aa the alternative to legal rationalism, do you have that, no just a minute, I am, no aa you are right page 223, that is the facing page, I'll keep this, You look at this thing in the middle, in the same sense, you got the paragraph, judges when resolving the dispute haaan, say between agency and reasonableness and agency arbitrariness. This is I am referring earlier, may be biased by some jurists. Jurists are normally tools for learning, they are accustomed to applying to a case. Brother, you got, page 223, bottom, yeah yeah middle page, yes yes. Whether from their experience as

lawyers or judges or whether from their own ideological preferences. There are ways to frame issues or questions to avoid bias. Consider: “A bat and a ball cost \$1.10 in total. The bat costs \$1 more than the ball. The ball is not 10 cents. How much does the ball cost?” By framing the issue with information provided to avoid error, the problem solver’s biases can be reduced. Now everybody says that that the difference is 10, correct the problem is stated earlier, aaa I am sorry I should have read the top that A bat and a ball cost \$1.10 in total. The bat costs \$1 more than the ball. How much does the ball cost?”³⁸ Almost everyone studied by Kahn man and his colleagues reported an initial tendency to answer 10 cents” because the sum \$1.10 intuitively separates into \$1 and 10 cents. Kahn man uses this example to show that human beings are biased in their reasoning, “often content to trust a plausible judgment that quickly comes to mind[,]” thus reflecting a heuristic bias in the way we conceptualize and reason through problems. We all do that I am sure most of us, aa said aaa gave the same answer. The correct answer is 1.05 and .05. That is when it will make it more than one. But the learned author has not give it, we will not go into the mathematics of it. This sufficient demonstration, which we saw just now of thinking people. I mean judges are thinking people, of how one bias automatically kicks in. A bias suddenly operates and you think you have taken the right decision. You are right and then some of us are stubborn about ourselves so we say what I think, I can’t be wrong and so the case goes in a certain way. It is undoubtedly a not a very good think in terms of a correct judgement. And this is how conflicts occur in court. Court proceeding become whatever, judgements are reversed whatever. Even in at our level matters have to be referred, I am not saying that judges are not careful but this can happen and you have seen this just now. So emotion and reason are separate. So that is dealt with earlier, you will be able to see, I will not spend time. You see at 222 page, as somebody pointed out, you see aaa after enlightenment era rationalist philosophy. You see where there is 35 footnote. The mind is not capable of separating reason from emotion to derive clear and distinct truths; instead, emotion is not only relevant to rational functioning—it is necessary to it. Now when emotion plays a part in our decision making, you know that it can aa go wrong in the sense that emotions lead to all kind of situations in our mind and in our work. That has to be tempered by thought, by reason and which is the topic of the day. Rationality. So, you think that it is a gruesome murder and you want to do something about it, you are aa but you can’t do anything you want to do , you have to look at the evidence, you have to look at aa what are the probabilities, what is the , then you will apply the principle of prove beyond reasonable doubt. There is a dead

body, there is a medical report, firstly, whether it is homicidal or natural, aaa natural homicidal, or suicidal. Then you look at the other evidence, weapon, then you see whether the weapon can be connected to the accused, whether the accused is responsible for the aaa the accused had access to this person or that was not possible. There are so many things involved in , so you decide on that. So, your initial response that this fellow must have killed is an emotion. This has to be when it is supported, when you look for support, you remove the irrelevant and stick to the relevant. This is called the line of reasoning. And the line of reasoning after taking into account all this factors leads to the conclusion, you have rationality in a judgment. This is what I have understood as to what is rationality in a judgement. You know this is something which is very important. It is not sacrosanct in the law. That a judgment must be full of rationality. Do you have AIR, please get AIR 1916 Calcutta. There is this judgment which I have requested the director to bring. The judgement is AIR 1916 Cal 181. It is aaa I will read out, not that it is very important, it is a one line judgment, 181, 181, it is a 1 line judgment> think it only says, I will read the actual words of the Calcutta High Court, he says that a recognized agent as such has no right of audience. That is it, and I have checked up to my knowledge, that judgement still holds the field , it is considered to be good law and it has held the field, 81, it has held the field till date. Now this judgement does not aaa deal with reasons, it is more with conclusion But you look at this, it says that, a recognized agent as such have no right to audience. That means there was a dispute whether a person could be a recognized agent or not. The dispute was whether he had the right to represent, he had the right to audience in court or not. So it deals with that aspect of the dispute and draws this conclusion. Now this is a one line judgment and this aaa you cannot say is totally devoid of rationality but it doesn't give reasons. You see there is a perception of it, but there are no reasons in it. So there is no reasons in the judgment but you sort an invalid judgement. That was a time in the law when aaa if you remember the 1940, Arbitration Act, no reasons had to be given, by an arbitrator, he simply has to give an award and saying that the claimant is entitled to much, so many rupees from the aa respondent aaa whatever the opposite party and that was all. And those awards were considered valid. Now , this is a method of deciding, you see rationality is not the only method of deciding known to law. In fact, I am sure some of you remember in aa the High Courts we did not have to aaa write anything more than dismissed or rejected, one line, one word, not only one line , civil writ petitions, earlier, haan , thereafter, but the High Courts also if they were not going to entertain, the division bench simply, wrote rejected, that was the judgement. The judgement, was legitimate,

you see there is a discussion here between legitimacy and rationality. The judgement was legitimate, it was not devoid of reasons in that sense, but the reasons were not expressed in the judgement. I was understood if you read the, aaa pleading, aa you read the issues, you could understand what the judges had said no to. If you read both sides, it simply said rejected, and that was good law. It is incidentally, an interesting thing, that aa there was no arrears because of such practices those days, so the the division bench could run through the board in 20 minutes or 15 - 20 minutes , 40 -50 matters and start the final hearings . So there was no arrears in admission, there was no arrears in in hearing, final hearing. I really wished this could be restored, there are reasons why it can't be but this the view for aa the argument in favor of this is that if you trust somebody with such a high constitutional office, as the aa that od a judge of a high court, then you can trust him to say aa take the correct decision and say, that rejected, he is right there is nothing wrong with it. But that brings into play something that has entered the consciousness of judges, and lawyers and litigants, that judgments, as this book says, this article says is a social event, there are other people involved in it, there are people who must know what happened, they must know why, so there is an insistence on rationality, the superior court must know why because otherwise they they, there is a headache in the superior court, why could the high court has decided this or the other, why could the high court? Was this the reason, was that the reason? Then the lawyer says no i was there this was argued, this was not argued, this is why it was rejected and you never know. And that is why that practice has been discontinued. But I would still submit aside, that we must have judgements which give reason but, very short. We must have short judgement, the day of the long judgement re over, we cannot afford it either in terms of time or terms of arrears anything. Yeah this judgment is here only, page 1916, page 181. No but aa that right has not been taken away. The Supreme Court in some cases because of the last mentioned reason, has said that the high court should give reasons so that we know why you have decided it in some way or the other. I don't think there was a specific clause which said that you can reject without reasons. was there? Which latest pattern? If there is a latest pattern, then it will be interesting to know. [Participant Judge- In Calcutta High Court, latest pattern is there] is it been amended to say that without reasons is taken away? [It was long back, in those time , that is why the judge were aaa] so now there is an amendment[haan yes, now it is not so] aaa I see, you are from Calcutta brother[My lord] I see, I am not aware of that, but I don't remember this clause aaa you remember, I don't know what it is. But the point is, that those judgements were as legitimate as our judgments are

today. There is nothing less authoritative in those judgments, rejected all, something like this, that a recognized agent does not have any right to audience, that all it says, as we are today. But something has changed and the change is that the consciousness has expanded. And there is another thing there is a greater and greater reliance on the doctrine of precedents. Now, aa the word rejected, many things are there, its a final decision, you don't know how to use it as a precedent, you cant file the pleadings and say that this and this is so and now this is also the next should also be where the pleadings are similar. That is another reason. But may be there are some reasons for requiring the High Courts to write reasons and I don't think in any case we can go back on it because it is so well settled. But what I was saying that it should be short in fact, there is a very interesting story of a very famous author, I think it was Dicken or someone, I am not sure. Who used to stay away from his father his father told him that you write a letter to me every weekend. So, he used to write a letter every weekend and normally, that letter was about 10-15 pages because he had to tell his father everything that happened in the week. So, aa normally used to write 5-10 pages , telling everything that has happened in the week. One day he wrote a letter running into 25 pages and aa he wrote at the end of it that father, I would have written a much shorter letter but I did not have the time to think. I thought this story so true. For instance, if you have thought a lot and then you write, you take time thinking about a judgement, the judgement is short because you know so much of it is irrelevant and leaving out irrelevant parts is rationality so that you line of reasoning sticks to the reasons. Now leaving that out produce shorter judgments. Normally my own experience, I have also written some judgements which are longer than necessary. The judgement turn out to be long, it is a big waste of time because you take time to reproduce this an reproduce that totally unnecessary. So I would request and urge that all of us switch to the shortest judgement possible in the case and the only method is rational thinking. With this I would hand over to the learned director whatever is next or we start a discussion on that or my learned brother [Justice B. Gopalagowda- lets go for discussion] okay.

Justice B. Gopalagowda - these are the critical aspects which require to be applied in the daily exercise of your discretion under power. Now kindly respond to the inputs that are places before you. So that brother can clarify, we can aaa interact, we can debate aaa what are the difficulties otherwise there is no point. You see it is not a lecture it's an interaction, whether you have followed,

not followed, whether it is possible to follow, not possible to follow, what will be the difficulty. All these things you can tell so that we can give our ideas or you can give better ideas than us.

Participant Judge- The learned councils give so much of long arguments, giving all the points. So whenever we want to answer all arguments, the judgment become automatically long sometimes so we should feel that we should address the argument otherwise they will feel aggrieved and sometimes, they also give written arguments also, raising so much serious points. And while we are discussing all the points one by one, then our judgments becomes automatically long which we cannot resist. This problem is there otherwise we can skip some. We can go to the real facts no problem, real issue despite of that they give long argument, it is also difficult how can I cut short the judgment

Justice Sharad Bobde- See, long argument if it is required, you must allow it. Whether it is a short argument required or a long argument required depends upon each case and your understanding of each case. It depends on the judge to have command over the court that is called court management. When you take up a case briefly you must understand what is the case about and what is the law involved in that, what is the constitutional position in it, if it is a matter of constitutional issue or any other common law issue. So therefore the judge must have the clarity of law and the facts. Facts arguments are there, facts he has to narrate in brief. Facts must be applied to law. Now he is arguing his case for the appellant or the respondent. So, what I am trying to tell you is that long argument may be necessary to cover all the points which may be required for your consideration. Long argument may not be necessary if he is prolonging, or trying to mislead the judge. So therefore, you must cut short. You must have the command over the court and you must have the clarity of the facts and the law in which you are involving in that case. And it all even depends on writing judgments if he has given long submission apart from the long arguments, you may not take into consideration what are the issues, what are relevant. My brother emphasized that we must follow writing short judgments. Short judgments must contain short sentences like 1916, so it should be in the usage of words, so that you may shorten and may not use those irrelevant, go on dissecting it. That should be the art of a judge while writing the judgment.

Participant Judge- And if I may add, in all cases there are undoubtedly several issues, several issues raised in arguments. Now you must understand when if you are deciding a civil litigation

suit when issues are framed and when you will read the issue, spend some time on reading the issues. You will realize that there is one issue that is central to all the issues. If you decide that issue you need not to touch the other issues. Now if you can focus on that issue then you can eliminate all the arguments relating to other issues. And you need not to deal everything that has been argued if it is relevant to what you are considering. Now the problem is, as I understand it, we belong to a generation of lawyers and judges who were aa who saw the indiscipline which came from writ jurisdiction. When you decide a writ petition, what has happened is people aaa advocates and aaaa we all did that sometime, plead facts and law and also suggest conclusions. Now strictly pleadings should not involve all that arguments. Pleadings are only that you state facts and you make your claim. It does not involve argument. Writ petition have become argumentative because there is no other pleading there, parties do not give evidence. That is why the writ petition contain the facts and evidence. Now this have aa lot of people have been confused with how to deal with that. You must understand that this is a pleading of fact and this is the evidence of this fact. Even when you are deciding a writ petition and accordingly, get your ideas of issues. There are issues in the writ petition as well it is just we do not frame them, does not mean that there are no issues. So there also you must understand that this is the main issue and not get lost in the pleading. Not get lost in the writ petition which is always aa these days full o evidence and argumentation. So, and I must tell you one thing, I am aaa that it aaa I am very happy that you asked this question because asking the question, in fact even attending this programme, such a programme involves an acknowledgment that you don't know and you want to learn. Ones that mind sets in that you want to know, how to do a thing, you will find a way of doing it. That is every body's experience so, this kind of participation is very important.

Participant Judge- My lord said that judgment without reasoning is also valid. Now you have to give reasons whether that the aa judgement with reasoning, trust and faith. Previously, there was trust and faith, without reasoning, everything inside, It heard rejected, whether there is trust or faith.

Justice Sharad Bobde- I don't think there is no trust or faith in the judges, it does not strictly relate to that what I said was there is an expansion of consciousness in the sense that you write the judgment for the litigating public also, so that people know what is right and what is wrong and how to behave. They modify their activities and affairs, according to what you say is right or

wrong. And with this that it's a final decision, people want to know, superior courts want to know, what was the reason which persuaded the judges to decide against. But there is a difference between the length of the judgment rejecting and the lengthy of the judgment allowing. Length of the judgment rejecting can be very short because you give this is the reason why I am not deciding in your favor, one reason why I am rejecting, it need not be long. I don't think anybody has lost faith in the judges.

Participant Judge- No I am not saying judges. I am saying the society has gone to the extent, that now they question everything.

Participant Judge- So even the litigant is entitled to know the reasons for rejection. Therefore reasoning is required.

Justice Sharad Bobde- Yes and therefore it has created a problem on insistence on aa local languages. Madhya Pradesh, Tamil Nadu, there is an agitation but there are states like Madhya Pradesh, Uttar Pradesh where it is settled that Hindi is the language of the court, one of the languages of the court. There is not even any agitation about it. So though I don't think many litigants read judgements and Ultimately, my own experience and feeling, my brother knows more, he is more experienced judge. Litigants are hardly bothered about the reasons. Litigants want to know whether they won or they lost. Only the result, *Hum jeetey ya haarey, bas itna batayiye*. That is the truth and aaa so it is not necessary for us to waste our time, writing 100 pages for what nobody is reading. So you must have the entire prospectus in mind. You must have the entire circumstances in mind, judgement is not a place to show your learning. If you want to show your learning, we should write a book or a judgement is not a place to show learning, how learned I am how much law I know, you must take this case and these facts and decide it. One way or the other.

Participant Judge- In this regard, I am be permitted to express my views that to make a concrete judgment with reasoning , rationality and precedents, a concrete thinking is necessary for which scheduled time is also necessary. We have time or hearing but we do not have any scheduled time for thinking about the judgment. there is no judgment time in our schedule may be highlighted in the aa on this point.

Justice B. Gopalagowda- Aaaa I understand that your question, this is the problem that is confronting the judges also of the single3 court. In reality it's a hard truth but we are used to it. aaaa rationality, my brother the presentation is a thinking process must be on. Thinking process not necessarily after hearing, thinking process must start while hearing. If you don't have that thinking process whether that submission is correct or not to affect legal issue or a point of issue which is framed in addressing at the high court level, in a constitutional court in appellate jurisdiction or in original jurisdiction. SO a constitutional functionary is expected to know the constitutionalism and the constitutional philosophy and the concept. The constitutional philosophy and the concept is in all the common law principles and the statutory rights, even administrative law. So therefore, a judge after 10 years of practice he is in the power under the constitutional requirement to elevate that judge. So that judge has got a learning and learned council is appearing before you. So learned council and learned judge addressing it is the interaction with the reference of the case and issue which is formulated, thinking process must be on and decision making process must be aaa must start. So therefore, you can't say that there is no case. You please see how the federal courts function, you see not necessarily the professional judges during the British rule. You see the judgment of 1951, Privy Council with regard to the date of knowledge and the limitation act. Justice Venganka, so he was understood aa he understood the entire gamete of the jurisprudential principle with regard to the limitation. So, we are trained as a lawyer, trained as a judge, that is why these judicial academies. Our mind is very trine mind. So the thinking process will be on when you take up the case. Decision making process must be started while hearing. SO these 2 things will go aaa run parallel. Now after hearing, hearing, you will be formulating the issues and you must have appreciated the contention after hearing both the council, what is correct what is not correct? Whether the original jurisdiction is entitled for relief or not entitled for relief. You know, in appellate jurisdiction whether the order requires for re-appreciations and comes to a different conclusion, that rationality, that thinking process, rationality means thinking, so a a thinking process is on that will be apply to your decision making process and such go on searching what is correct and what is not correct, what is to be applied and what is not to be applied and you have to arrive at a conclusion. If you arrive at a conclusion, immediately, on the bench for want of time you will not dictate. But we used to dictate, we used to dictated 20 judgments per day., you may believe, you may not believe. I used to dictate 20 judgments regular first appeal, regular second appeal , three second appeals, criminal case, very very sensational case it may take , it may

take one and a half month, I have aaaa I wrote the judgment in Akshardham case, it took one and a half month. But i took 3 months to read and understand, assimilate so therefore, no time, I don't accept. We are all working 16018 hours, but yes we are over working, we have no other job, other than the judging and deciding the case. You must always remember a Judge's life is a very very precious life, it is aid that he is a hermit, it is a mindset. We should remove from our mindset, we must have leisure time. Yes leisure time is there, we can go to the Botanica, we can go to the foreign judgments, all these things are not required to arrive aaa in all cases in very important cases one or two such cases for example the constitutional aa judgement, recent judgement National Judicial Commission, the constitutional aspects are involved. In that case the moment the argument has gone on, a presiding judge or a judge who are hearing must make up their mind must do more work in their house they must go on thinking. I think I have aa , yes

Justice Sharad Bobde- And there is this another aspect to it, just a minute, there is another aspect to it what my learned brother said. I don't know how everybody else thinks but most of the time thinking doesn't necessarily takes place when you are sitting with your aaa court dress and it aa solutions occur anytime, it may be when you are having your meals , when you are taking a walk or aa and the other thing that you must remember is so there is no need to have a fixed separate time for thinking. The other thing that you must remember is , I am taking the liberty to say this to you because, the programme is for newly elevated judges. Like any other skill that you have ever learned ones you learn this skill of thinking when you are hearing a case, you will find that it will tackle less and less time to decide and to even deliver a judgement. You must have faith in yourself, you must have faith in the process, it takes less and less time later. So it is not such a serious problem.

Participant Judge- one of the one of the honorable judges

Justice Sharad Bobde- just a minutes he has

Another Participant Judge- aaa sir my question is, is it relevant to reproduce the statutory provisions, circulars, notification and the passages from the judgments, that will run into pages. that is the main problem that we are facing because unless we reproduce the statutory provisions,

especially in taxation matters, there would be amendments every year and there may be circulars, notifications and besides them even the passages. so aaa

Justice Sharad Bobde- aaa that is a very good question. That is the problem with everybody in the room faces. The own view is this that every notification does something. Take an exemption notification, it says that good of this a particular description are exempt from taxes. Now it does that, now you can simply para-phrases it and say that, this is the notification of this date which does this and put in inverted commas those, words which are operate to exempt. You don't have to begin at the beginning and end at the ending. Also it is the same thing when you are quoting decision, you don't have to reproduce the whole paragraph, you can say that the judgment in this case held that, aaa recovery from such a place, at the hands of such a person was not accepted and you can reproduce a few words if necessary. Otherwise you can say what the judgment held. Unless the words, themselves are important for interpretation.

Participant Judge- Okay Thank you sir

Justice Sharad Bobde- And this matter of I don't know, every judges doesn't use it but more and more judges are using it happily Footnotes are not being used. You must aaa ask your steno to put the passage itself in the footnote. You can say that this judgment takes this view, so and so and so and so takes this view and the footnote carry that , the other so that the reading is smooth.

Participant Judge- And I was also told that, in case that these matters are taken up in appeals before the apex court, then sometimes these relevant enactments are aaa if they are not easily available before the bench, like the local laws.

Justice Sharad Bobde- like the Kerala Land Reform Act, of the West Bengal land Reforms Act which deals with redemption, which is not normally found in statutes

Participant Judge- so it will be easier for the honorable judge to

Justice Sharad Bobde- they can always have it in the footnote, that particular, like this, you can have it in a footnote. It is easier. In fact we have aa one of the joys of being in the supreme court

is that the library is absolutely superb, one of the best in the world, I think. So that is not aa Mr. Thomas will tell you.

Participant Judge- Now in a lighter way, out thinking process. One of the senior judge used to tell us, that the best way to arrive at a decision is your washroom. Where you are alone, no disturbance

Justice Gopalgowda- My experience, I tell you one case I dictated , judgment was dropped in, I went to bathroom, in the morning at 3:30, suddenly it tugged to me , state legal service authority regulations. There is a case where, five years after the appeal dismissal, regular first appeal, in a suit for specific performance from Kerala High Court, it came before supreme court. The aa I was the companion judge, 2014, both judge was telling, there are a 50- 50 5 SPL must be kept there, I did not kept the SLP I was just holding the brief, then he said what brother you are holding the brief, I said, sir we are required to do substantial justice therefore, we have to issue notice. So the senior council was taking course about the property in Cochin, then I suddenly felt, he could not able to pay the court fee a conditional sale. He has filed a suit for specific performance to redeliver the possession, he could not pay the court fee. The value of the property increased, then I said legal service authority is very much there to his rescue, he has not gone there. It is the duty of the judge to ask him to go to the legal aid services authority, I incorporated that paragraph in the judgment. SO you are right, it stuck to me at 3:30 in the morning, and I was in the bathroom. hahahaahah

Justice Sharad Bobde- But the important thing, if I may say with respect it, that it can happen anywhere. It is not. That you are not making out a case for visiting the washroom very often.

Participant Judge- The another reason is that for lengthy judgments

Participant Judge- Is that way for each and every point what they do is that the lawyers butter the argument with several cite decisions. So naturally we are called upon to either refer to that or distinguish the facts, so naturally it becomes lengthy. That is one of the reason. And secondly sir, there is a new trend in writing the judgements, with say introduction, sub-headings, then facts of the case, the factual matrix, the arguments advanced and ultimately these are the conclusion. Is it a good form of writing a judgement?

Justice Sharad Bobde- Absolutely essential, because when you refer to the judgment yourself or somebody else refer to a judgment, he knows where it is being discussed, he doesn't have to read the whole judgment to only read one sentence

Justice Gopalgowda- You are telling that they cite number of judgments, right judgment or wrong judgment they cite. Rather, the judgment required a binding principle or judgment which is decided in that case. They go on citing the judgment. You must scan through, while deciding the judgement for that we must acquire the knowledge of charity, you must tell that this has no application to the facts of the case. You must tell him. If you tell him in one or two cases, he will stop citing unnecessary judgments. There are lawyers who won. There was one lawyer, Mr Balaratam, he was a senior lawyer. I entered the bar, he used to bring 50 judgments of interlocutory interim order of injunction, the appoint of a receiver. He used to tell it to the judge that look at here these are all the judgements I have to cite, I am ready please hear me. There will not even be one judgment what he need to consider. So therefore, your problem to cite one or two judgment, you must cut the cut the at the beginning, tell the lawyer who is arguing, what point you are citing the judgment, what are the facts involved in that case, what is the issue that arose in that case, what is the argument advanced, what is the question forum, arguments advanced, considered. Considered not like that, required to consider all relevant statutory provision, law in the question. Then that will be the binding precedent. Otherwise it will be a obiter dicta, so obiter whether it is applicable to this case or not is the question. So go on citing judgements, judgments, all those judgements in that paragraph one, distinguishing is not necessary for that you are required to aaa for that the last paragraph, after addressing that issue and reasoning. Reasoning supported with valid reasons after considering the relevant material facts in that case, you can say that these are all the judgments which are cited have no application to the facts of the case, they are misplaced, simply 2 sentence that is all.

Participant Judge- Your Lordship, just reacting to this thing on judgment writing. I came across a case, I am a new judge, so very short experience. I came across a case where, not many cases but I would say just about 6-7 judgments were cited. One was a comprehensive judgement. They were all good judgments but one was comprehensive, and I felt that only that one judgement was sufficient. So I do not need to cite the others at all, I kind of read it and I am little meticulous, I don't go to the paragraph, I almost go to the entire judgement, which I know I have to cut short

otherwise, I will land up reading too many judgements I think. But there was only one, which was very good, so I decided okay I will use only this because it goes in the favor of the petitioner. So I decided I will do that in my experience if you are fighting as a lawyer for private litigation, then the pressure is more on you. If he gets a good result he doesn't bother about the reasoning, he is absolutely happy with the result, but if you are a government lawyer, unless it is the case of a high official involving large money, they are bothered about why did you lose the case, then it is necessary to give the reasons. So I think when a private litigant is there, then he has to give reasons for losing the case. Then I really need to give him reasons otherwise if I am deciding in his favor, he is happy if it is a brief reasoning and he gets the result. So that is all, I am coming to some conclusions

Justice Sharad Bobde- No No reason is required, more for the advocates, officials and appellate courts. Whether it be private party or government parties, required for these three wings, who have to grapple with the situation and have to take an appropriate action. As the lordship rightly said that parties are not bothered about the facts which went into the mind of the judge when disposing off, but it has to be handled by many people who need that, otherwise it will be only on paper. Implementation would be there, execution will be there. So all those things therefore, the reasoning is more essential for those three people, the advocate the officials the appellate court.

Justice Gopal Gowda- My brother said 1916, what a meaningful one sentence, the proposition of law, it is 1916, that is at that point of time, 181, you see the recognize agent has as such no right of audience. Like that the American case, *The Vitrally vs. Sitan*, one sentence, is that - he that takes procedural sword shall perish with the sword. They know what context. The context is this. if the procedure is laid down to do a particular act in that particular way, there is a procedural safeguard to a litigant, if that is not followed you will finish it, that is the principle. In the subject of jurisprudence it is very familiar. If the district authority is required to take action, required to follow the procedural safeguards which is provided in the conduct and discipline and different relation and if that is not followed then the action of the authority vitiates that is bad in law. That is the meaning of this. The principle of natural justice is the requirement. Every rule is a codified rule, the foundation and the background is the principle of natural justice. That is what is interpreted by the supreme court. The procedural safeguard in the civil procedure court, procedural safeguard, in the rules administrative rules, disciplinary rules all are

procedural safeguard and correspondingly, it is the duty upon that authority to exercise. If that is not discharged while exercising the power, that same power is deprived. Therefore, it has got a serious civil consequences that is the development of law by the constitutional bench. According to Dr. Bentham principle, the principles of natural justice, that is the 12th century, from the 12th century, the principle evolved, the principle of natural justice. Any action or act that will have civil consequences or criminal consequences in the absence of a statutory provision, it must be read into it. That is the principle of natural justice, here there rule provides for it that, in compliance of this natural justice, is in the form of a rule in the conduct and discipline and regulations. So that is a procedural safeguard because the cation in tiles serious civil consequences. In one sentence it gives, the meaning that he who takes the procedural sword shall parish with this sword. what beautiful, that is why we are aa we must try to learn acquire knowledge, case to case or aa thinking rationality, reasoning, shortening the judgement, giving the full meaning, instead of 2 paragraphs and 2 lines that is the exercise that everybody must do it. We must do it not only necessarily, the judges in the district judiciary, in the constitutional functionaries in the high court, even the Supreme Court that is required. We are required that's why we our mind set always must be trained and we must always how to reduce, how to minimize the aaa volume of judgment, this is very important, for the exercise we must do it. That is why we are meeting here.

Justice Sharad Bobde-Learned brother from Calcutta, which is the clause in your latest patternt which says aaa because, it is just the matter of interest, that you could dismiss without reason, earlier which was the, you said that there was a clause which empowered the judges to dismiss without reason [Participant Judge-I have not read that] okay. That is alright. No because I don't remember having read it, because Nagpur latter patent I have also seen it doesn't contain specific clause. [Participant Judge-I started my career in the original side at the Calcutta High Court, as an advocate on record, so in some case I could see that the judges are passing the orders without citing the reason] no no that was the practice throughout India [I asked my senior that, without deciding the reason, then I learnt that the chartered High Courts they had the power to pass such order] yes yes, no not only Chartered, every high court, chartered or not a chartered

Participant Judge- In one case my lord aa, I passed an order like, it is a clear position of law that an employee, who pumps before the court at the fog in his career has no legal right to maintain an application with a prayer that his birth was this and not that, so I just simply passed this order and

disposed of. [Justice Sharad Bobde- am sure it was upheld] I have not cited the decision there, several decisions were they at fault

Justice Sharad Bobde- no you see this is what we must think on because that is the need of the hour, the need of the times, that we must be able to follow a line of reasoning which makes the judgement very short. Stick to the essential part of the case and then come to a conclusion on that. And not worry about whether you are right or wrong. Whether you are right or wrong in the result is another matter but you will never be wrong in this following this process because it is also good for your own thinking, it makes your mind disciplined to think about the relevant things and come to a conclusion, it's also good for the system and it is good for everybody

Participant Judge- My lord much time would be saved, if at the very threshold, the controversy in issue is ascertained and thereafter the councils are asked to address arguments on that, it's only if we identify the controversy in issue at the very threshold that we could save out much time

Justice Sharad Bobde-You are absolutely right, the Supreme Court for instance requires the framing of a a substantial question of law or substantial questions of law, in the SLP itself, you can restrict to that. The CPC in all civil matters requires the framing of issues, the purpose is the same thing that you are saying. Somehow, nobody has done it for Writ petitions. So Writ petitions we have to do it then as a judge

Participant Judge- why I say so is because most of the lawyers they don't, they start of from the very beginning, without telling us to what was the controversy to the main thing that is first of all to be asked from them is, what is the point, what is your grievance

Justice Sharad Bobde-Right Right, but do you have to set this custom in your own court, yes you are absolutely right, that is the only way and in fact that is the difference between individual judges. Some judges let arguments go on, you know some judges let the lawyers wonder here and there and eventually, in the middle there is some point. And some judges insist, you argue as long as you want but you tell me on what point you are arguing. But this something which we all do and this is why, such meeting sand such workshops or whatever you call this is very important. Judges should meet and stimulate their minds to ensure that these practices are inculcated in their own mind and in their own court. Because what a judge says, is what happen in court because whatever

aa it is not just the matter of personalities, the simple thing is nobody wants to lose his case, no party wants to lose his case, so that chances are they go along the judge's line of thinking. So therefore, it is very important that the judge takes its decision and as my lord said that he has to take command of the proceedings and of his own court. In any case you must be clear in your own mind, that this is the point on which it has to be decided, you can ask him that, this is the point please address me on this because even the supreme court often begin with by saying that the principle question involved before us in this matter is, you can always say that it's a good practice. You see this is what, aa you avoid the this shows the truth of that author's dilemma, he said that, I didn't have the time to think that so I wrote a long thing. Take the time to think and frame the question

Participant Judge- My lord is it right to consider a application for Writ in the reach of mandamus, if the writ petitioner has not given the demand of justice, then whether this is to be considered as maintainable or not or at the threshold it is dismissed.

Justice Sharad Bobde- You know this has a great value, see it's like this, the majority of the writ petitions are against the statutory authorities or government. They have to be because that is the one of the requirements, this I am saying , distinguish it from some private writ petition in some private dispute like landlord tenants and all that, tenancy matters. Now if you insist that there should be a demand before hand, it will reduce the litigation and pendency in court because the authorities would have get a chance to satisfy the demand like section 80 CPC. See the purpose of section 80 CPC again this has disappeared in the writ petition, the purpose of section 80 CPC was this that you write to the government and say that this is my problem, this is my claim, you solve it, if you don't solve it I will go to court and then come to court and the court says have you showed 80 notice, otherwise we are throwing you out. That has a good effect but again the writ petition it has disappeared. There are judgments of the Supreme Court which says that there should be a demand before we, but aaa High Courts are not insisting on it, we are not sometimes insisting on it, that we think that in order to do substantive justice, we think this is a procedural aa problem. It is not merely procedural, it has a great impact, and litigations do not come to courts if the demands are met outside. So, you should insist that go there first unless there is an urgency, a matter of life, liberty, something like that

Participant Judge- That is why the Honorable Supreme Court in a decision pointed out that ordinarily, the word ordinarily has been aa

Justice Sharad Bobde- Ordinarily, you know is a phrase, throwing the baby out with the bath water, so what happens is everything goes out. So you don't do anything neither ordinarily nor. Yes...

Participant Judge- My lord my submission is that, it should be treated as a sign for none. Why because not only would it give a chance to seek redressal from the authority concerned but in case of refusal there would be reasons and therefore, it will be easy for court to adjudicate on the matter

Justice Sharad Bobde- Quite right, quite right

Justice Gopalgowda- a very important topic is chosen by the National Judicial Academy. For the last aa I think this is the third day for you. The different resource persons, from different walks of life, different facets of aa judging on this topic, different facets the art, science, craft of judging, aa importance of reasoning aa the appellate judging, social context adjudication, the components of judicial reasoning, stages of moral development, how to comprehend precedents, etc. etc. Today this matters have been taken to you by presenting the meaning of rationality or importance of rationality. With reference to certain material made available by the NJA. See judge's role is totally different. Judges from service side, you are already in the grips of judicial making process. Judges elevated directly from the bar it is a new avatar as far as you are concerned, you have to adjust yourself to the decision making process, it is a tough job. You can argue hours together standing in front of the judge with reference to the pleadings aaa the evidence and aa citing the judgments. It is very difficult for a teacher to teach the cardinal principles, if you want to deliver a lecture on an important topic, it requires a 3 hours study. Study on the relevant subject. After you are elevated as a judge, now you will be confronting with aa so many legal issues. Here as a lawyer you are thinking to aaa present a case on behalf a litigant, is a different role in deciding a case after hearing both the sides, so for that you require judicial discipline. So therefore, don't feel what this NJA is doing, why these people are making us to listen and they have tied us here hours together. Yes, it is very much required not necessarily for the constitutional functionaries confining to the high courts. In my view, time and again I have been telling, it is also required for all the judges including the Supreme Court. This is my firm conviction and firm opinion from understanding of this

judgeship. So therefore, judge role totally different and a tough job and also easy job. Easy job, if you acclimatize yourself and clarity of law and clear thinking. Rationality means what? Human being is a rational animal, the difference between animal, aa we are also an animal but we are rational animal. Rationality means thinking to do a important job. What is that important job, you are deciding the issues of the people who are coming before the high court, very important job. There are constitutional issues, violation of fundamental rights, violation of human rights, and violation of statutory rights. In public law issue all these substantiate issues concerning the between the government and government, state and the central government, state and other state, state and the citizen and executive and the citizens, this kind of complex problems will be committing before us. The rule of law is the backbone of democracy, the constitutional governance is not exclusive domain of the people who got elected from the aa people to govern us by forming a government. We are also a very important role. We are part of the state, we are heading very important institution of judiciary. The judiciary, state includes the judiciary. We are answerable and accountable, this we must keep in mind. We are more important role playing, what is that? The legislature enacts the law, to discharge the constitution functions. The concept of constitution is the preamble. The what is the preamble? Sovereign, Socialist, Secular, Democratic, Republic India- Sovereign, Socialist, Secular, Democratic, Republic India- these are all the phrases used, have got the purpose and the meaning. So to achieve these conceptual idea, the law is made. depends upon the list I, list II and list III. So therefore, law the test, the constitutional valid law is the job of the court and the framing up of a policy and implementation of the law to achieve the constitutional goal, is the job of the executive. And we say independent and strong judiciary. So you must be strong enough and independent enough to oversee both these functionaries and their function. Law tested by the latest cases, the national Judicial Commission to appoint judges, judges themselves should not appoint the judges. The sovereignty, there is the word sovereign, sovereignty flow from the people to the representative, they constitute the legislature, legislature enacts the law, that is the will and wish of the people. They have been given the sovereignty to exercise that wisdom. So the wisdom exercise by the parliament 542, 5 constitutional judges struck down the 98th constitutional amendment, what powerful we are. So not only five, one judge or two judges of the high court can strike down the constitutional validity of a law. So therefore, you are strong, you must be strong, you must be very very learned, aa you must understand the gamete of law, you must constitutional philosophy, you must understand the constitutional concepts. These

are all required for the good governance of the people. That is why I said, the governance is not the exclusive domain of either the legislature or the executive. We all see these two functionaries, the judiciary, this you will keep in mind while discharging your function as judges. It includes, may not have the power to decide the constitutional validity for the district judiciary. Nonetheless, the district judiciary is exercising more power than the constitutional court to maintain the rule of law. If there is no rule of law in a country, it will not be a civil society, if it is not a civil society there is no democracy at all. So therefore, the democratic republic India. This is very very important. So the high court judges are constitutional functionaries, we have to play this important role to see that the administration of justice is your hands. The ray of hope for the people of this country is in the judiciary today. The pendency why, pendency that people are talking, forgetting that the more number of people are coming in all jurisprudences. It is not the conservative system of judicial adjudication today. Expansion has taken place today over a period of 65 years. What expansion? Earlier consumer jurisprudence was not there, it is coming, the family court concept was not there, it has come in and the public law review is very very limited. Even today they never report PIL whether it is a juvenile or not PILs are there, private interest litigations are also there increasing. Earlier complaints are very minimal, village panchayats were deciding. either in the case of outrage of modesty of a woman, it was not being complaint earlier, today number of such complaints are there, number of cases of rapes are reported, domestic violence cases are coming in and the suicidal or the aa cases are more, insurance claim cases are more, compensation cases are now more today, there are more than 15 lakhs cases of motor vehicle today, which are there in the courts. So the jurisdiction of the courts is expanded many many times. The expansion in the number of judges is very minimal. I won't deal with that. I am on the point that public today has got full confidence in the institution of judiciary because we have achieved the credibility. They know that in my cases, if I am aggrieved, my right is violated the court will definitely give the justice, is the understanding of a common man today. That is because of a our aa over a period the decision making process, the judges and public law reviews, all these instances are responsible today, the credibility of the people. So this you must keep in mind, while writing the judgment, all these things are very relevant for understanding our role and discharging our function. So what is rationalism, what is rationalism? A rationalism, I got some points, I'll read for you, is a reason rationalism means, a reason is the power of the mind and one that put aa filter out the relevant from the irrelevant, this is what the debate has gone up. So you have to filter what is irrelevant.

SO when judges exercising their reason, you are exercising the reason would be objective and just in their opinions, must be just and their opinions would arrive at the clear and distinct truths of law, while you are aa objective is to exercise that reason to find out to form your opinion, to arrive at the clear and distinct truths of law. So aa thinking reason, your power of exercise to find out to give the reason to could be objective, it must be objective and must be just in their opinions arrive at. The clear and distinct truths of law, this is very important. Your aim to arrive at a conclusion to find out and it must be in relation to near to the truth of law, it is very important. The way judges would apply reason to law is through rules, you are not inventing anything, new facts rae not searching, new law you are not supposed to search. A case before you in original jurisdiction or appellate jurisdiction or revisional jurisdiction, you have to find out the reason to arrive at a conclusion through rules of law. If the fundamental rights are violated, what is the violation of fundamental right? Is it traceable to Article 14, is it traceable to Article 16? Is it traceable to Article 19, is it traceable to Article 31, is it a case where constitutional face of the judgment. We stop it here. Brother has come, we are aaa tea break is not there we are continuing. So, take it brother, after you I will continue. I have in the middle. So tea we will serve here? Better. So I was certainly, the way the judges would apply reasons of law, reason to law is through rules, so it may be in relation to constitutional rights, in relation to common law rights, it may be in relation to criminal jurisprudence, you are inventing anything there. A very fact is placed before you, law is to be applied to the facts, you are required to decide that case, with reference to the rule of law, it is this work we are required to do it. You are not making aa new invention there, but your reason must be relatable to the aa although the rule of law and fact situations. Rule s like clear and distinct ideas are propositions like and can be applied to any facts of case in a consistent and technical manner, rules can help filter out relevant evidence form the irrelevant, rule can distinguish proper procedure from improper procedure and so forth. I will give a illustration here, one illustration of a civil case and one illustration of a criminal case. There may be evidence with regard to the volume of pages with regard to specific performance. In specific performance, there must be an agreement, agreement is there must be proved, thereafter your willingness must be proved. So these are things are required in suit for specific performance that agreement may be there but still, the agreement may not be enforceable in the eyes of law. So there you are required to scan through that agreement and rights which is claimed by this plaintiff is in relation to his property or co-parsinory property, or joint property if any other person has got. So such agreements is going to upheld the right

whether or the property which is mortgaged in that agreement whether such an agreement is enforceable in law or an agreement which is a detrimental or determinable a specific performance can be given or not. So what is that fact, what is the pleading, what is the issue, what is the law, you must trace it and find out. And what evidence, the entire evidence you need not, what is relevant for that deciding the issue that you are required to trace it out and incorporate in your decision which you are going to do it. In a criminal case, 304 B, in a case where to prove the fact of 304 B as amended, still revive, a DNA test is an evidence which will be procured and evidence will be produced. There is a reference to section 293 of the CrPC, 293 CrPC must be read 293 (1) (2) (3). Now in criminal jurisprudence, criminal trials to prove that the dead body found at a particular place is the dead body of the deceased who has killed by the husband is the fact that must be proved, to prove 304 B. SO that dead body is the dead body of the deceased who was murdered by this person, husband the DNA Test is very much required that is experts evidence section 45 of the evidence act. SO evidence, expert evidence must be permissible, expert evidence and opinion is very much required notwithstanding the fact, a report not necessarily person who conducted the test need not be examined, but the other person who is the expert in such as the knowledge of that DNA Test can also be examined. So, evidence which he gives, really that is not evidence, whether that is evidence or not is required to be examined on the basis the person who is giving evidence is expert, person who is capable to speak the prove, the test of DNA conducted on the basis of blood samples obtained from parents and the dead body is that of the daughter, trellis with the parents then that is the dead body of the deceased who has involved in the murder case. So irrelevant evidence, relevant evidence, what is evidence, what is not evidence is required to be as so this is very very important. That is possible only if you have got understanding of law, knowledge of law or not necessary that you must have the knowledge, you must your thing process, is it evidence, is not evidence. How what is the bases for to say that it is evidence, is competent to speak, in fact it is the fact is proved or not, if it is not proved, then is it evidence. SO the whole evidence is to be dissected and what is required, what is applied, what is relevant, what is irrelevant, irrelevant must be kept aside, relevant must be taken into consideration to come to the conclusion and give the reason to arrive at a conclusion that this the correct the thinking process must be on with regard to this. A rule like clear and distinct ideas or propositions like and can be applied to any set of facts in a consistent and technical manner, rules can help filter out irrelevant evidence from relevant, rules can distinguish proper procedure from improper

procedure and so forth. To place that expert's evidence, proper procedure is followed, the technical aspect in conducting the test is followed or not, all these things are required to be scanned through to analyze and arrive at a conclusion that power of thinking rationally to give reason must be there. When a judge reasons by the rules, the judge is not only ensuring the objective fair and rational. Resolution of a dispute, is very important, when a judge reasons by the rules, you are giving reasons by rules but that judge is not only ensuring and objectivity, fair, rational, a resolution of a dispute but that judge is also upholding the rule of law. Rule of law, we are the upholders of the rule of law, so the judge must always have the objectivity. Objectivity to find out the truth, objectivity, you are required to be fair, you are not required to be biased, you are not required to be pre-determined, so you must be fair and rational resolution of a dispute, you are always, yes yes but the judge is also upholding the rule of law. The legal philosophy ranging from so on and so on and so and so. So these are all the cardinal principles which you have to keep in mind, the judge deciding of cases. The every material is very much available, only your application of mind in an objective manner, in a firm manner, apply the rule, to the facts associated with, dissect the whole evidence, keeping in view what is required to answer that whether it is original jurisdiction, appellate jurisdiction or revisional jurisdiction, for this purpose you must have the clarity of law, if you don't have the clarity of law, very difficult. For this you must be thorough with the constitutional philosophy and the constitution. There is no way out, without reading, without understanding, without understanding in a proper perspective that is very very important. What to be read, what knowledge to be acquired, what is to be transmitted in your judgment depends upon your proper correct understanding of the jurisprudential principles. Your predilections, your perceptions should not mix with the judicial decision making process. You should not therefore, objectively must decide, you must be fair. In a case where, husband, if you form an opinion, that he must have killed his wife, yes marriage has taken place, they had gone for a honeymoon, while coming back, she was in his company must be explained, provided if it proves that, requirement of ingredients of the probability of the offence. So therefore, always judge must have objectivity, fairness, the predilections shall not be there and your perception must be in place, you should see that the rule of law always must be kept in mind to decide a case rationally judging a case.

SESSION 10

Importance of objectivity in decision making process

Justice V. Gopalagowda- So my brother, let carry on with this. Anything is further, I will comment on that later.

Justice A.K. Sikri- thank you Justice Gowda and good morning to you all. If you see at the programme the way it is structured, on day one as I have seen it you were told by one psychologist, I see one Dr. Aruna Broto, is a well-known psychologist, she told you the art science and craft of judging. Of course she is not a lawyer, she is not a judge but she was telling you about judging. Here what I presume is, that how we arrive at decisions, not just legal decisions in life in everyday incidence, so what is the psychology behind, how we think, how we believe and decide a particular thing. She may have explained that. But of course as judges, when we talk of deciding the cases, this is the role of the judge. Primarily a case comes before us, 2 parties are litigating and we decide and we write our judgment. The entire course of this particular programme is aimed at that. Art and science of judging, then appellate judging in appeal, thereafter social context judging which is another totally different facet of judging which Prof. Madhava Menon must have discussed in detail. But then why and how a good judgment should be written, it should be supported by reasons which you had on day 2, importance of reasoning, what are the components of judicial reasoning and then how precedents are to be used in writing this. Now you are talking about rationality and I am going to speak to you about objectivity. So a decision has to be rational, it has to be supported by reasons and there should be objectivity in decision making. These may be overlapping aspects when I heard as when Justice Gowda was speaking, he did not only confine to rationality but he could not and in the process talked about reasoning and talked about objectivity also and that's why I have said that these are overlapping. But before coming to this let us go to the basic things and what I feel in a programme like this one thing that has to be kept in mind by us more than you people is that you are high court judges. We are not here to teach you, this is not a teaching class. So therefore, when we discuss this let it be a collaborative effort by all of us as to how to achieve this purpose for which we have assembled here. Of course this is a new function for those who have been appointed as elevated from the bar, those who have come from the services, as I see 2 faces from Delhi high court, so both of them have been elevated from the district judiciary so they have this experience of judging for may be 30-35 years one and the other was

direct recruit for about 20 years. So, you may be also amalgamate of these two classes. But as high court judges first thing that has to be kept in mind and let me start with that, it may look a bit fundamental and little deviation from the topic may be for 5 minutes or so and may be then we will come to this particular topic. What is our role in the society or under the constitution which in his remarks Justice Gowda was emphasizing, of course the primary role is to decide the cases, as we said but is that the only role? Of a high court judge or a supreme court judge in a society, the one with run by the constitution, in a democratic society of which he or she is a judge. This as high court judge you have to keep in mind. One thing is there that whenever you decide a particular dispute, that when you are deciding those come from district courts as I said and are elevated. So, was a case between two parties, you decide it, may be subject to appeal is one part but then it is not the precedent in the sense which is binding and has to be followed, things have changed now. As high court you decide, it becomes the law of the particular state, which is under your jurisdiction. If you are deciding as the judge of the Karnataka high court then whatever principle of law that you have laid down in that judgment, that becomes binding on all the courts in that state, sub-ordinate courts. Likewise when we decide it is binding throughout the country. So that one responsibility has to be kept in mind while deciding such cases and as IO said that you are deciding, aa you are not only deciding the list but in the process you are also laying the law in certain cases. Particularly if they are urgent fields or maybe there is a case law in a particular subject but for a new nuance or for the further development thereof of the principle, because that was not not the factual situation earlier, which you are developing the law for. So laying down the law, developing the law which would be precedents. So this makes your task much more important as high court judges. That has to be aa I mean function of the judge that has to be kept in mind. And in a democracy governed by rule of law and by the constitution. As somebody has said, I think is Barrack, Chief Justice of Israel, there are 2 functions that normally the judges perform, that is of the superior judiciary, the high court or the supreme court. One is bridging the gap between the law and the society, when you decide these cases. And number 2 is upholding the rule of law or the democratic values or constitutional values, this becomes very important in certain situations, certain type of case which you come and when I come to the topic of objectivity. Because in the process when we talk about bridging the gap between the law and the society, as we know the constitution has some of the, it's based on certain principles which call is as the features or the basic features. Of course rule of law is there, separation of power is there,

fundamental rights are there, independence of judiciary is there and aa in the process where the dispute comes and we decide, is the faith of the people in the judiciary which we try to sustain. That becomes important when I come to objectivity and that is why I am giving this introduction. And at times situations come when we assume significance of protection the constitution or the democracy. Recent debate may be we are not going into that debate and that case which has been decide by the Supreme Court on collegium. So whether it was aa the supreme court has in the process, whether it has violate the principles of separation of powers or it has maintained it or it has saved the constitution or the legal system in this country. It is a matter of debate, but these are matters of moments, sometimes the decisions are to be taken, and when we know that for people the judiciary is the last resort. When people come, when they have not been able to get the justice from executive or other branches of the state. So therefore, the responsibility of the judges is become, of the Supreme Court and the high court more Honorious. When you decide the cases, most of the cases from our experience we can say, may be straight cases , the moment we see, we find that there is only one answer to it, we can term them easy cases, they do not pose any problem. But there are certain cases which may be treated as hard cases, where the choices may be difficult and in deciding those cases all these attributes which we are discussing they, come into play, at what decision we should take in such matters. So therefore, it has to be we have to apply our reasoning, we have to apply our rationality and, we have to be objective. Now, how what is this objectivity. Let us first understand, you have seen reasoning, which is essential because you have come to a particular conclusion unlike other bodies or administrative decisions, now certain administrative decisions in certain circumstance a have to supported by reasons, but you know unlike any other branch of law, we give detailed judgments, each argument of each facet is which is argued by both the sides which say why we agree or why we don't agree. That is importance of reasoning, I need not dilate much on that. Rationality also you just heard my two worthy colleagues. What is objectivity in our decision making? Actually it can be treated as I have seen it, making judicial decisions on the bases of considerations that are external to the judge. Now keep in mind these words, making a decision on the bases of considerations that are external to the judge that are not personal to the judge and that may even conflict with the personal views. When I decide a case I may have personal views, I am coming to those kind of cases, I will give you simple example to illustrate it and we can go on, rather, I will also ask you to give me example of these nature. The wife files a case against the husband on the ground of cruelty. And she says that

look if I do not cook the food to his liking he slaps me, it may be happening occasionally, may be ones or twice a month but he does it. Whether it amounts to cruelty? Perception of a particular judge may be yes, one judge may think that look, she is your equal partner, she too has the rights that you have, you have no right to treat her as cattle and therefore you cannot physically assault. Other going by the ethos or by his own ideology, may think no, in our society, it may be acceptable. I mean when a child commits a mistake, occasionally child is slapped, so what if wife is also slapped. That means personal view, so one judge on the same facts, the same incident may treat it as aa it's amount to cruelty, other judge may think, it is not a cruelty. So this is my personal view or personal ideology, should I bring it in the decision making process. If I bring it then I am not objective. That is why when I read you what is the meaning of objectivity is that, it is a decision on the basis of consideration that are external to the judge and not personal to the judge and it may even conflict with his personal views, my personal views may be something else but what the law says? I have to apply that law or what is the norm. Or when we talk of cruelty as I gave you the example, the law says it is cruelty, it is one of the ground of divorce but what is the societal norm on that, which is generally acceptable norm, I have to accept that and not what my personal view is. Here that is what we say that the personal experience is the aa has to be actuate and accepted values of the societies. Now take the example, there could be many many examples, one may think, I mean, now these things are coming aaa they are being debated, say whether there should be ban on beef eating or not. If I am a fundamentalist Hindu as a judge, I may say, no no it's totally wrong, cow is our mother, how they can eat and if ban is imposed then I may uphold that ban. Otherwise, if I may belong to some other religion, I may think no there is nothing wrong in it. But can I bring my personal believes, the moment I bring that and ignore what the law is, what the constitutional norm is, I am losing objectivity. This I just wanted to tell you the broad meaning of what may be the objectivity, so therefore, the underlined message, which I want to give is that, things may be regarded as moral and just by the society in which the judges operates and not moral and just in the subjective way. SO the norms which have to be there, I have given many clear aaa I mean those kind of examples, you may say the societal norms and what I am talking about it. But when we come to objectivity, I'll give you how may be there are personal factors which may influence our decision making process and then how they are to be ignored while making the decision. That is what the aaa I mean the challenge is. What are the factors which may influence or these are when we call I mean when we lose objectivity or we do not take into consideration, as I said and don't

take into consideration factors external to the judge but which are own factors. Which could be these, I have given you one or two examples, but one author has mentioned, five such factors, I'll give you that and then I will ask you to give me examples and then we will start discussing. One, first is which I tell you, conscience falsification, falsification, it's the falsification which is conscious. It may be treated as something that is not expected from a judge, that he is distorting the facts in the process. But here let us presume that the judges are otherwise good and will not go into this because that may amount to judicial dishonesty, I am not talking about judicial dishonesty here but since I want a particular result which I think is the correct thing in my perception. Now that I have decided the issue that has come before me, I think that no this should be the decision and taking into consideration that outcome first in my mind, I now sometimes do that distort some of the facts which are there on record. This could be one such factor. Second is which is most important, I would say that and when we talk about objectivity, normally we talk of this second, on which I have given you one or two examples, which we call as Priors, PRIORS, our priors, is what we already have in our mind about certain things, about how we perceive and these are shaped by our experiences. Give you simple example, suppose- as aa before becoming a judge, you are a criminal lawyer, defense lawyer only and in 2 or 3 cases you found that look police is normally framing wrong persons, because the clients which you defended according to you, with the interviews with your clients you have found that they were innocent and were framed wrongly. Now because of this experience it is in your mind and a notion which is establishes that the police normally frames innocent people and rope them in false cases. Suppose this is one example that I am giving by experience, you find that in your family somebody had met with an accident who was overrun by a truck driver who was drunk and that person died. This is registered in your mind that the truck drivers normally when they drive are drunk. So if a case comes before you now as judge, giving the first example of a police and you are deciding a criminal case you will be and the defense counsel is pleading that, here is a case where he is innocent and this was the vengeance because of which, he has been booked into a false case, we will say, yes normally people are like that. A case of accident comes where the accident is committed by the aa the truck was driven by the driver of the truck. You will say yeah, these people are bastards, they drive only after aaa under the influence of alcohol and he must be drunk. So these e are some of the ideas which are shaped because of your experience. So this is one prior experience. Temperament, the way your temperament is of a judge hoe he thinks. Ideology, I h gave you the example of ideology of beef

etc. Moral or religious values, take the case of bigamy. Now suppose the issue come that there is a I am giving you an example, that there is a debate whether, this aaa should be treated as a criminal offence or not. There is a debate and there is report of the law commission also on other issue I am saying aa extra marital relationship, that it has to be treated as criminal offence or not. It should be ? So a case comes before you, the constitutional validity of these provisions is challenged by filing a petition. Now your own ideology, your own religious values on this may matter your decision one way or the other. What could be your your and the way the judge is brought up in the society, which strata of the society he belongs to. Here I am talking about socio and economic factors. A judge may be , aa you have the example of that why the French revolution started, when that king or the Prince of France was told that the people don't have bread to eat, he said why don't they eat cakes, so this is the perception, so let them eat cakes. So he doesn't know what the poverty is. So therefore, the judge and his upbringing, if he belong to aa I am not saying all judges may do that aa we have found judges who have come from very rich families but have given judgments when they have sit as judges. Judgement has to be pro-poor but mostly, what I am saying that these are some of the factors which may influence and socio-economic factor is one. I'll give you a example of 2-3 cases of United states and our cases also on this. So how the schooling was, how the education was, in the school he studies, whether a government school or it was a convent school and the experience there. What was the upbringing in the schools, that atmosphere because that has I mean shaped his ideology also, his views also throughout that period. Then there may be some psychological factors, some emotions, one may be governed by that one may be governed by that how? How emotions play role in decision making. Suppose many a times these things happen when the husband and wife are there before you or two persons are there and one starts crying in front of you and you become emotional, you may start thinking without going into the records or may be how he or she is crying. She must be right, that influence your decision making sometimes and you may ignore, or even if you may not ignore because you have to ultimately give a decision supported by reasons but it may be losing to some extent some rationality and some objectivity. And you may start construing the same evidence in a different aaa start analyzing the evidence in a different manner. That do happen in any case, such things do happen because why it is so that in the same evidence trail court says that this person has not committed any crime and acquits but the appellate court reverses the judgment, evidence is same, so these are being analyzed in a different manner. But many times if it is objectively analyzed keeping in view the

principles which are under the evidence act which Justice Gowda was giving you those examples, then it is rational decision, it is supported by objectivity. But one is when we talk about objectivity here and the factors will come and at the back of your mind it is again subconscious mind, not that you are deliberately doing it. But then could be the affect. What could be the examples now, before that okay let me complete, this was the second. Third is cognitive illusions, sometime we perceive, we think to be there we may not be there, we imagine, after hearing 2 sides after looking into the evidence, something which is not there on facts but on that basis we start drawing out conclusions, that happens in life. If Broota told you about science, art of judging, I don't know whether she gave any such examples or not. Then fourth is again is priois, priois is again shaped by irrelevant reactions. What are these irrelevant reactions? X is a lawyer who appears, I do not like this lawyer, happens many a times in the court. No no he is a dishonest lawyer, he always tries to mislead, and we go by this consideration, this is priois, whenever he comes. Yes, you may have experienced it earlier then he must have told you earlier something which was not on record then when you verified it, you found that it is something which he is saying is contrary to record, he is not an honest lawyers, he does not tells the facts correctly and it has happened 2-3 times, so you have found , or you have sort of formed an opinion about him, some image about him. You see that that he is arguing something and then you say it must be false, *badmaash hai saala*. That kind of approach, but should that influence our decision or yes, you may be more careful, what he say you verify from the record but that should not influence the decision after all when we are deciding we are not deciding his case, the case of the client for whom he is arguing. So but these are the priois of irrelevant reactions that is disliking of lawyer or what? Disapproval of the lifestyle of a person. I tell you it is very strange may be in today's time aa what you may call totally disgusting but it happened about 25 years ago, when I remember, I was a lawyer sitting in the canteen and one criminal because I did not practice on criminal side, but one criminal lawyer, we were having a a coffee. And one criminal lawyer was narrating some of the instances of cases he come across till date and he is a very famous criminal lawyer in Delhi, he has gone in this case to some small town and the case was of a rape and you know when the aaa the judge was reading the medical examination of that lady there it was one word was written, pubic hair shaven, and he says, ohh she lives like this, sorry then she is a woman of easy virtues, it may aaa it may be a consensual virtue it may not be a rape and acquits. So his dislike of lifestyle of why, and likewise a person may say, don't we say many a times, when the case is the offence is against women, that many

people would say, it is the mistake of these girls, why they wear such dresses, why they wear skirts? If that can be the opinion of those persons it can be opinion of judges also. It is irrelevant consideration and therefore, if the judge finds that this was the lifestyle of that girl, who is raped, then say no no no, she may be aa. So these are some of the considerations which come into the mind of a judge. Shaped by his own personal priors which may be irrelevant. Then, last is many times un-meetingly we do pressing of facts to minimize the likelihood of being reversed. It happens and you will learn with the period of time. In the high court only, suppose, there is aaaa I mean aaa a appeal to the division bench from the judgement of the single judge, and I am sitting as a single judge, they two are sitting in division bench and I know how is the opinion of Justice Gowda, who is my senior judge and if I decide in this particular manner and appeal goes to him, he is going to reverse this. Why we form opinions about judges, he is pro-labor, he is pro-management, he is pro-tenant, and he is pro-landlord. This is if suppose the judge is to decide according to law, why it should be there? Still it is there. So that means if such an opinion is formed about a particular judge, it is not that he is doing the cases objectively, without naming the judges because we have aa we are all sitting judges here. We know that there was a time in the Supreme Court, if a case is brought by tenant against the landlord without even the lawyer arguing the case, appeal will be admitted. There was a case and I still remember, then after 5 years or 7 years or 10 years, I was practicing at that time, Justice Sharad Bobde is smiling, he knows whom I am referring to. Another judge, who came cleared all these arrears by dismissing 30-40 appeals a day, deciding and aa saying that there is nothing in this because he was treated as pro-landlord judge, and what was talked about in the corridors of the supreme court was they came through backdoor and they were given exit through backdoor, and or it was aaa that there was some other expression used I don't remember. So, that means that when case of workman is coming, I have to decide in his favor or against him if I am pro-landlord, that should not be, that means that there are reasons because of which, because of the personal ideology or personal views of a judge he loses some objectivity. So these are, now here I know what I was telling you, the my fair that I should not be overruled. many times judges decide that we should not be overruled by the superior judge or by the supreme court. So who are the judges sitting there, so I should decide it going by so that I am aa my view is approved by the division bench. But in the process what I am doing, I may be twisting the facts in a particular manner and subconsciously or I mean without any I mean deliberately, we are not talking here of dishonest judge, we are talking here of the circumstances under which a judge may

have lost some objectivity and he has not acted in an impartial manner. So can you give some other examples in next few minutes. So please participate in the discussion now. These are some of the areas where I have told you where there bias may come, lack of objectivity may be there. Yes

Participant Judge- When the case of a tehsildar of revenue department comes and he is accused of accepting a bribe. So the general perception of the revenue department or the Tehsildar is that they are basically corrupt. Therefore, that would be a factor which would differently raise in the mind of a judge, that he is likely to have taken the bribe.

Justice A.K.Sikri- That's right. I tell you, I remeber still gain we were young lawyers and one judge in our Delhi High Court, he had bad experience as far as Delhi Development Authority is concerned, DDA and in the court openly, he would say yes, you would have done this if there is an allegation against you. So it happens in revenue department, police departments all and this. We have given an example of a truck driver who has I mean, any other example, revenue is one good example. Yes

Participant Judge- In Jharkhand we have something known as the Tenancy Act, protective legislation basically it was largely for the protection of the scheduled tribes. When I joined the bar in 1992 there, a lawyer of mine belonged to backward community, he says, it is not only applicable to the tribes, the land belonged to schedule tribes can only be transferred to the schedule tribes, lands belonging to schedule caste would only be transferred to schedule castes amongst them and land belonging to the OBCs would be transferred only to the OBCs. In the context of tribes, it was there observed, there were loopholes in that but in the context of the schedule caste and the OBCs it was not observed. Only a few years back, one minster Mathura Mahto, he took the law and issued a circular. I felt that after observing that because he said that any lawyers worth his salt or any even any non-lawyer would read on just reasoning the provision section 46 would have seen that, you see. So every lawyer, every judge who went through land issues, whether in the district courts, whether in the high courts they would have known that section, absolute conspiracy silence I would say. I think that is a matter of research you know. How that was avoided? socio class interest may be, socio and economic class interests, class community interest.

Justice A.K. Sikri- Any other examples of any aaa I'll welcome

Participant Judge- Wrong notion about police personnel

Justice A.K. Sikri-Yes yes

Participant Judge-Recently, there mostly community has been treated as a terrorist.

Justice A.K.Sikri- Yes, very good example, very good example. So a case coming before the judge where the accused is a Muslim who has committed some crime , and because that no mostly Muslim would be terrorist , if he is and the allegation is that yes he is the part of say some terrorist attack etc, so judge goes with this notion that yes, yeah if he is a Muslim he must be a terrorist. Very good example.

Justice S.A.Bobde- I want to aa consider a situation where you have to say that yes he must have done this, where you are deciding cases of customs. I mean customary things like aaa when marriage rituals or things like that then there it is not a matter of losing objectivity, those it is a fact that you are drawing a presumption, it is warranted. It is aa you have to , you have to, to say that he must have done this and yes of course the contrary is proved that is objectivity.

Justice A.K. Sikri-Yes give me example of it yes. The question is that we know all this but still many a times our questions are influenced, then we are not doing justice in that matter in that particular matter. So therefore, this is one and as far as ideology is concerned two aspects, okay as aaa as when we talk about police our perception are this thing. It is sufficient to this thing that yes okay, as I said these are our perception or internal factors which we have take into consideration only the external factor, what is on record, what is the evidence there. In the case of bus driver whether there is an evidence that he was drunk or you presume that he was drunk or even when some evidence is laid but that of course some evidence must have been laid by the police but that is not worthy of credence. If you apply the rule of evidence, but then we are inclined to believe it because he is a truck driver. So therefore, their challenge somewhat may be easy of course our mind set , we have to train our mind set, he may be even if now benefit of doubt is there we are deciding a criminal case. It has to be given to him. Not that okay if I can weigh both the evidence and both the views are possible still I decide and convict him only because he is a truck driver. That should not be there. But it may come with some kind of a training after some kind of experience you decide over a period of time and all that, you are able to take away these kind of

factors from your mind.. That training is must and you should keep in mind always. But let me here twist this when we talk about ideology etc. You must have heard I see Prof. Madhava Menon on social context adjudication, a case comes yes it is not necessarily to be decided in favor of workmen, it is not necessarily be decided in favor of disabled person, it is not necessarily be decided in favor of women, if law says otherwise, if law is against her or him. But then what is social context adjudication. There are certain matters, there are certain constitutional values which we should keep in mind and although we do not show sympathy but we have to show empathy in such cases. The decision making process has to be such that, ultimately we are doing justice. Why Krishna Iyer is referred even today because of his that philosophy. There was nothing wrong if he was deciding in accordance with law but doing justice to the disadvantaged and under privileged section of the society. So, you have to keep in mind don't ever think that what I am trying to say, that it is a part, no sorry I have to say no to that. The constitutional philosophy while deciding such cases has to be kept that, that is not your personal ideology, if you decide in the favor, that is a constitutional philosophy. I mean, I am putting it aaa so do not take what I am saying in wrong sense that no when a case comes up for that under privileges or a woman who is abandoned by the husband and she is there with the child and she comes for maintenance etc. you say no no, I mean yes, you have to decide accordance with law in the sense that if the husband is able to prove that his salary is only Rs. 10,000/- he cannot give Rs.20,000/- maintenance, that is there. But you cannot deny maintenance also on totally on frivolous considerations, the empathy has to be shown, so keep in mind all that was told to you in the context of social context adjudication as well, I am not repeating that, he must have because Prof. Madhava Menon is expert in this. This is favorite subject of my brother also. hahahah

Justice V. Gopalagowda- The preamble of the constitution speaks of justice, social , economical and social. The land reforms act is enacted, land to the aa the constitutional amendment has taken place. Right to property is a fundamental right guaranteed under article 19, any how it has been taken off and out in Article 300A. What is the aa constitutional philosophy of rendering social justice to the weaker section of the society is to provide equal opportunity and equal protection of class. If a person is a landless agricultural laborer working in the field the philosophy of the constitution is that you must give them justice to see that, land reform act, abolition of landlordism, land which is in possession of a teller is vest with the government and conformant of occupancy

right is recognized under a statute and constitutional validity of that act is upheld. So therefore, the relevance of social context, you have to keep in your mind that is what exactly the objectivity and personal prejudices, your class, the character, or representing from that he is losing his land, therefore he is getting land, he has no right, right is there in the social context is that the land reform act confirms a statutory right upon the tenant and also the tenancy act the statutory protection. Statutory protection is different from contractual tenants. So therefore, these are all the areas where constitution recognizes it, that is the object. Constitution object must be achieved while interpreting, while keeping in view social context.

Justice A.K.Sikri- What I am trying to emphasize is if that is the ideology of a particular judge then that is not wrong because that is in tune with constitutional values, that is in tune with the rule of law, that is in tune with legal norms which we have to apply in any case. So that is still objective. So personal ideology can be like this, if that is so there is nothing harm, I mean there is no harm in that. So this you have to keep in mind and ultimately, because of course as you didn't have any tea break and now from 12 to 12.30 again so let me wind up in next 2-3 minutes by again from where I started, to your role in the society as a high court or supreme court judge and protecting the constitutional values etc. Ultimately, when we talk of deciding the cases, when we talk of giving our judgments, rational, reasoned judgments, ultimately what we are trying to do? We are trying to advance justice, justice in a particular manner to the needy or the two parties who are coming because to the needy is one thing, I mean they may be two, both are mighty parties, it may be a pure commercial dispute with 2 multi-national companies also, such case also comes before us, we have to decide those cases also as per law, no doubt it. So therefore, ultimately, it is the virtue of justice that has to be kept in mind and if you see the theories because, it is not that we are having any discourse on jurisprudence and what are the present theories as of today, it may also come in these discussions, but I have excused, I have not as gone into that. At the end I will only say that, this virtue of justice or judicial virtue is to be kept in mind, when there are 2 elements of theory of judging, if we talk of jurisprudence. One is judicial virtues and other is virtue of justice. What is judicial virtue? I wanted to say one, I'll only say 7 or 8 points, will not deal with that in detail. One is, a judge is supposed to be a judicial virtue, judicial incorruptibility and judicial superiority, which we have to maintain. Number two judicial courage, if you find a particular decision has to be given to advance justice have courage to give that decision. Third is judicial temperament and

judicial impartiality. Fourth is showing diligence and carefulness. Fifth is judicial intelligence and learning-ness, keep reading not necessarily law but other things also. We are all learned judges but we should be really learned. Fifth is judicial craft and skill learn that, then this objectivity etc will automatically will come and the seventh is that, practical wisdom, which is very very important. sometimes we don't have to be totally critical in giving the judgment, what we have to be practical also and there have been debate on this also aa aspect as well whether he is formalist judge who simply apply the ABC of law without understanding the impact thereof or he is a realist judge who keeps in mind the reality of a decision, or how the decision is going to impact the society and even the economy of the society etc. in many cases, the cases have come of these tenders etc. A particular tender worth awarded, You have to keep in mind what if I lay down the principle how is it going to affect. These are some of the judicial virtues. But the virtue of justice ultimately is that justice should be fair, the approach the outcome is fair, fairness in justice and lawfulness in justice. If you keep these 2 things in mind and you have those judicial virtues I think we will be automatically objective in our approach. Thank You very much.

Claps

Justice V. Gopalagowda- three aspects I have not I omitted to mention. This aa regarding this importance of rationality. The three very important aaa my brother also dealt with it under aaa I wanted to tell you. A judge while arriving at a decision may adopt the three processes. One is syllogism means a reductive scheme of a formal argument consisting of a major and minor premises on a conclusion. Here the judge accept an argument on a major premise which out ways the minor premise to draw his conclusion. So that is what lengthy argument to your telling somebody was telling, this is the answer for that. The judicial dictionary meaning from Ramanath Iyer, what syllogism means, logical form of argument, I told you, only you must take logical argument, legal argument. Logical form of argument consisting of three propositions of which the first two are called premises and the last which follows from them, the conclusion. Number two. Inferential, my brother was telling inferential. The judge here simply relies upon an evidence and reaches to a conclusion. The meaning of this is, deducible or inferable from the true facts. The inferential facts means, it is from some inference and conclusion from evidence. So your conclusion or inference must be on the basis of evidence. It is true such conclusions are not conclusions of law, conclusions of fact, but the inferences are conclusions of fact. So this is what inferential. My

brother was telling in his intuship on, what is that? Here the judge adopts psychological process. See the pshycytrist, it is the object, the lecture or interaction on this discourse aa here it means that the judge adopts the psychological process intuitive, which may or may not be based on his subjective preference or bias. In this process, judge arrives to a conclusion more by intuition or emotion rather than reason. It lacks reason with reference to the material that is because he adopts psychological process or bias. Subjective thinking with reference to the subject and material on evidence, your decision making process shall not enter into the arena of the psychological process or bias. Your decision must be fair, reasonable, your decision must be satisfaction with reference to the material on record. You should be influenced by extraneous considerations, if it enters into your they will aa thinking process the rationality is lost, you are on the wrong path , you are not on the correct line, you will not arrive at a just conclusion. So that is why all your conclusions or judging or decision making process, right thinking, on relevant facts not on irrelevant, this is intuition is not permissible. In fact there is a beautiful passage from the Olga Tellis 1986 SC, what a beautiful judgment which the constitutional bench has said, Olga trellis, kindly aa , this must be go on reading any number of times, 1985 3 SCC page 545. Paragraph 40 is very very important, para 32 also very important I don't want to read that, Paragraph 40 is very very important, you must always 1985 3 SCC page 545, the legal principle laid down here with reference to Article 14, 19 and 21 of the constitution of India. Supreme court, justice Chandrachud is author of the judgment, one of the classic judgment, which is being cited and considered by the universities of America, alternative judgment not only America, other foreign countries are also following it. This passage kindly keep in your mind while deciding that is, just as a mala fide act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right, in this case right to life must conform to the means of justice and fair play. "Always keep this in mind while exercising or thinking. All these predilections, your likes and dislikes should not enter into the arena of decision making process, you must always be fair, you must not be arbitrary, you must be reasonable and there is not existence in the eye of law with mala fide act. It is not recognized, you are required to decide in accordance to law. Keep this in mind and rationality will go on improving every case to case, every minute to minute, day to day, month to months. This is our experience, we are telling to you, you follow this you will also accrue that knowledge.

Participant Judge- before listening to the parties if we go through the facts does it amounts to re judging or just judging.

Justice A.K.Sikri-It is a very interesting question otherwise because there are two schools of thoughts, you are right there. Some people think that we should not think anything and come to the court blank because we should aaa our mind will remain open that way. But I feel is that in today's world and the the kind of work load we have, it is very difficult to come to the court without reading. At the same time when you read, you may even form a particular opinion, that opinion is not that you are losing rationality and you are losing the objectivity. After reading this you have formed a particular but that should be your only prime facie opinion, form final opinion only after hearing the counsel. Many times it is our experience again, we have seen that we come up with something but then the lawyer tells one fact which was not seen by us at that time, we ignored it for some reason or the other because you are not the lawyer, you are just reading the brief. You may have glossed over some particular aspect and one fact will change the entire decision. We have seen and I am telling you from my experience. Mr. Walia must be knowing, I was chief justice in Punjab and Haryana High court, ones or twice it happened there while dictating the order, we found some particular fact that would have change the order and in between we turned the decision other way, since why it was not told to us, then we changed. So, come after reading but remain open as far as mind is concerned.

Justice V. Gopalagowda- It is very important to supplement the reading is justifiable. A lawyers in aspect to read and assist the court, your reading to know the facts and what are the rights claimed by the parties, what is decided there. Rightly decided, wrongly decided or what is his grievance or infringement of right, is it a fundamental right or a statutory right or a common law right. There of you read the advantages what is missing there you can find out, you can tell the lawyer on this point you please address the argument. So don't form an opinion, please go with a open mind, after reading, knowing the facts, finding the reasons, law involved in that case and if that is not considered either by the first original court, the appellate court and second appellate court. It is open for you to tell that there is something missing, that fact is not considered, this piece of evidence is not considered, from this perspective, you can tell, that is the advantage of reading number one. Number two is if you don't read, go on doing hours together for a case, public time

you are spending. If you read the case, you can have the control over the court management, ask him please address on these points.

Participant Judge- Sir with your lordship's permission after receiving the great legal information from three of my lords, I am sorry aaaa this is the message I received, a case should be decided by free mind based on the facts of each case independently with reference to the statutory provision without any bandages, falsification or prior personal experience, personal presumptions, ideology, moral values and poor or rich and twisting of facts. This what I have gathered from my lords.

Justice V. Gopalagowda- Good you have assimilated. No poor or rich is not the criteria, everybody is equal before the court of law. It all depends upon if it is a law or a case in relation to the social context adjudication like- industrial disputes act, here weak verses strong and family matters where weak verses strong. Reality, existing reality in the society is gender dominated from ages and Article 14 and 15 is not given affect to therefore, so much of oppression of that the section of the society must be taken care of despite 14 15 irrespective of the caste, religion, creed, colour, the equality, we are unable to achieve it. And there is a domination that is what my brother was in detail explaining what is objectivity, There, still the law which is enacted in so far as the Domestic Violence Act, a social piece of legislation to protect the weak from the on slot of the gender dominated society. There is nothing wrong, then that is why Supreme Court, section 25 petition. We aa from Calcutta to Bangalore, we can't expect lady to travel alone in a train, the hardship is more in this system society. Therefore, without seeing any reason we transfer a case a family case, a divorce petition files there transferred to Bangalore. So there protection wherever the litigant which is considered in the context of social context, there taking a view to protect their interest keeping in view the constitutional object, nothing wrong. You can't attribute if anybody said my brother said it rightly, that is the correct understanding people cannot brand you and say that you are pro-landlord and pro-tenant, pro-worker, nothing of that sort, those are all people according to me. I may go one step ahead and say, they are ignorant of the constitutional philosophy because even Supreme Court judges they say, this was told to me with reference to my name in a colloquium at Bangalore, Justice aa Sinha, like my brother Gowda, he renders judgments in favor of the working class. My brother senior judge also told before Gowda if you are arguing a case, you may lose the case. No that is not the position. My understanding of law is in context of life,

bread and butter of that man and that family. So that is the protection given under the constitution that is why the Industrial Dispute Act 1947, that is why the collective bargaining agent is recognized keeping in view that they all need to be protected because equal opportunity and equal protection of law both under Article 14 and 39A. This is very important. In that context rich and the poor question does not arise. He has been affected that is not my topic otherwise, I would have justified it by telling in detail. So this context way. Now next is revenue aaa somebody understanding is revenue verses the assessee, yes revenue verses assessee, it all if suppose there are decision making process is arbitrary illegal, you will set aside it but if it is decided, fact finding authority we will all say very conveniently, concurrent finding. Yes concurrent finding, I set aside a death sentence three, you said that, he said that Muslim is a terrorist, innocent people have undergone imprisonment for ten years. So like that here, what will happen is, the context in which we are deciding you must be very very careful, you have to see the object always. Keeping that in mind your thinking process must turn on.

Dr. Geeta Oberoi- Can we give a big round of applause to Honorable justices. Sir thank you so much aaa we are really grateful to all three of you for coming over here and giving this discourse, an important discourse in understanding what rationality objectivity is there because these are all components of reasoning and with this aa we take a break aaa short break, but before you reach the cafeteria please assemble down there for that group photograph at porch because this is I think golden opportunity for all of you to have three three justice. Yes, Trimurtis. Thank you

SESSION 11

Free and Equal Decision Making

Dr. Geeta Oberoi- Sir shall we start

Mr. Mohan Parasaran- Estimated judges from the Honorable Supreme Court, Honorable Justice Shri GopalGowda Ji, Honorable Justice Sikri Ji, Honorable Justice Bobde Ji, Honorable judges from the high courts, director and the organizer for this programme. You earlier had a very Think important discussion in the morning for nearly 3 hours and this topic also, free and equal decision making, is a very important topic in jurisprudence and also an imperative element in the justice

dispensation system and it is one of the core conception of constitutional justice. In fact it is fundamental in upholding the rule of law that it is very essential for judges to make equal decision and as this casts an Honorious duty on judges to continually police the boundary between what is and what is not within his or her power to decide and to decide all cases in this way that never disregard the subjective evaluation of both parties. I have actually sort of briefly divided this particular topic after introduction into aaa because this has a jurisprudence also, the jurisprudence of judicial decision making, different processes of judicial decision making, the hidden aspects of judging that is also a very important aspects since it has been discussed by various authors, the overcoming the individual predilections in the process of decision making by the judges and then the conclusion. In fact the Supreme Court Justice Subba Rao observes that it is the sacred duty of the Courts to protect the rights of the people and fair decision making is a integral aspect of this process. A sensitized judiciary is a prerequisite for performing this sacred duty. A socially sensitized judge is a crucial armor in the justice delivery system than long clauses of penal provisions, containing complex exceptions and complicated provisos. The credibility and legitimacy of judicial decisions depends not only on its merit and soundness in law, but equally on public perception of impartiality and objectivity of the judge. Further judges should internalize sound procedural safeguards like conducting the proceedings in a fair, orderly and dignified manner to ensure that 'Justice is not only done but seen to be done'. The domain of judicial decision making is the most deliberated and disputed topic that is pitched against the institution of judiciary. A jurisprudential outlook can help in comprehending the varied perception on this topic in an organized fashion.

In the jurisprudence of judicial decision making there are several prominent schools of thoughts on judicial decision making. Legal Formalism is an old school of thoughts, which at its most extreme views judges as meticulous, by-the book adjudication machine. Testimony, evidence, and impartiality are fed in one direction, laws and precedent in another, and rulings are produced from this combination without any personal references from the judge. This is considered an inadequate theory of judicial decision-making as it refuses to admit that anything other than the law impacts judicial decision-making. They even do not see the figures or anything and just go by the book. The other school of thought is Legal Realism which is opposed Opposed to Legal Formalism, Legal Realism views judges as human beings who are captive to their

personal beliefs and opinions. Thus, their decisions are impacted by and contain elements of those beliefs, and are susceptible to personal whims, rather than devoid of them, to such an extent that only personal preferences and individual philosophies matter in legal decision-making. The critique of the Legal Realism theory is that it gives far too little credit to judges' ability to evaluate facts and determine case outcomes without letting personal beliefs completely sway their decisions. In fact we have seen at the Supreme Court and the high courts at some period of times that some judges are pro-tenant, some are pro-landlord and some judges were actually pro-public interest, some judges are anti-public interest, etc. There are numerous cases decided unanimously by the Supreme Court of India, which would not be expected if Legal Realism held true for every case. In the most extreme vein of Legal Realism, judges are viewed as wantonly using their positions to influence law and policy. While a few judges may rule based solely on personal philosophies, nevertheless majorly Judges are capable of putting aside their personal interests and interpreting many cases simply on the merits and the law, as evidenced by the percentage of cases decided unanimously. The third school of thought is Legal Pragmatism. A newer school of thought in legal academia which sought to more accurately describe how judges make decisions. A core tenet of Legal Pragmatism is that judges have a "heightened judicial concern for consequences [of their rulings] and thus a disposition to base policy judgments on them rather than on conceptualisms and generalities. Justice Richard Posner, one of the prominent contributors to the theory of legal pragmatism, differentiates between "shortsighted pragmatists" who focus only on the consequences of the case at hand, and "sensible legal pragmatists" who focus on "systemic, including institutional, consequences as well as consequences of the decision in the case at hand". In other words, Posner views "sensible" judges as actors who pursue outcomes in their decisions that have long-term impacts on the legal and political structure of the country that comport with their concept of the good society, i.e., their values.

Then the different processes of judicial decision making Justice Richard Posner, Judges resort to non-Legalistic decision-making in cases where the limited methods of literal interpretation and adherence to precedent yield unacceptable results, or are insufficient to even reach results. Thus there are two modes of decision-making namely, (A) the Legalistic decision-making and (B) the non-legalistic decision-making. So far as the former is concerned there is not much of hue and cry

however, it is the later form of decision-making that actually revolves around a lot of speculations and conjectures.

In so far as Legalistic decision making most people accept the rational doctrinal model of judicial decision making i.e. the Legalistic decision-making. This is not surprising because legal scholars, judges, and lawyers focus on doctrine when they analyze the law. Judicial opinions explain the application of constitutional provisions, statutes, and judicial precedents through accepted methods of statutory interpretation and case analysis. Arguments are made logically, step-by-step to a conclusion, almost as if the law were a form of mathematics. This approach is comforting because it shows law to be impersonal and based on rational action. Plus, most legal questions are straightforward enough to be answered by doctrine with little appearance of discretion. The focus on legal doctrine is also understandable because it relies on written materials and processes that can be explained. This is the visible part of the law. In Non-legalistic decision-making postulates on judicial discretion, which is a vital component of decision-making process. The non-doctrinal factors that make up discretion are an invisible part of judicial decision-making that cannot be explained with any precision given our primitive understanding of how the human mind works. The importance of judicial discretion has been well known since judges began resolving disputes. It also has generated unending attempts to limit discretion and to make judicial outcomes more predictable. The unpredictability of the decision in some cases stems from the dynamic nature of the world. With new products, new processes, new financial instruments, new corporate forms, new modes of communications, and on and on, the legal system must continually adapt to new kinds of unanticipated disputes. The world is too complex and dynamic to enable even a comprehensive statutory regime to provide answers for all the problems that are sure to arise. Think of a curtain that divides our understanding of the judicial process. We know what is visible in front of the curtain: written doctrine, accepted methodology, etc. But we only know a little bit about what lies behind the curtain, although we know something is there. The judicial world is not like the Land of Oz, where we can pull back the curtain to see the real source of decisions. No matter how hard we try today, we cannot understand all the hidden factors that influence judicial outcomes. In a classic article, *The Path of the Law*, published over a century ago, Oliver Wendell Holmes emphasized the unconscious/hidden factors that influence a judge: *“The language of judicial decision is mainly the language of logic. And the logical method*

and form flatter that longing for certainty and for repose, which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment it is true, and yet the very root and nerve of the whole proceeding.”

The hidden aspects of judging, Judges as individuals have different systems of beliefs that create different filters through which they perceive the world and its problems and also create different theories to explain the world and devise solutions for the problems. These belief systems develop from life experiences with a myriad of influences—from parents and family, peers, teachers, religious authorities, government leaders, public commentators, and so on. Undoubtedly, it is this differing belief system that makes for judges with differing judicial philosophies and for judges to be labeled either liberal or conservative or either activist or restrained. Many dissenting opinions are a testament to the differing belief systems of the various judges. There must be tens of thousands of cases in the history of Indian law that would have turned out differently if different people had ruled in the case. It is obvious that the belief systems of judges are part of the hidden aspects of judging. Many judges openly admit the impact their belief systems have on their decisions, often in an unconscious and unexplainable way. As Holmes explained: “...The very considerations which judges most rarely mention, and always with apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at the bottom the result of more or less definitely understood views or public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and in articulated convictions. ...” A “balancing” test, common in constitutional law, frequently requires judges to balance incomparable considerations. For example, in regulatory cases, a judge must determine the outcome by balancing the harm to the aggrieved party against the benefit to society, usually where the harm and benefit cannot be quantified. Another common approach requires judges to look at a number of factors and make a decision based on the totality of the circumstances. Some judges will view one factor as important; other judges will disregard that factor and concentrate on another. The next factor is Sentencing domain how the judges is best-suited example for this. For illustration, the factors

that influences the judge's minds while balancing the aggravating and mitigating circumstances in deciding such predicament. Judges are also constrained by the society in which they live; they are subject to cultural values and norms. More so in the contemporary society the role of electronic media in giving feedback to court decisions both in terms of social commentary and visible effects on economic and social affairs, has amplified the influence on the judges that surely creates some incentives for different outcomes in subsequent cases. For example Case against Bullfighting, Beef Ban the whether to impose of death penalty or life imprisonment is one case etc. Besides there are also other external unsaid factors that prevails within the judicial community, which influences the decision-making process. In Japan, judges are promoted based upon performance evaluations by senior judges, so the standards and objectives of the senior judges constrain the actions of judges who desire promotions. There is no collegium but still see judges evaluate junior judges. Overcoming the individual predilections in the process of decision making by the judges. In the Nature of the Judicial Process, 1 Justice Benjamin Cardozo tried to explain how appellate judges overcome their individual predilections in decision-making. His thesis was that the different perspectives of the members of an appellate bench balance one another. He argued that "out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements." But another Judge namely, Judge Edwards, who served as Chief Judge of the D.C. Circuit from October 1994 until July 2001, differed with the Cardozo, though not in principle, but in the phrase used. He used "collegiality" instead of "attrition". According to Judge Edward "Collegiality" has an important judicial function. When he speaks of a collegial court, he does not mean that all judges are friends and do not mean that the members of the court never disagree on substantive issues. That would not be collegiality, but homogeneity or conformity, which would make for a decidedly unhealthy judiciary. Instead, what he means is that judges have a common interest, as members of the judiciary, in getting the law right, and as a result, all judges are willing to listen, persuade, and be persuaded, in an atmosphere of civility and respect. Thus collegiality is a process that helps to create the conditions for principled agreement, by allowing all points of view to be aired and considered. Collegiality plays an important part in mitigating the role of partisan politics and personal ideology by allowing judges of differing perspectives and philosophies to communicate with, listen to, and ultimately influence one another in constructive and law-abiding ways. What is at issue in the ongoing collegiality-ideology debate is not whether judges have well defined

political beliefs or other strongly held views about particular legal subjects; surely they do, and this, in and of itself, is not a bad thing. Instead, the real issue is the degree to which those views ordain the outcomes of the cases that come before the appellate courts. Collegiality helps ensure that results are not preordained. The more collegial the court, the more likely it is that the cases that come before it will be determined solely on their legal merits. Likewise, in a collegial environment, divergent views are more likely to gain a full airing in the deliberative process. Judges go back and forth in their deliberations over disputed and difficult issues until agreement is reached. This is not a matter of one judge "compromising" his or her views to a prevailing majority. Rather, until a final judgment is reached, judges participate as equals in the deliberative process—each judicial voice carries weight. This we can actually see very much in the supreme court even on a miscellaneous day, even though I think people get only few seconds or a few minutes before admitting or dismissing the case, the senior judge actually looks at the junior judge, their eyes actually interact with each other and then an order is passed, so that you sort of find the act of collegiality between the senior judge and the junior judge. But since in some high courts what we have seen there is no interaction between the senior judge and the junior judge. Therefore, unless and until, this sort of a collegiality is there, does equal participation, I think we can achieve, free and equal decision making which will satisfy the common litigant public, the bar as a whole. Of course many members of the bar walk in the Supreme Court when their SLPs are dismissed but, you must see the amount of hard work the judges put in on the weekends, even the lawyers also put a lot of work in the weekends and by and large 90% of this 99.9% of the decisions would not go wrong. Ultimately, the court is actually a court under Article 131 aa 136 exercising discretion, but why I am emphasizing is, there is a interaction, close interaction amongst all the judges sitting in the combination of 2 or 3. Unlike in High Courts, High Courts they should develop the system of collegiality. Hence, the presence of hidden factors in the judicial decision-making cannot be completely eradicated, as it is an inbuilt component in every decision-making process which involves human beings. The highest that can be accomplished is to minimize the role of these hidden factors in the judicial decision-making process as much as possible through effective conferences between the judges in the Bench before delivering the final verdict. I remember one occasion in the Madras High Court, aa notorious chief justice, who I think filed a case even in the supreme court, he used to put the chair of the judge three feet away, distance would be three feet's and there used to be no discussion at all. he used to actually rule the room. And the aaa what was

the purpose of the division bench. At this point in time, it is apt to refer to the process of decision making in the International Court of Justice in The Hague. In the world court, following the completion of argument session by the respective parties, the procedure is for all the 15 judges (quorum of ICJ) to write an independent opinion and thereafter assemble for a qualitative deliberation among themselves. It is only after this tedious process of deliberation that the final judgment is drafted, which is again circulated to all fellow judges for perusal. This procedure is in view to eliminate the regional predilections, if any, among the judge and to settle the law rightly. Such procedure cannot even be envisaged in the Indian Courts context considering our backlogs, but still that is which competes with the height of Himalayas. Nevertheless, all judgments should be delivered only after due oral deliberation and judges should not be a mere name lender to his/her brother/sister's judgment. It is for this reason that the decisions delivered are referred as the judgment of the Court and not referred as the judgment of an individual judge. Then coming to final remarks- Ultimately, judicial decision making would be free and equal if judges are more honest about their reasons. It is widely been said that "...the life of law has not been logic, it has been experience." I read a phrase in the recent past, which will be apt to conclude this session and a good start for your next session on "Challenges in judging" by Justice R. Basant. The phrase goes as follows: "For the first ten years, a judge swears he will do nothing but justice. For the next ten years, he declares that what he does is justice. For the last ten years, he does not care what he does." Thank you.

Claps

Dr. Geeta Oberoi- Any question anyone on the subject.

Participant Judge- Sir, I am sorry that I am asking this question, Can you call any Honorable judge as notorious? No you just now called as notorious judge. Can you call any judge as notorious. hahahaha

Mr. Mohan Parasaran- No no, he was known for his notoriousness, the Supreme Court itself did take notice of that. In the judgment and I think because of the court, parliament came to his rescue, I can't say beyond that.

Justice Sikri- I think everybody is happy. hahahah. Should I sum up in two minutes what he said? You see I aa just got on that, but since that was not the topic so I left it on that. As he said that to you, of course we have talked about rationality, reasoning, objectivity etc. The judicial behavior, aa this may be called in inverted commas judicial behavior. There are two kinds of judges rather three kind of judges, but the other aspect that was talked about was objectivity. Now that is if you remember I said, that there may be a legalistic judge, there may be a reformist judge, which he said in that sense pragmatic judge and legalistic judge. You can call it reformist you can call it legalist. Now is what the debate is going on, between Posner on one hand on one hand who is one of the judges of court of appeal. He has written some very beautiful books on judging and his one book is "How Judges Think" , I think as high court judges must read that book, it is a really interesting book, how judges think. Of course to his credit there are many books and in that book he has aa analyzed this in greater detail. Now legalist approach, is that approach you are going by the letter of law, simply if the particular section says so and you stop at that, apply this norm and it goes with what Dworkin has said, that every every case has one answer, one outcome. and therefore it is the aa attempt or the endeavor o fthe judge to reach that outcome which is the correct outcome. Which is to some extent deferred by Posner and I gave you the name of Barrick also Israeli Chief justice. They said that look, there are many cases where the discretion is still with the judges in deciding some cases. Some play in the joints is there and it where the judge can modulate and do the justice. So, a legalistic judge is would simply, whatever may be the consequences or whether I am giving justice or I am not in a particular manner the outcome is fair or not, I am deciding the case what we say, is deciding the case in accordance with law, in accordance with the letter of law that is legalistic approach. On the other hand the pragmatic approach or reformist approach is and we call these judges in our parlance you will understand, activist judges, that these are judges who will sometimes only in principles of law, know the liberal construction of a particular provision, mean not led to just results. So that is why we have purposive interpretation and other kinds of interpretations. So he'll go beyond, he tries to see where justice lies, whether if I give this interpretation and only legalistic approach, whether it is going to do justice in a matter. Whether it is going to bring out the fair results and therefore, he will not aaa I told you the attributes of of the judges, one is that a judge should be courageous and all that. So activist judge or reformist judge, or a pragmatic judge, will go into the practical side of the things. Yes, we are and therefore, he may of course he will find out the ways, legal ways of doing the same thing, I give you one

very good example, which comes in my mind and I did that case and that may at least show the difference between the two approaches and again bringing out legal results only. I mean both the approaches. You know under section 125 of CrPC, second wife is not entitled to maintenance and there is a judgement of the supreme court. Clear judgment because second wife is not treated as wife because the marriage is void, so she is not a legally wedded wife, second wife and therefore, she is not entitled to maintenance. Now if case is brought out by 125 petition by one such woman and a legalistic judge will simply through it away, sorry. Now on the other hand, if it is to be reformist for pragmatic approach the other judge may go little deeper into this, yes, if a normal consequence is this, the legalistic judge has done, but what I am saying is a case that come up and the judgement. It is the facts of the case that, the husband has taken divorce from his wife, ex-parte divorce and after taking this ex-parte divorce, he marries this second woman after 2-4 years they also fell apart and he abandoned the second wife and then in these circumstances she files the case. When she files the case, he now wants to defend the claims of the second wife so he buys peace with his first wife, whom he has divorced that was ex-parte divorce, he ensured that he files for setting aside the ex-parte degree and he does not contest that so ex-parte degree is set aside with the result that there is no divorce and therefore the second wife become the wife as it was wrongly divorced and naturally the degree is treated as null and void, what is the effect of that. On the one hand if you have the legalistic approach, the second wife sorry you say and this is not done. If you have a pragmatic approach you will say look at the time when they got married, he was divorced number one, number two why husband should be allowed to take advantage of his wrong? That he now manages to get the first degree set aside, so another a both the approaches are possible. If you adopt first approach you say that she is a second wife and I can't do it, here is a judgment of the Supreme Court you dismiss it. But on the other side, you will say look on the other side, she has other rights or not will be seen but in so far as maintenance comes. So this is one example which a so any judge who is pragmatic judge or who is reformist judge or social context adjudication, he will give relief to that second wife and he will arrive at just or fair conclusions by saying that look as far as the second wife is concerned the day she got married there was a divorce degree, she was told about that and therefore on that date the marriage was and for the purpose of maintenance I recognize this matter. So that is why a that is right the matter of illegitimate children is another good example. And this is what the I mean two theories, this is one example. Every day you know an active judge would like to a you have a simple case I will give you

another example- writ petitions come to you now, aa maintainability of that writ petition is challenged by the respondent on the ground that under the statutory act there is remedy of appeal, departmental therefore, you may not do it, this writ is not maintainable. Now there are many cases where the court says yes, the principles are very clear, principles are normally, it is not that the high court has to throw out the case. 226 remedy is available but it is a self-imposed restriction on us, that it's our own creation, not that there is any bar that one statutory remedy is available, you should normally exhaust that remedy. But then there are judgments of the Supreme Court also saying that the act which is challenged is aa violative of the principle of natural justice on the face of it, it is a void act, writ would be maintainable. Now, a legalist judge may simply say that yes, the aa a this remedy of appeal is there, sorry you go there. On the other hand the pragmatic judge may think that whether I am sending him, by sending him to the departmental or the statutory remedy I am doing justice in the matter, going by the facts of that particular case and it may prick his conscience no, his case is where total injustice is done to this person so under 226 why my aa I mean my hand should be tight and I should do justice. So same situation 2 judges approaching in different way. This is where the element of discretion comes and how this discretion is to be exercised. It all comes with experience. All of us may have decided many cases in the second category, where we may have said yes, go to that statutory appeal but in other fact situation we have may have said it is sending there may not be appropriate in the circumstances of that case and therefore, it is we who should do the justice and remedy the wrong here itself and we may have taken that approach, When and in what circumstances you should, one thing or other thing, this comes by experience, of course and your own wisdom, how you apply. And as as I said in my address at the end, ultimately, justice is the virtue which you have to keep in mind. And whether I am doing justice, by adopting one course of action or other course of action, discretion is a bit large available to you to adopt both courses of action and as far as hidden aspects are concerned, which Mr. Mohan Gopal said was which influence the decision making which we discussed in the previous session and prior to that rationality which was discussed by my two brothers in detail.

Should we go for lunch or is there some question. I think we should now go for lunch. And a big round of applause for all our panelists for today. Thank You so much.

Justice Sikri- Again the way we look at it. Are seven minutes still there or we are aa we have shorted up for 23 minutes. hahahah lunch time was one O clock. Whether the glass is half full or

aa it is a way of looking at, half empty or half full. Somebody will see it as half empty and somebody half full. Yes hahaah So activist just think that legalist are pessimists. hahahahah

SESSION 12

Challenges in Judging

Dr. Geeta Oberoi- Good afternoon, ohh there is a good chit chat, there I could see from one row to another row. So aa welcome back. I think you had non-break, non-stop sessions and now you have one more session after a good break. So this is about aa challenges in judging. So, you are free to express your challenges and Honorable Justice Basant who has spent quite number of years in as a judge so he knows challenges of judging as well as now he is a senior advocate Supreme Court of India. So he knows like everything about this whole system and he'll be speaking to you about his challenges, that he faced and then maybe you can conquer as to which challenges you faced or you overcome. So this is all about sharing our knowledge about our challenges. With this i leave you in the company of honorable justice Basant.

Justice R. Basant- Good afternoon my lords, one input which I would like to know before I start. How many of you are real fresh judges. Those who have joined from the bar. Altogether 1,2,3,4,5, 6 okay. The others I assume are from the district judge's cadre who have come isn't it, right. I thought it was important because I was thinking, that will going to seeing some nason judges you know, those who are new to the art, to the science or the philosophy of judging and the others I know they are there for such a long period of time I will be holding a cold Cassel if I will be telling them about judging and its challenges, I understand that. So this input I thought would be very very material. So next think is you would like to know something about me, isn't it. I know you had sessions after sessions or the sublimities of judging, what is precedents lot of pontification, jurisprudential thing you have already heard. I thought I should not trouble you with this, when I went to the programme, I thought this is not the time I should trouble you for one more reason, post lunch first session is a very difficult session. Whether you are a judge or a listener and the speaker's plight is very very unenviable. And they give good lunches and it becomes very difficult,

very difficult for the speaker to keep the interest on of the house for such a long time, if he start speaking about very very serious things. Now I thought I should tell you why I am here. I have had interactions with the system for as they call it donkey's years. I counted today and found that I have been in the system for about 46 years now, 3 years as a law student, I am including that also, then about 15 years as a practicing lawyer at the grassroots level, next 15 years direct recruit as a sessions judge, next decade as a judge of a high court and the last three years the second inning as a lawyer. So all this adds up to 46 long years and I think it is my boost that I have remained in the system at every level with alert and critical state of mind. Critical that is important , more than alert, I think I have been critical, I have not learnt , I have not been able to accept the system as it is and therefore, I have been looking at things slightly alertly and critically and that I think is my credential today. Anyone who has put such long number of years must have imbibed something from the system and will definitely will have to tell you something. 25 years of judging that is what I have gone through. And therefore, may be rather I trying to tell you something, of course which I will do in the opening few little time that I will get, thereafter, I would like you to cross examine me. Find out from me if you want anything to be found out. Now I always feel when you come for a conference like this , there is a state of mind required. I used to tell my officers in the Kerala judicial academy always, as a portfolio judge, as a district judge, that if you come to a conference the general state of mind is that, ohh I have been here for donkey's years here, who is this man coming to tell me all this. And for all the people this is the person who will be improving the whole system like this now, I am not going to change let him say whatever he wants to say and go away. this is one of the attitudes, general attitude but I would very very earnestly, request you to understand that this poor country is spending a alot of money on you, to attend a programme like this. Ours is a a very poor country, they are looking after the judges very well I would say, after the Shetty Commission, at least we all will agree that fairly well. They are looking after the judges fairly well, more than what this country can afford. Now look at the infrastructure, now when I joined as a district judge this was unimaginable, now all the high court judges come here, district court judges come here, they interact, they know the problems of the others, this is good training ground or or experienced ground and therefore, please when you come for a conference like this, please do not have the attitude oohh nothing is going to improve let him say what he wants to say and go away. Rather than that lets try to find out, introspect, find out that if there is anything that we can improve , our system deserves improvement undoubtedly. Is it anything that

I can contribute? can I take something from here, keep telling that I come here usually for taking the session for the district judges or even the junior division judges first time I am coming for the high court judges programme and as I always say that your first is always remembered isn't it, first day in school, college, marriage, member of the bar, my first day as the judge all this I remember and I will remember this for a long time because I am coming here for the high court judges programme for the first time. As a high judge I want you to be very important in this system. I always tell the district judges that your attempt must be that when I go back and sit in the bench tomorrow I will be much better than what I was before I started my trip to NJA. NJA is a such a wonderful system that we have, you have to understand that. I have been associated with NJA from my district judge days you know. I have been coming here as a faculty since then and I say it is a cradle of a new generation Indian judge. We are trying to transform mindsets. That is the most important thing. See there is no point in my telling you how to understand the precedent, no point, that is very easy, you are all district judges for long time, you have been chosen from the bar. I don't think I need to tell you about precedents and all. They have given you a lot of articles, I went through them, Paiker was good enough to send me those articles. I am not going to touch those articles in this session, you can go through them yourself and understand it. What is more important is how do we bring transformation of mindsets that is the most important thing, that is the most important thing that the system has to worry about and that is why I thought I will not specifically take you to the art science and craft of judging etc. You have had it sufficiently. I have been told that you have covered those aspects very well. Now, today's problem is, the topic that they have put up is the challenges in judging that is the topic. I always start my session with aaa you see there are 2 words here what are they? challenge and judging. A Greek philosopher once said before, you start any discussion any argument understand your terms well. The terms have to be understood properly then only there is a point in discussing. And the point today is, judging and the next is what are the challenges in judging. Now challenges keep changing as you know today's challenge is not tomorrow's challenge, it keeps changing. There are some traditional challenges to which I shall briefly refer, there are new challenges that are emerging. At the time when I joined as a district judge in 1988, the challenge that today that is perhaps unimaginable. One could never have thought certain challenges that I will take you now could ever have been faced by a judge at that time, look at the difference over a period from 88 to 2015, so much of changes have come about and therefore, it is important that we understand what is judging. Because I always say

that in the macro picture find out your slot, what is your slot in the macro picture and then you understand my role better. What is my role in judging and then you understand your role better. Okay now, the purpose of all laws , every system tries one thing, can you tell me what it is? every legal system, every social order tries to achieve one thing that is harmony. That is there is harmony in the society. Why is there criminal law? Because the harmony of others should not be affected by some. You analysis the purpose of every law it will be harmony. But in a society there will always be conflicts , disputes these disputes have to be resolved. Earlier the king or any strong person would say that my decision will be enforced and there will be harmony then. there is be no dispute because is ay that this dispute must be decided in such and such manner. So in earlier day the ability to enforce was the hallmark of decision making, of dispute resolution. If the king would say that this is the solution then there would be harmony. But later on it was realized that that was not enough there is a content of justice in dispute resolution. If there is no justice in dispute resolution, whatever be the power with which you enforce it , it will not bring about harmony and therefore, it was felt that the ability to enforce was not enough there must be justice in dispute resolution. And then tried to find out how to arrive at justice and that is how your tribe and my former tribe was born. The tribe of judges. The thought the society thought , the polity thought that there must be an expert group of people who will resolve disputes justly. Not merely the decision must be enforced there must be justice dimension of dispute resolution. And then the said that we must have judges a who are away from society, who are unbiased and experts in dispute resolution, who will decide dispute through reason, you must have heard a lot about reasoning in justice. The only commitment must be to reason, logic. And then this expert tribe of judges must be able to resolve disputes independently, without any biased, impartially, with the aid of reason and logic. You know that isn't it what is the strength of your decision, the strength of my decision is not the operative part, it is the judgment. The judgement that give you the reasons as to how I came to that conclusion. So the king and the modern society thought, that they must have a skilled group of person, who are unbiased, who will be looked up with respect, how will resolve dispute with the help of reason and logic. That is your tribe, that is the beauty of being a judge. Society always give great respect to the judge because on his decision depends the justice in each case. And therefore you find that earlier there were disputes between man and man and the king or the king's council or the judge could resolve the dispute between 2 individuals. Now after sometime the society marched forward, you will find that citizens started having disputes with the king, with the

state and therefore, the same system that has worked out, they said that they themselves will resolve the disputes between the state on the one hand and the state on the other hand. That is an added responsibility. The dimension of the challenge changes, earlier the challenge was only that to decide things between 2 individuals. Now the next stage in the dispute came, you have to resolve disputes between the person who appointed you, the king or the state and the citizen. Look at the change in the dimension of the challenge, how it challenge has changed. Now when the Dicey's separation of powers came, there could be dispute between the three pillars of the democratic government. republican government, legislature, executive also, those disputes also we wanted somebody to resolve, who will resolve those disputes. Now the society in wisdom thought we have trained set of judges, they know how to decide, they know how to respond to reason, logic and law and therefore, even the dispute between the executive and the legislature, judiciary and the legislature can also be decided by this tribe of people who are specially skilled who to decide, who know how to be answerable to reason, who know who to disassociate themselves with personal predilections and therefore, they said that let this judiciary, this tribe look after the disputes between themselves and the executive, between themselves and the legislature and in any constitutional government you will find that there ought to be an authority that will dispute between these three pillars of democratic existence. So a modern state existence. Look at the change of law look at the change in challenge. Earlier it was easy to decide between two persons, then it became between the state and citizen which appoints me. The dispute between the king and the subject has to be decided by the person appointed or engaged by the king. this is where the challenges changes. Now I would want you to see just and fair settlement, by a group of persons distinct, you know, you see, the most difficult part of the judges life is he sacrifices everything. Before I became a judge in 1988 I was member of all the clubs, I could go anywhere that I want, I had no restrictions at all, I don't drink but my friends drink I go with them to the i can go wherever I want but ones that cap fell on me all the restrictions have to come on me. This job is package, the society respects the judges but judges have to make a lot of sacrifices in order to be a judge, in order to fill the role which the society wants the judge to play. In the lighter way I cannot quarrel with my wife, even if I have to quarrel with my wife that has to be in a very low tone, the neighbor will not hear it or otherwise he will say oohh this is the man who is going to decide family dispute tomorrow. That is how responsibilities come on you. Challenges come like that. See you say that people should behave orderly, and if there is one little error on your part

people will start saying ooohh in spite of being a judge, this is what he does, this is what we think of the judges. I am not talking about the negative things like corruption, favoritism, I am not talking about that, I am not at the moment on that, I am talking about a very straight and honest judge, the amount of sacrifices that he will have to make, it is not a good cap at all. I will come back to the bar and tell you look at him in the point of view of miner, freedom, it's a great responsibility on the judge's shoulder on the judge's head. It will continue for ever but we want people who enjoy. That is the importance of being a judge. It is not like any other employment or engagement. It is a challenge, it's a mission in life. Those who have been district judges it will be much easier for them to understand because for them it must have been a life of complete discipline. This is very important that you understand the sublimity of the work that you do, some people call it divinity of the work that you do. Because judging you know, I don't know to which religion you belong, every religion says a day ultimate recurring will come which they call the day of recurring, when your acts on planet, acts on earth will be judged by somebody superior that is called the act of judging. Which they say is Devine, it is godly. Now we have a chief justice by the name Malimath, he used to say that your function is divine, there are many amongst us who do not believe in god, you are entitled not to believe in god. You have to sublimate yourself to a certain level in order to judge , which function traditionally is not assigned to man but god or nature, if you do not believe in god. The pint is the godly function that is described is only a sub-line function and out of the ordinary and much higher function that we have to perform. You should also, I keep on aa I want you to , aaa because judges should enjoy the work. Judge should appreciate the nature of consensual work that they can do. I call it the rapturous pressure of being a judge. That is important. I'll tell you as a lawyer, I have been on both the sides. As a lawyer, I am always looking at facts. looking at truth, justice through the specs of my client. That is all that I can do. All of you must have been lawyers, when you were lawyers, your perception was , through your client of truth and justice. It was that, but I always had a Chashma aa a the glasses which I wear and look at facts around me. Whereas a judge you will find that you have an STD facility with truth and justice, it is a direct contact with truth and justice. The whole idea of judging is very easy , you ask me what is judging, it is very easy, the idea of judging is find out truth, find out what is correct and od justice, simple simple. But it is not much of a challenge in there if you are honest to yourself, you know the law, you study the fact, you find out truth to the best of your ability and then you find out what is right and prescribe what is just, easy, but that is a great experience whereas other

provisions may not give you that. you are always looking at things at a much higher angel, wanting to look at what is truth and what is justice, enjoy the pleasure of that, that is the thrill of being a judge. Now doing this is not very difficult also I must say doing is not difficult of course errors are possible . I believe that some courts superior to me might correct it. So that is not difficult. the most difficult part of judging is challenge number one very mundane on earthly level, justice must not only be done but it must appear to be done. The whole problem is the whole sacrifice of a judge is in making justice appear to be done. That is a big challenge. I always say that if I am even my son comes and argue with me I have no problem, I think I can know what is true and decide, with some training all of you will achieve that there is no problem at all. Even if your friend, parents comes and wants a case to be decided, you can decide that without any problem, unless you are dishonest to you self you can easily do that. The problem is not that, of course personally you have to do that, the problem is to appear it to be done. all the sacrifice you'll find that I do not go to the club, some private functions, I don't do many things which I would have otherwise done because I am afraid that justice will appear to be not done and myself wanted to have brothers in the court, I am just taking examples. When he completed his law wanted to practice in the Kerala high court I said no either I will have to go or you'll have to go why because if that is done people may think that a brother judge, I may not appear in , hear his case but a brother judge is giving good orders because the brother judge is my friend. isn't it, he may do it, i may not do, I may not want him to do it but still the perception is what matters. Therefore, if at least one good thing that success of my son is attributed to my position as a judge would be dis-service to the system and to my son who has to work hard and prove himself. See looking at anything you will find that it is very important that we make sure that justice appears to be done. And that is the most important thing, it's as important as justice being done. You aaa I don't know the examples within the 4 walls I will tell you. if you engage A people will save ohh you will get, you might have not thought about that at all but the general perception is that a which is again failure of justice, justice is not appeared to have been done. Well if we are conscious of the pit falls of adjudication we must always remember it is not enough that i good and correct but i must go the extra effort to make sure that no one perceives me in a different manner. Challenge, that is one of the challenges, making justice appear to be done, and ensuring that nobody misunderstand you, nobody carries with him a wrong impression about you and your act of judging. There are traditional challenges, there are layered challenges, they are new transformed challenges. I am now going to take you to very very mundane

instances of challenges. One I find is that judges do not listen, judges sometimes go sleepy sorry to say that. I am sure if I go on like this, I am immediately find some of you sleepy. See alertness in court is the hallmark of a judge. It is very important. I am just looking at the challenge, it is said about Lord Justice Denning, if you have heard about it, The day I dose off in court I am going to resign. As a judge I will always feel that , I may feel sleepy I think that is one of the occupation hazards of every one of you. It is possible if the argument is so boring, he does not come to the point, even ask him to come to the point, he keeps reading judgment and deposition, you get bored and then sometimes you are like to aaa[Participant Judge-especially in division benches] specially in division benches[the senior do not do anything for the junior, not allow anything to the junior] okay okay at this time I will interrupt and tell you that please do not think that a junior judge is an insignificant part of the division bench, good if i get input like this i can respond to it also. It is a very wrong impression, why the law says that there must be 2 judges because the law wants the 2 to apply their mind, there is nothing in the judicial discourse of a senior judge and a junior judge. There is nothing like that. Now people in Kerala will say, I has to disagree with a chief justice.

Participant Judge-excuse me sir, I accept your assertion, at the same time if senior judge pass any order, junior at one side, it is not a judgment at all, [I did not get you] if a senior judge passes an order, without referring the junior judge that is a not a judgment at all.

Justice R. Basant- Yeah that is what I am saying. I have to disagree with chief justice of my, a very good chief justice but on an issue i could agree with the chief justice, that was the time I was just elevated from the district judge, I had hardly 3 months experience, but I could not agree and I told the lord chief justice, sorry I can't agree and then it created such a big fuss in the whole state that a junior judge disagree, then I said that the judgment is of 2 judge bench and both of us are important and to conscience did not permit me , I have to have the guts to say that I disagree, else I am not worthy of being a judge. See many of the junior judges I find these days think that, they call it aaa 1-0 benches, then there is 100 benches, they say 1+ 1. You know that is interesting, why do we all get the same salary? Does anyone of you know? The judge having 15 years' experience and the judge who is sworn in yesterday, you know that? It send out a message please understand and the message is that you both are equal in justice dispensation

Participant Judge-but we understand that we are not suppose to interrupt, it is not the decorum of the court to be questioning?

Justice R. Basant- with great respect madam, even that is not correct . I am as important as my chief justice and if I have a doubt, courtesy demands that I tell the chief justice that I have a question to put. You don't have the guts to tell they chief justice, you are are very poor specimen of a judge. See if you see earlier in my high court also there was a rule, there was a wrong expression when we are sitting with the senior judge only he can pose questions, and we changed it, if I am something to ask who will do it? I can't ask my chief justice, I have to ask him. So what do I do, I tell my chief justice, may I put one question? That is why you compromise your tradition and requirement of modern judging. See because the chief justice is senior to you or the the brother judge is senior to you and you do not ask what is the rationality tell me? Is it justice? Injustice to the client, injustice to you because you are not enjoying your judgeship. Why are you made the judge to do justice and if you can't do that. Well please I would think that even at the risk of displeasing my chief justice I will do that and you have to do that. Don't displease the chief justice, 101 reasons to do it graciously, you must do that. And if there is a chief justice who do not take it graciously, let him not take it or a senior judge who does not take it, don't bother. I came tell you that also because AAA don't quote me anywhere, what can chief justice do to you? Please tell me. Be extremely courteous to him, be extremely gracious to him, and be extremely propitious to him. I will never compromise on that, I had best relations with all my chief justices but nobody has taken me for granted. Everyone knew that if he had a disagreement he will express and they will accept it, no body questions you. Sometimes remind to yourself that you are equal, drawing same salary, it is my as well as his duty to do justice as my duty. Well, courses apart you are not subordinates to anyone on the bench. On the bench you are sovereign, sitting indicvially singly or in full bench or in constitutional bench, you have part of sovereignty in you. If you compromise on that you have, you will not doing justice definitely, you are submitting to that test to judging. If you think because the senior judge is there, you can't put any questions, no, you want an admission that you disagree that you disagree. You can say that I don't think that it is a case to be admitted, then the senior judge thinks again, that is justice. If both of you ultimately disagree may be some principle says that in any case you admit it. On admission there is a disagreement you admit it. Okay you admit but tell him that I do not agree. A judge cannot be pedestrian, if you want

to be judge you have to be very strong. Yeah, if you are not strong, you can't be a judge at all. Well don't tomorrow go and pick up quarrels with your chief justice, I am not telling you that. Please

Participant Judge- when the files are placed then we have to go through it

Justice R. Basant- There are greater problems to that, sometimes detailed to the bench. After hearing, judgment reserved what you say is wright.

Participant Judge- no i which situation it can be done?

Participant Judge- he may dictate order on the bench so you cannot delay, say it on the bench that sir I disagree because after dictating he will see we we we, not I

Justice R. Basant- My senior brother takes it, whatever I say he takes it.

Participant Judge- I am talking about it when you become a senior judge also, I am talking about the situation when you become a senior judge also, don't take any junior judge for granted, he is as important as you are. See I would never have dictated an order without turning brother or sister and say that we can do it this way, and mostly when the discussion goes on you know, and then they would agree and if they say I do not agree, I will say okay reserve it then finalize later on. Okay so judge should have that fortitude in them that what I think is correct and then I must persuade my brother or sister to take a different view, that is part of your job, See it usually it happens, as the question goes, you know that there is no agreement, then the question I have to put to them I will put it to the brother judge, okay you understand there are techniques, you know that the brother judge mind is going in a particular direction, you can to question in between among you, you know that circumstance against the approach which he is making ask the council, how are you saying? Then he answers then I entered in an argument to him that goes to the brother judge also. There are techniques, not that you are helpless. Is there any such practice in any court that case? We have been told that the practice in Great Britain old time, but at least in India I think such a practice is not there. You see judicial acceptance, it should not be there. I have no doubts in that but I have to be courteous to my senior judge, I will have to tell him, sir or my lord I have a question, can I put it. You must be sure that is important and as adjudge you have to be sure of

yourself. You are not a prisoner with the brother judge impressions. Right. That is how the discussion be. I do not want to enter in a monolog with you. You have how many of you have been in the NCC and things like that? In NCC they say that when you sleepy, when blood supply do not reach the head, you know that. When your brain is not working well and that is when the blood supply is not there. I was a NCC cadet and I use to tell my juniors to move your toes inside your shoes and then you know sometimes what I I just put my legs up like this. Everyone will feel sleepy sometime, so what I do I put my legs up, then there is and a pain, I then fight my sleep. On any one day, if it happens, you have to. I do not know how many of you know Justice U.L. Butt, he was the Assam high court, MP high also he was there and justice used to tell us that it is only normal that a person feels sleepy. What you do, he says keep on asking questions, relevant irrelevant or indifferent. He goes to that extent and say keep on asking questions so that you involve yourself.

Participant Judge- I was feeling sleepy but your speaking has done away with my sleep.

Justice R. Basant-That is a compliment. Thank you. Some people say that some lawyers come and sleep in my court your court and they say that it is very difficult to sleep in your court because the volume is so high that it disturbs. And then I tell them as soon as I see anyone dosing I have a bad habit that when I sees someone sleeping I also want to sleep. It is very infectious habit

Participant Judge-Sir the convention of a junior judge speaking through senior judge is very good because the bar will also be on a check otherwise if the bar comes to know that the 2 minds are working in different directions, they will try to convince that mind. SO junior judge, as you said, speaking to senior judge, because sometimes what happens it happened in my court, I told my senior that I have a doubt, he clarified my doubt. Me asking the advocate, that gives a message to the bar that both the minds are working in different direction, otherwise they take advantage of that this man is in our favor.

Justice R. Basant- I think being equal partners both must put like that. I always encourage my junior judges to pose questions because that is education for me. But you know assuming that such a practice, assuming that someone will not take it timely, you may always resort to requesting him for permission to put it but it does not depend upon question. Even if he says no, you will ask him,

I will ask him but then next question must be from you... According to me it is on-negotiable, no junior judge should feel that it is sub-ordinate to the senior judge, not in those terms at all.

Participant Judge-Is it necessary to ask every question to the brother judge

Justice R. Basant- no it is not necessary, in my high court Kerala high court. The first 2 AAA now supposing there is a court where this practice is there. In my court also sometimes this practice was there but we used to resort to this via media then if you want to put you can put questions. If there is on such practice, assuming that there is a practice, the incorrect practice, the earlier you dispense with this practice the better. My mind is clear on that now it is up to you how you work out on that. Then, well the day you become a judge you lose something, you know what that is? Freedom of course we all know that we became judge like that, there is one important thing that you lose, you don't have a mirror. From the day you become a judge, nobody will tell you what you really are right? sycophancy rules the roost, really let's be candid about it, see every lawyer comes and tell you ohh your judgment if that way would not have been there these guys would have fallen,. Sir after you have come to this high court this has changed, do not people you. See sir after you came for one, we have a court that is hearing me. What I am telling you is that you lose your mirror, an objective assessment is impossible. I am in the Supreme Court, so the Supreme Court judge they make outrances comments, on the bench you know and then all the bar laughs so heartily as though what a wonderful joke has come. You know is always say that you need not say anything if you have that expression that you do not approve it, the quality of the bench will improve... If is as a judge, if I indulge in irrelevance and I know that you as a lawyer is not appreciating that, your expression that way, I will not repeat it. That is what I call a corrective dimension of advocacy. If everyone laugh on foolish jokes, you must have also seen that, your court also it must have been happening. Ridiculous jokes by you people will laugh their heart out, what is he trying to do? He is interested in the next interim order. See understand this eared all against your oath. You say you shout at one lawyer, the other one say ohh what a strict judge that way people laugh. You don't have a mirror, you have to have a selfie, and you must look at yourself and find out. There is no other person who will tell you. And I also say, I am losing out time, I also say there is the fall of a judge how it happens. Now initially those who are from the bar, you have been trying it on other, so if anyone tries on you you understand, ohh ho you are trying to take me for a ride I understand, you smile at him but you think, I am taking him for a ride, he thinks I am

believing what he say but I am taking him for a ride. After sometime after being a judge for say 4-5 month you think, that there is some truth in what he says. That man is trying to tell good things about you, then you think ohh there is something that he says, there is a truth in what he says. So you try to believe that you are what he says that you are. And after sometimes, you think all the others are saying this why this one man is not saying that. You become anger to one who does not resort to that that is the death of a judge, with that you die. A person an s a sub-lime person you dies. See sycophancy can have different dimensions, it may happened like seeing you in a party and then slowly telling you, it may have a take shape that he is taking an appointment to coming to the chamber to come and tell you, he may invite you to a function and may do it, or he may do nothing and sit in the court and laugh and laugh on all your funny jokes. It can happen in any ways. All the ways what happens is, your challenge is belied, your challenge of deciding impartially uncials that is lost. You lose in that main battle you lose by things li9ke that. So, the loss of the mirror I said, feeling sleepy I sad, then, another thing that I wanted to say was many a judge call the stenographer before he has really understood the case, right? Until at least you think that you have understood the case fully please do not call the stenographer, that is she minimum that you can do in the cost of justice. Understand the case, I see many a judges saying that no, no no case at all. Has he understood the case enter in a discussion with the bar, after all there are only 2 witnesses, why should I disbelieve them, what is the reason to disbelieve, and then he say some reason, I am sorry. Then I have the satisfaction that you know the case, without understanding the case, it is snot a dictation, we call it dictation. There are 2 dimensions for dictation- a dictator dictates, pronouncement of a judgement is not dictation in that sense of the word, you are always available to reason and logic. You have to hear a lawyer, understand and meet his arguments. I say a good lawyer expects a couple of things from a judge, one is accommodation, if I am there before another court, and I can't be here, don't adjust but accommodate. You know after sometime, you assess the lawyers who are asking unnecessary adjournments. Your good senses must tell you. And if a person keeps on doing it for 2 days you can easily catch him, who is trying to take you for a ride. But otherwise accommodation is something which you must give to the lawyers, otherwise it becomes very difficult, no lawyer scan say that I will take one case a day, he may have 2 cases and unfortunately both may come up for hearing at the same time. One of the 2 judges have to oblige. Some judges are very very touchy, I know, where your senior is, ohh he has in

court number 2 before to court number 4, and he is taking me for granted. See again the challenge of being a good judge is lost.

Participant Judge- therefore, everybody says that it is her chief court.

Justice R. Basant- Yeah, then you ask him how much cases the chief judge is hearing simultaneously. Ahahahah. Then give a patient hearing that does not mean as is used to tell my sub-ordinate judges. Sometimes the patient hearing is slice this, when the argument starts they go under the chair, *chalo chalo* whatever they want. When I say give a patient hearing, it is an involved hearing, you must also be involved. Very very mundane examples of AA what is bonfire need? Every high court has 100 decision son that. You are not going to allow him to read all 100 decision, hostile witness can be believed in part, or disbelieved in part, there will be long line of decision to support that. So, when somebody ask to cite a decision, you say what is the point, this is that point, you don't have to cite decisions. Don't see patient hearing does not means allowing him to say whatever he wants. A judge must involve in hearing and guide it, you are the leader, and you are the help. I have told you that there is a great quotation from Justice Chinnappa Reddy" The proceeding is a voyage, you have to cross the ocean of truth and half-truth, in the voyage the helm is with the judge always, you are in control of the situation. But one who guides the voyage to the source, the destination of truth and justice is the judge. You are the master, master of this journey is always the judge. And if you are the master, you are always at the helm, you will involve everyone, you will give everyone a hearing but you will not allow you to take astray. And then next one, I have to cover I am running out of time. Now next is, when it comes to judgment dictation, every serious point that is being urged must be met. Kindle, unfortunately do not refer to incontinent parts of the case which is very unfortunate. As a judge you have a duty, as a lawyer he has the right, as the client he has the right to know the serious contention raised by him. Please do not avoid and cut, that is the challenge. Rule of law challenge is that, when somebody raises a point he is got to know why, this point is not being accepted. Well sometimes I find that even in the Supreme Court some say that concurrent findings, say you have to get involved, and take part and convince the client or the lawyer that you have understood the case. Next is new melody that or the judgment is not being pronounced, you hear, you reserve, the judgment does not come at all. Every high court has 1 or 2 judges known for it, isn't it, I need not mention, every high court 1-2. That it is becoming viral, infectious judgments are not coming on time. Recently, there was a

case before the supreme court, the division bench murdered arguments, 2 years; later the judgment comes and I request the bench why don't you say, that if the judgement does not come say 3- or 4 months or may be 6 months then thereafter, you know the decision which justice Thomas said, that you remove the chief Justice. [2001 mater SC, within 3 months] yeah 3 months, See if within 3 months its does noit happens then what happens? See you can request the chief justice to release it. Which lawyer is going to ask you to release it?

Participant Judge- A recent practice has been started, we are giving statement to the supreme court as to what are matters pending for more than 90 days, don't give it , high courts are furnishing

Justice R. Basant- see in my court the judge will say I will not give. High court is not subordinate to the Supreme Court, both operate in the realm of sovereignty. Ask your office to give it, AAA I would say don't give it.

Participant Judge- How many matters are pending beyond 90 days and the list is being send to the Supreme Court [don't keep any matter matter pending beyond 90 days] yeah that is different thing if you are keeping anything beyond 90 days you are a very poor specimen of a judge. See I would always and this is consistently my advice to my junior judges, try learn to dictate on the bench. If you have heard both sides you have understood the case. When do you want to postponed it, when the lawyers are presented it properly, you think I shall read it but when both sides presented it properly there is no question of adjoining it. Then dictate the judgment there. Suppose you think that the bar has not assisted you properly, what will you say? I used to say, that is why I am saying, okay I have heard you but I will go through the records myself, posted day after tomorrow, then I come, the doubts I ask and then I dictate. Don't reserve unless there is a very original question of law that you want to answer. Very original question of law because you have not understood the case fully please do not reserve and then what you can do is, post it to another day , in the mean time you also study it , come back to the bench and ask them this is my doubt what to do? Proceed to dictate [That is a good point] this is according to me a very good point. Therefore, your reserving judgment will only be in respect of things where you want to have original approach, where you want to lay down a new law, that is your duty t then you reserve. Applying the existing law, you please do not reserve it. It is scandalous, it is bringing bad name to the judicial institution. I as a judge used to burn my mid night oil and ensure that no judgment is

delayed. But in meeting when I go people used to start criticizing, what Kerala High court judgement are pending. Why should I hear this? The chief justice have to be strong, they are to ensure that no judgement is delayed. You have to ensure that your judgment is not delayed please. For this, one strategy I would suggest to you is don't reserve judgments unless there is an original point which you want to make out. That of course you have to reserve not otherwise. And then also before you start dictation have a flow of thoughts ready and a short note on the flow of thought not the details, but flow of thought. I start with this and I will then go to this, this, I'll disbelieve the recovery, I'll disbelieve the I will go to this this this accept and then acquit. Have a flow of thought don't start thinking about the result when you start dictation. Before you call the stenographer, your conclusion must be very indefinite, again a challenge in judging. The mechanics or dynamics of judging include all this right? I will take only, I don't have much time, when are we supposed to stop? 3:30 over you will excuse me. You will excuse me. Is that unanimous that I shall continue? [Yes yes] okay. We can get that even I would mind hand. Okay gentlemen human nature is such that when you are final you become arbitrary, I don't know how many of you will accept this. When is know I am final there is a tendency of being arbitrary. Intellectual humility is warranted. Your matters may not be taken up for appeal before the supreme court, how many client can talk up the matter to the supreme court please understand that. To engage an advocate on record or senior advocate the average earnings of a man is in India is much less than the fees that a senior advocate charges for appearance, unfortunate but it is true. So lot of finality because you know that this man will not go for an appeal, you are final. Supreme Court is final and therefore you find arbitrariness in many ways. So you have to subjectively satisfy yourself that finality will not bring an arbitrariness in me. Because in many matters under the constitution unless you grant leave the matter does not go to the Supreme Court, or unless the Supreme Court grants special leave. So there is a finality in the domain of your judgments and interim order the Supreme Court is not going to look into it. What you have decided is final. So always fight against that element of arbitrariness which is a human weakness in you which might prevail if you are not in a constant dialogue with yourself that I shall not be arbitrary, if that arbitrariness comes it is failure of rule of law it is failure of the challenge in judging. Again something what we are discussing today, that challenge is lost. what about intellectual humility when is said, I don't want anyone of you to violently object, the lawyer is a teacher, your teacher is a teacher it is not something which I am saying because today I am a lawyer, please this is something which I am

saying right through, there are good and bad teachers I accept that but if you don't have the intellectual humility to receive from a lawyer the whole exercise is lost. I am not saying that they would lawyers be enlightening, some people are not well prepared you are convince that he is not looked at up well, you have right to cut strongly on him. But I would think that judge has the duty to improve the bar also. It's is your duty to improve the quality of the bar also. If one day he comes unprepared one day, you can say that Mr., so and so you have not assisted me properly at , is' 'all post it for tomorrow please look and then argue. You are improving the quality of the bar. See don't start an assumption, that lawyers are unnecessary, they are wasting time, some of them do but I am not in quarrel at all, many of them do, I'll agree on that but that is no reason not to involved hearing he will be exposed. 2 questions from you, if you are alert and know your brief well, it will expose that he has not studied. Sir, I will give you time till tomorrow come and argue tomorrow. Well, thereby he studies, all those sitting there realis that they have to study and the next day without study to that gentleman's court he is not going to take it timely and therefore you improve the quality of the bar. See this is the AA we have the duty to improve the system also, the challenge can be met only that way. That is challenge in judging. How many of you can read the case both sides and then decide tell me, can you do that, I would not have been able to dispose of 1/4th number of the cases I disposed of as a judge, if was not obliged to be briefed myself, right simple, very simple. I always says that quality of the judgments that is rendered is proportionate the quality of assistance I got from the bar also. So bar is your teacher, you have a a duty to improve your students aaa teacher and therefore, respect your lawyer, give him the respect that you give it to a teacher, if he is a n indifferent teacher try to improve him, respect him but respect the bar. Bar is not AAA we are a team and B team, we are all part of the same team and together we are trying justice. Have that perception in you I am sure it will put you in good instead. It is so often been said that we are 2 sides of the coin we do not see each other at all. Okay now, I am slightly more important things now, in 1973 I joined the bar, the type of allegations aspersions casts again the lord chief justice of Indian today, and nobody would have raised that against the second class magistrate those days. It is unfortunate, very very unfortunate, the polity and great respect in the judge, the institution of the justice, even today it has but a lot of water has flow down the Ganges that is not uniformly available for everyone. One great chief justice came to Kerala and said 20% judges are corrupt aaaa or put it otherwise, 80% are not corrupt from that day onwards when anyone looks at you , I am not sure whether he is looking at me as 20% or 80% right, you

understand. See so today our own brought about this and our own men have done this, I am not saying about the chief justices. Our own people who are unfit to occupy the judicial chair have occupied the judicial chair and may be selection process is not good, may be it was a bad apple, there anything could be the reason. But my point is today people do not trust the institution and all its members as it used to do. 88 when I made a sacrifice and chose to become a judge, I did that because there was a hallow around a judge, whichever judge, around everyone there was a hallow, it was pride to belong that institution of righteousness, virtue which has hallowed around . Today that is perhaps not available. It is not not to trough hands up and say that it is not available, we have to work that is the way I want you to look at that, no institute will function, no democracy , rule of law can function unless there is general, vibrant , honest, righteous virtues judiciary. So burden is on us to work it and capture that the lost ground. Which means that you are to be more careful. Earlier people would accept it and today channels are such that anyone can say anything on anyone, there is no sense of restraint. Today, you decide a case before you sign it, the channel will start discussion on the judgement and some of them will say that I have not read the judgment but this is my view. I don't know how you will criticize a judge. See my only justification for my decision is my judgment, if you don't read my judgement and start criticizing it all that is can say is that, very good thank you, right, if you don't read my judgement , if you start criticizing my judgment what is that criticism worth. I have seen the retired Supreme court judges commenting that I have not read the judgment but the judgment is very wrong, is don't understand that sir, what is the process by which you can say without reading the judgment that I do not agree with the judgment. The man must have found out some new point you should read that, well and therefore today, every judge is running a risk and what I am interested in telling you is this should not go counter to your oath, what is your oath? to do anything without fear or favor, that tomorrow some fellow ignorant fellow may criticize me without reading the judgement is no reason for me to change my judgment, Well if you do that you are violating their oath, you shall do things without fear or favor is your oath, the fear may be of your portfolio judge, the fear may be of the media, the fear may of the ignorant critics, in any case you are violating the oath. You are committing breach of the oath. You must have the conviction that what I am deciding according to me. How many times a person can say that I am always right? I am writing the judgment because I think I am right , that is the best claim that I can make, honestly I think what I am doing is right , just, truth that is all that I can claim isn't it? Can anyone say that all my judgments are correct. It is

another thing that I want to tell you. I see of the judges saying none of my judgments have been reversed by the Supreme Court, you must come and see at the Supreme Court how the judgments are reversed and not reversed at the Supreme Court. Two people have been consistently foolish is no reason, your reasons will be given in your judgment. See it is not whether the outcome is right or not. A great judge of the Kerala High court said this, he said if my judgments upheld, I am happy because I have been able to do justice at the first instance at helm. If my judgments are reversed I am happier because my error was not perpetuated, that must be your attitude towards your judgment. I do it because I think it is right if somebody else thinks that it is not right in the hierarchy let him reverse it, judgement is not entitlement of the judge who passed the order, not at all, our system does not work on that at all. What is your strength? My strength is when I call the stenographer and started dictation and sign the judgment, I honestly thought that this was the correct resolution, only that. Somebody reverse it let him do it, you should not be worried about it, why should be worried about it. As the Kerala chief justice once said I told you, upheld thankful, my I was able to see what was right at the first instance. Reversed, very good my mistake was perpetuated. Well either way that attitude is so very important. Another danger today against the challenge before you is we all want to be good boys right. I have a small grandchild whatever I want the child to do is clap, then he will repeat it, right. My judges today are waiting today for the applause of someone, you are waiting for the approval, you are waiting, we are becoming approval seekers. You want newspapers to highlight your good judgments. We are falling a prey to approval, this approval syndrome is killing the system. May I call them populous judges, seeking approval, very populist. Well the judicial system believe me is not majoritarian, if 1 against N number of people in the world, if N -1, if justice is with one, I am with that one, and not with that whole, in my perception that man is justice, whatever N-1 people shout at me, I am with the one who I am convinced is just. If you start playing on the gallery the rule of law would scum. The concept of rule of law is not to find out how many people are there, how many people support this. When Kasab was supposed to be hanged, the day Kasab's judgment came, every channel was highlighting, 4500 inside, one here, 1.25 lakhs 2 here, so it is an attempt to prejudice you, you are not supposed to go by the populist impression that is there, you have to decide the case in accordance with law along with your conscience. Populism is a challenge, fighting populism is the challenge which the modern judge got to do. Your decisions cannot be based on tomorrow's headlines and newspapers, if that comes in then it is a great danger.

Participant Judge- Sir in the olden the senior judge used to advise the junior judge not to read the newspaper, but how many of us can do that] because it has its impact on the mind of the judge [Justice R. Basant- yeah] Some of you can do that I don't think that it is a bad idea, but in today's world it is not possible. But judges are judges, they must know what should be kept away from judicial decision making. See the problem today is next day you give the judgment, immediately the imputation is that you are corrupt. If the judgment goes against what the people around you wanted there is a fear of an allegation being corrupt, I don't know that you know that earlier, some of the high court have only 1 bench for bail, today there are as many as 5 benches dealing only with bail applications why, no subordinate judge grants bail, one he is afraid that somebody will think bad about him. So it is not given, again failure of justice, the fear is deciding the judgment, the fear saying the outcome of the proceedings [Justice R. Basant- sometimes subordinate judges are afraid of granting bail because they are likely to be taken into task by higher ones which] who are these higher ones, it is you [Justice R. Basant- this is the reasons why bail matters are more in high court] this is right, how many people can come to the high court in this country. If you make the subordinate judges fearful of their decisions what is going to happen, okay. The approval seeking tendency I think judges especially the constitutional judges should want their names memory to be perpetuated in law journals by dealing with law and not in newspapers, according to me it is very important. You are striving to get in the law books or journals and not in the newspapers, or headline. It is a risk which everyone has now. It's a failing which I find very common these days. You want the approval and for the approval you are, people are wanting to get into the newspapers. I think the judges must get into the law journals for their judgements and not in the newspapers. one more and I as the time is running short I'll close by that. Whenever a judgment which is inconvenient to the majority, whenever there is a judgement which is unacceptable to the general public comes, there is immediately a criticism that this judge does not have any social commitment. What is your social commitment? Your commitment is to the constitution and when I say constitution, I do not mean the book, I mean the values of the constitution. Your commitment is not to the fleeting moods of the electorate at a given point of time, your commitment is not to that at all. Most people think that majority opinion is social commitment, it is absolutely incorrect, I have no commitment to the opinion of the majority at the given point of time. I have no commitment to the views of the electorate at a given point of time.. If an electorate in certain election 100% it is a theocratic party, which brings in legislation which

makes India into a theocratic country. Still the court have to hold against it. It is the court which has to say no the fundamental values are violated. What I am trying to tell you is that the way the majority response in a given point of time in history is not going to influence the judge in decision making process, if that happens then it is clearly a failure to meet the challenge of adjudication. Newer challenges are emerging it is up to the judicial institution to withstand the onslaught of these new challenges. Media is playing havoc into the lives of judges, the oath of fearlessness is at times, inroads are made into that oath. It is for the judge to be of stiff and prevent these inroads, only then there is a future for us for adjudication for judging as we see today. The burden is heavy on all of us. I mean the institution in general and the judges in particular to see that it is done. Well, I think I generally covered\ . Anything you want to discuss, then we can conclude. Another 10 minutes we'll have for discussion. Anything which you want me to comment.

Participant Judge- Sir, the Supreme Court in Yaquub's case, that a terrorist has got an extent the Attorney, sitting judge of the Supreme Court. Opinion. Just to ignore they said

Justice R. Basant- Ignore it with a contempt it deserves. I'll add. See in any decision making, is bound to retaliate. There may be half the people who will love the decision, and there may be half the people who will not. The possibility is that because of the fear what will you do? The fear cannot have any impact on your decision making, if for state to give you adequate protection, there will be a threat on that. It is very unfortunate that judicial decision making exposes you to a threat but that is no reason to deviate from the path that you have chosen for yourself. One minute he started, I'll come to you later.

Participant Judge- What is the role of a Zonal Judge at the high court. Like in Jharkhand we get different districts, judges who have come from the district courts will understand, What do I do and what not to do? It needs a lot of experience

Justice R. Basant- I know that I had been a district judge, we call it portfolio judge or judge in charge of the district, at some places it is called zonal or administrative judge. That judge is a lot big role to play in the administration of the district. Your district judge is the one who runs the district but you have the administrative control over that district. Normally I would think every Zonal judge or every portfolio judge must give due respect to the district judge in charge, very

important. The district judge there runs the show, you are there only to intervene when something goes wrong, you are there to supervise. The calendars of judges will come to you , you will be only seeing them, you'll be seeing their returns, the quantity of work, type of work they do, you have to make intelligent assessment of the work that they do. If somebody is not doing his work properly, you have to pull him up, means you have to advise and guide him , to council him, to ensure that the maximum output and quality output of work is demanded from him. And then all the administrative things that are there in the district, you'll be in charge of the district judge and the district judges, the other district judge is in charge, you have supervisory control over it. Basically what you do is, you ensure that there is no possibility of corruption administratively, you make sure that judges do turn out work, you must see that the judges sit for the entire working day. It is not like that aa I am not saying that you play aaa police and thief, that is not my intent. The portfolio judge is to ensure that the work in the district does on properly. Giving due space to the district judge and normally it his writ that should run in the district unless he is wrong. In which event you ought to interfere. Transfers, posting within the district are your domain, subject to each high court variations. You you write their confidential reports of the judges concerned, you counter sign the confidential report written by the district judge. Those are all your function broadly.

Participant Judge- and also for the that infrastructure is concerned

Justice R. Basant- yeah that again. you are suppose to look after the infrastructural requirements of your district. Speak to the chief justice, speak to the registrar. Like in some place the photocopy issuance is taking a lot of time. You can take it up with the registrar that one more photocopier be made available for that. Deployment of funds. All that , that way you are the monarch of that you are to survey in your district, subject of course to the district judge's guidance.

Participant Judge- Sir, boycotts and strikes are the greatest challenge for the judges these days. I think so. By the bar and strikes by the advocates

Justice R. Basant- What can you as an individual are suppose to do in that. well the system as a whole will have to meet this challenge. When the whole high court bar is going on strike what can you do? But I would always feel that judges are not as helpless as they think that they are. We are not as helpless as we think we are for example, in the state of Kerala you will found several strikes

but in many courts you have to rise by lunch or within one hour of their sitting. But judges who mean business, bar knows and there will be some arrangements there. This is very true, a lot depends on the personality of the judge. As somebody said, the best assurance for the quality of the judiciary is the assurance on the personality of the judge. Now supposing even if they are on strike, the court as a whole is not going to tolerate that and you will take matters and dispose off, those that can be disposed off otherwise on merit, those on default you will dispose them off. Now the problem is that the moment you come to know that strike is going to be there you started adjourning. Sometimes the bar does not turn up at all. A bail application he does not turn up at all and the you adjourn it. To give justice you will have to strategies. If genuinely one is not appearing please accept it, if deliberately please dismiss it

Participant Judge- referring to the comment of Justice Chinappa Reddy, he once said, a presiding officer in the court is sitting on a ferocious horse and if he gives the rope in the hands of the advocate, the less said the better

Justice R. Basant- Yeah right. The thing is that you are the master of the voyage, direction is fixed by you, the power is given by them. We need judges of good quality whether you select them through collegium or NJAC, whatever it is. We need judges of quality, judge who will comprehend quickly, we need such judges. Well I will not put any particular line for that.

Participant Judge- we have that habit of sitting up to 5, we are coming from the district judiciary. but in some matters particularly the old appeals no advocate is turning up. [Can you dismiss it for default] criminal appeals, civil appeal you can dismiss on default] but what is the ultimate justice which you are doing

Justice R. Basant- if you are indecisive and soft your work will never be over.

Participant Judge- we have come across so many cases sir, even the advocate files his own affidavit on the memorandum of facts. [Okay you will allow or the next judge will allow it] whoever it may be [Justice R. Basant- if the next judge allows it don't worry about it] yeah [Justice R. Basant- you allow it on cost] yes [Justice R. Basant- you insist on deposit] yes we are doing it.

Justice R. Basant- if think that it is being done then raise your cost. instead of 100 you say 50, 000. Do that otherwise you have to take it up in challenge, isn't it may be exaggerate. Believe me I am the lawyer today and I know the pulse of the lawyer. Which lawyer wants it to be disposed of and calls the party to file an affidavit. His reputation is at stake, we are assuming, my problem is that we think that we are not as powerless as we think we are. You can hold the realm and control the court.

Participant Judge- But I have come across such cases sir where advocates file their affidavits

Justice R. Basant- they file their affidavits, you say. No representation post it for final disposal tomorrow, tomorrow also no one then finally post it on so and so day, and then when he comes the next day with application, you know how to deal with him. We are not helpless, we think we are that is the problem with

Participant Judge- One more clarification sir, in criminal matters, suppose the dismiss is on non-prosecution, what is the remedy available to the person

Justice R. Basant- You should not dispose off on non-prosecution, having called for records, a revision cannot be disposed off on non-persecution. It is alien to our system of jurisprudence. Criminal Matters cannot be disposed off on default

Participant Judge- No in pour high court in Hyderabad the priority is they are dismissing on non-prosecution and then there is no remedy available in the CrPC. So they come under for being mentioned.

Justice R. Basant- If you don't have jurisdiction when it came for mention then how do you have jurisdiction, you will throw it away. Okay I think it is time we call it a day. Thank You very much. One last thing that I wanted to, wait one more thing. Those in the Kerala judiciary know what I am going to say, but I want to say that because, it is very important for me, it is our attitude to work which makes it, which decides. I keep repeating the story, 3 persons standing and cutting stones, under the very hot sun and the man went to the first one and asked him what are you doing, he got angry I am standing under the sun cutting stones, are you silly can't you see that I am cutting stones he said. He went to the next man he asks what are you doing, same work they were doing.

The second man said, you do not have any wife and children, you can walk around and ask foolish questions, I have to earn a livelihood, I have to maintain my wife and children and therefore I am earning the livelihood. He went to the third man and asked him what are you doing, and he said, I am building a cathedral. All of them were doing the same work, earning livelihood, supporting their families. But the third man's attitude was worth he said I am building a cathedral. Judge have the rare opportunity of building cathedrals of truth and justice, it is the attitude that matters, the way we look at work that matters. We are judges and lawyers who earn their livelihood, we are judges and lawyers who just conduct cases or dispose of cases. What we want is judges who do their work with sublime attitude that I am building a cathedral of truth and justice. That is what is important. If we have that transformation of mind set. I am sure that all these challenges in judging can easily be negotiated. Thank you very much

Paiker Nasir- Thank You so much sir it was a wonderful session, it was quite interactive. Thank you so much sir. Thank You everybody. Again we have a movie screening in the evening at 7 O' clock and that would be followed by dinner. Thank You so much sir.

SESSION 13

Judicial Persuasion of emerging trends (National & International)

Justice Kurian Joseph- shall we start now only, couple of our friends have to join but let them come, we will start. Good morning all of you. How many of you are 2015 judges and 16 aa I am sorry 14 14 , 16 is in the offerings, we are thinking about 16 so aa 13 ohh and still prior no. Mam you came from the bar or service? Okay okay. What were we discussing about yesterday? Rationality, objectivity okay what is the difference between rationality and objectivity, objectivity and reasonableness. Discard what is irrelevant and leave out the rest is rationality. What about reasonableness? How judgment be reasonable and rational? Reasonable is balance [Participant Judge- conclusion must be supported by reason] reason reasonable [Participant Judge-a reason in support of an issue] that is reasonableness. Aahh the societal norms should be reflected in the judgment which is in regards to the applicable law. You are from which high court? [Participant Judge- J& K] J& K right. There are 2 judge s from Delhi, aa there is a case on 277, unnatural offences. Haan right. The Delhi high court took a view and the Supreme Court took a different

different view. The Supreme Court said that it should be in connection with the social norms, on the where the society will look at it. But the Delhi high court took the view that the society should take a progressive view. What do you say about that? We are just analyzing that issue. [Participant Judge- what the Delhi high court said or the Supreme Court said?] Both because we are discussing about the judgments. That is right [Participant Judge- Delhi is a metropolitan city so the social norms would be totally different] that is right, that I something very peculiar to India, India is not India everywhere, the social norms, the conventions the approaches, attitudes, cultures they are totally different. So as you may have to have the contextual what you said something local situation where the law is interpreted and applied in the society when you thinking about the rational part of it. Well is rational and reasonable both the same. That why I asked you what could be the difference? We just started the lecture sir

Justice Santosh Hegde- well as far as I am concerned I have told the director that I have forgotten my law so I am here just to discuss certain things which are of great importance. Actually the delay in judgement which is likely to as sort of as bit people lose the confidence in the system itself. I don't know there are matters which have taken 16 years to be solved. I don't know how a matter can take 16 years to be resolved. VIP cases are coming like that like chief minister of Tamil Nadu's case people will lose faith in the system no one will be afraid of the punishment part of it. Take the case of former tele- communication minister Sukhram. The first court tried and convicted him for 10 years, the matter is pending in the Delhi high court, still. He was about 84 years when he was first convicted. We have to evolve a system not only VIP cases but all other cases also. Like judgment to one forum then to another appellate forum, then another forum, revisional forum, reviews, we have many forums to delay the proceedings. The other party certainly gains by the laws delays. If you don't find a source then there is a likely of extra constitutional bodies to come, who will say I will settle the dispute, you send it to me I will settle the dispute in this court. I think this is a very serious problem which we have to deal with. Of course the vacancies, I am told that huge vacancies are there they are filling it. But I spoke to a former judge in Delhi yesterday, he told me how do you fill up vacancies? There are about 65 vacancies in Allahabad high court but they do not have the rooms the chambers, no courts also. And we can't have all judicial benches, we need to have single judge benches also. We got to sit and do something about this otherwise, this is extremely, extremely difficult according to me. I told the director that I will not speak on any of the subjects that are here but I would like to speak about the dharma of writing judgments.

I mean I don't remember holding up a matter reserved for judgment for more than a month. That too one month means that the constitutional bench has to settle it between five judges. It is absolutely necessary that some sort of improvement in this should take place. That is a major problem today being faced by the judicial system. Of course one leads to another like, there are multiple judgments, reading of aa which one to follow rather. I was just reading a book or a paper from the law commission, but I think how matter bad the judgment you may think, the best way is to refer it to a larger bench rather than you decide and give it a contra- view and if at all it goes wrong in the high courts then each one will follow their own judgments. Many number of Supreme Court judgments on this on law of precedents. You may not agree with the judgment which is cited before you but if you aaa it is a coordinate bench you have to refer it to a larger bench, if it is a larger bench decision you may comment on it that I do not think that it is a correct principle but aaa certainly I will follow it and all. That is it. That should be the principle otherwise there will be no consistency in the decisions that are given. Well this is the major point and I want your view on it and how will you take it on yourself. I was just thinking to myself that why don't you reduce the number of appellate or divisional forums. There is an amendment to the criminal procedure code which doesn't allow a revision petition being filed you know but I can file any number of writ petitions under 227. The very objective of deleting the revisional provision is not adhered to aa deleting the revisional provision is not adhered to , I want to discuss this matter with you all. Though I was a judge for a short period of years but aa, I think it a great bit of service to the society specially the litigating section of the people. you cant do away with litigation whatever law you bring in the litigation will always be there. The question will be decided in the forum which is constituted centuries back by all independent people deciding the disputes between to parties. Yes brother.

Justice Kurian Joseph- In fact a good start. I started with reasonableness and rationality in judgment so aaa we will just have a aa bit of a discussion as to this issue. What is the time you take after you have reserved the judgment normally. What is the time you are requires as per the Supreme Court judgment.

Participant Judge- As per the Supreme Court judgment it is 3 months

And if you are not able to disburse it in 3 months the layers has the right for rehearing and you have a duty to re-post it also. From your experience have you come across a situation where you

are not to deliver it in a month. [Participant Judge- no at all sir, in a week delivering] no within a week? [Participant Judge- yes sir]

Justice Santosh Hegde- weak means all your judgments or aaa

Participant Judge- no no only exceptional matters very complicated matters we reserve, so far in my case I have reserved only one matter in one month.

Justice Kurian Joseph- let me ask one blunt question, why do we reserve the judgment, why do we not dictate the judgment soon after the hearing is over . I am just asking why? What do we aa what is the reason behind our reserving the judgment. Kindly switch on the mike.

Participant Judge- at time it happens my lord that the systems rendered by the council is not up to the mark and despite your best effort you have to apply your mind to look into the factual as well as legal background of the case.

Justice Kurian Joseph- This this my brother is speaking about the ideal situation where the people are required to get assistance in the case, where you have to decide an important question of law. Facts are there aaa it is an ideal situation , what my brother Walia said a speak out . But non-ideal situations makes judgments reserved. It is like open sharing.

Justice Santosh Hegde- I I like to add to what my lord said. How long does it take for you to prepare a case when to argue when you were a lawyer? Still give me an idea.

Participant Judge- If it is a second appeal, then one hour

Justice Santosh Hegde- then even if there is no assistance from the bar it should not take more then that much time for you to decide the case.

Participant Judge- As a lawyer you have drafted the petition, you are aware of the factual background, you have made the research and then you have prepared the case. When you have prepared the case, hearing it when arguing the matter not taking much time. But there is a situation where you are faced with numerous situations but not one. You may have a roaster with 100 or 150 cases a day and in that situation to expect that we would be aaa

Justice Santosh Hegde- No no sorry for interrupting. I was only trying to say you, are not reserving all the judgments, it is only when there is no assistance from the bar you reserve it. I agree with

that. But when you reserve the judgment most of you have to dictate it, there is a lot of pressure on you to prepare the judgment. [Invariably it is that decide the matter then and there] yeah, what about the reserved judgment, how long will it take [Participant Judge- how long will it take for] how long because you did not get any assistance from the bar. [Participant Judge-it depends my lord what is the daily pressure of work. Suppose the volume of work is very high and say there are about 100 or 120 cases listed a day then in those situation] you don't take 120 cases a day, that ways Supreme Court has to handle 84 cases on Monday. Of course the bar was not very happy because we have to read and come and we did not gave them any porosity to argue, no merit in the case. That is not the way of looking at it. But if you listen to lawyers all the time then I think the whole week will not be enough to dispose of 80-84 matters. [no 84 -85 matters I am not talking about] no I am just saying that apart from other matters on Monday, normally the Supreme Court has 80-85 matters listed a day. So we have to read on Friday night Saturday night, Sunday and go prepared for the cases of the whole week. Where there is a way there is away out I am sure. Because we did not find any difficulty in delivering the judgment in a week even the constitutional matter. Why I am saying this is because this is the one which is really really aa attacking the very roots of the judicial system. The matter has to be there in the trial court for 15 years, then he goes to the first appellate court to the second appellate court, then he goes to the Supreme Court. Why is the litigation increasing, because a party gets benefits because the matter is being delayed? The litigation has increased so much now, I know in the 70's 60's Supreme Court used to have 6,000 cases a year and now it is aaaa 40 yeah it is because the people what to litigate and there is somebody who wants to gain from it, the litigation. In Bombay I am told that aa there are outside people who have prepare to vacate tenants, they have to borrow to repay money. I am told that even banks are using that practice. It is all because of the fact that the judicial system is not a very adequate system, unless we change it

Justice Kurian Joseph- Sir I just thought of analyzing the reasons. One reason is a a this is not an ideal situation where you think that you have not got the sufficient assistance from the both sides. But that also contains an important question of law that needs to be researched and ideal situation. A good judgment needs to aaa from conviction that needs to be aaa good decision on point that needs to be what do you call it, needs to be researched. I am asking because unless we analyze the reasons why we are delaying the judgments we are not going to get out from that. So this is one reason, so we need assistance we go and take . so another reason can be there can be certain

appeals. so another reason can be that there may be certain appeals, civil appeals or criminal appeals which require a lot of evidence, lot of factual situation for which we have to go through evidence say 100 witness in a case. And that happens when we take up 4 or 5 appeals every day for hearing. Normally short matters we dictate in the open . But there are matters wherein they argue on law points but we want to make sure to ourselves after going through the entire evidence. And suppose we reserve say 4 cases a day probably we will be able to give dictation on a a single matter the next day , so that takes up , so we try to complete within one month

Justice Kurian Joseph- this is second ideal situation. this comes in regular appeals particularly in second appeals , whether it should go also in second appeal you are only on substantial question of law only But 1 question that is invariably framed in every court whether the finding is perverse. But in any case in first appeal this issue arise. Particularity in first appeal of criminal matter of conviction or even acquittal also. But don't you ask those lawyers to refer those facts and take you to those areas where they want to highlight and where you also have the sixth sense that something has gone wrong, do you not ask the lawyers

Participant Judge- we do ask them in the beginning what point in issue you tell because they start of that my arguments are not prepared in certain situation in which you want a lot of time.

Justice Kurian Joseph-so this is the third situation that happens that the lawyers they come and do the preparation when they argue. This is another trend that is in. The lawyers do not come prepared and you have to justice to your time and you want the lawyers to study with you and then find out a solution. There is nobody left in the court because you ask the lawyers and he opens his brief and he start reading.

Participant Judge-they will read the convenient portion

Justice Kurian Joseph-Right right, you did not hear my lord asking you, if they are using only the convenient portion what is the opposite side doing.

Justice Santosh Hegde- ultimately the blame will be on the institution that nothing happens there.

Participant Judge- the delay will be generally in first appeals and criminal first appeals, second appeal criminal revisions, they won't , seldom we keep it. Only first appeal civil and criminal where aa

Justice Kurian Joseph- in first appeal civil you will have a private lawyer at the other side. I am asking, first appeal against conviction, who will be on the other side, who will be on other side?

Participant Judge- but in criminal appeal what we find is

Justice Kurian Joseph-Are you happy with the way you get the assistance from the prosecution side.

Participant Judge- no it is better that we read the evidence.

Justice Santosh Hegde- how many matters do you take

Participant Judge-for criminal matters 2 or 3 matters a day

Justice Santosh Hegde- okay you complete one and then you go to the next one

Participant Judge-yes sir

So three appeals is a very good rate of disposal according to me. But then the question is why there is so much of arrears in the

Participant Judge-it is a great burden for the prosecutor to prepare for all the matters because merely 25-30 matters would have been listed on board each day the council has to go through each matter because he doesn't know which matter would be taken and in which matter the adjournment is to be given. So he has to apply his mind in all the matters.

Justice Santosh Hegde-But I am sure there are more than one prosecutor in the high court, even in the criminal side. There may be one special prosecutor but there are assistance prosecutors and it is not that all the matters on the board are taken up by one lawyer only.

Participant Judge- there is another problem in legal aid matters there is virtually no assistance.

Justice Santosh Hegde-I appreciate your problem the assistance from the bar is not that good as you expect it. But again the burden is on you. you need to find a system in everybody's court by which quick disposal is necessary. All this concept of justice hurried is justice buried. I think justice delayed is justice denied. I am sincerely concerned about the institutional integrity in the litigating people.

Justice Kurian Joseph-Let me ask know, we have got 2 reasons now, one is the lawyer's assistance, then the voluminous nature of the facts and third we found the legal aid council, not giving you assistance but still you have to render a judgment. As my lord pointed out that even if you render a bad judgment, nobody would say it that it was because of the lack of assistance. They will only say that poor judge he is not worth to be in the high court but unfortunately here is there and you have to suffer. So ultimately you have to take up the burden to own up your judgment, you can't put the burden on anybody else. These are the ideal situations I am asking about the any other non-ideal situation haan. Let me ask a question which is easier reserving a judgment or dictating a judgment in open court as a judge. I am asking about the ideal because there is presence of lawyers. I am asking about the ease of the judge while doing the work.

Participant Judge-Open court it is easier.

Justice Kurian Joseph-Sister Sehgal from Delhi court says that she is more comfortable when she reserve the judgment. Just to share our experience.

Participant Judge-When you reserve it you have more time , you are actually see into the judgments that have been referred by the council. You can have more insight to it. That is my personal view.

Justice Kurian Joseph-For better coition and better dictation etc. It is always ideal to have the judgment reserved. Rather than the open dictation.

Participant Judge-My lord in open court dictation if legal point is very clear then we can go ahead because, by reserving a judgment we get both the sides what could be the law and what is the law. it is to be determined in the chamber after looking in the legal process.

Justice Santosh Hegde- High court I don't find an area which is still open aa which is not covered by the judgment of the Supreme Court by now. I mean to do research work in that and to write a thesis is one thing but to deliver judgment is another thing altogether. You are bound to follow the decision of the Supreme Court if the lawyers do not cite on that point then there are any number of books are there you can easily find out that judgment you don't need that much of research in that. But if you want to write thesis then it is entirely a different matter altogether.

Justice Kurian Joseph- a judge feels that he should have the maximum number of reported judgement so. Well you must think of a human place of a trying to get the judgment, he is not bothered about your master piece actually he wants to know why he has a case or does not have a case. That's all what he wants. So for our own this is a selfish issue, this has element of selfishness in it. But then you may ask a question so therefore a somebody asks how many reported judgments you have. Well at the time of your confirmation, aa these are the types of question asked this was a question in the NJAC hearing also. The argument was it is not a question of reported judgement but disposal of case. There are several facts to it. So ideally to me if you don't want to aaa prolong this particular area much more, you should be in a position to say which is the judgement on which there is no binding precedent and which is the judgment which needs further elucidation on aa law , on which you are convinced that 2 views are possible and the view which you feel the best and the most correct in the law, should be laid down. So except these 2 situations I don't think that you must lay your hand on every judgment to be reportable judgment. And there are cases covered. Let me ask one ancillary question, I have saw several judgments, this case has been covered by so and so, dismissed. What do you say about such judgment. It is a 30 second judgment, this issue is covered by so and so, dismissed, covered against the petitioner so dismissed. I don't see even if against word is covered and what would this poor man getting the judgment.

Justice Santosh Hegde- after the Supreme Court what the poor man can do, there is no other forum where he can reach. At least in other forum he can say I will go to the Supreme Court.

Justice Kurian Joseph-Sir, I am just asking about the methodology, covered is covered, I mean should we not say what the case is and how it is covered and dismissed. At least in 4 sentences, at least in hearing matters, final hearing. particularly on 226, writ petitions being disposed like this so ideally I feel that this is a case on this issue, this issue has been discussed and decided by the

supreme court in this case and it is held against you or the issue involved is this , this stands covered by this judgment, At least 2 3 sentences.

Participant Judge-there has to be some reasons because reasons are the links to the conclusions and the material on which they are based and that would entitle the person to know as to on what basis it has been decided. To the common man who has come there he doesn't know, so some reasoning has to be given.

Justice Kurian Joseph-That is right, so on this issue what we conclude is this, on a issue which is wholly covered you don't have to discuss the pleadings and submissions and finally say that I find that there is a binding judgment and this is dismissed, no use in wasting your time and stationary, patience of the poor client also. But just say that what are the issue they are covered in favor or against, number 1. Number2, unless there are compelling reasons to write a masterpiece judgement on issue which is not covered or issue which a different look is possible in view of a subsequent judgment of the Supreme Court or of your own high court. Three, how much time you take to deliver the judgment which is already pronounced. You pronounce the judgment but you have still not released because you think some correction are to be gone into. Ones you sign okay. Justice Santosh Hegde- Have you given any death sentence

Participant Judge-No

Justice Santosh Hegde- That is what happened in the Supreme Court when I was sitting, your Allahabad gave a death sentence the high court reduced it to life imprisonment on the ground that when the matter is ending in the high court for 2 years only, only 2 years, the matter came upon to the Supreme Court and I was sitting with Justice Kadri aaa I was junior judge and he asked me to write the judgment and I announced the sentence to death sentence okay. A week later later there was another bench where a 7 year old girl raped and murdered trial court gave death sentence, the high court acquitted on the benefit of doubt and all, the matter came before the division bench, the division bench asked the respondent counsel, we are going to allow the appeal what sentence would you think would be appropriate and he pleaded don't give death sentence, pat came the reply from one of the judges, are we Justice Hegde. I don't have any religious this thing, if you are there you have taken oath to deliver justice in accordance with law and if the 3 concepts laid

down by the Supreme Court is good enough rarest of the rare cases, I think that deserves a death sentence because all these human rights activism is not correct, because what happens to the rights of the victim, you have reduced it to practically to 95% of the cases you can't give death sentence but if in those cases if you think that there should be no death sentence, I think it is not the way

Justice Kurian Joseph- Yeah, what brother said is the situation where without any discussion at all the trial court says that rarest of the rare case. SO after the conviction, and after hearing on the sentence without any discussion on the aggravating or mitigating factors and taking it has rarest of the rare case. Just to add on what the brother said, in case of a warranting case situation, but your duty is on arriving at and distinguishing it as a case where finality, death and nothing but death would be the difficulty of punishment

Justice Santosh Hegde-the Supreme Court has laid down this only. But there are some cases which come within this thing, where your thinking should be not be that I will not give death sentence.

Justice Kurian Joseph- It is not a question of your personal philosophy but you have a duty why, there is a confirmation of death sentence by the high court, what is the reason behind that. It is not an appeal it's a confirmation why? There is a reason behind it. Analyze because the high court is also in division, it is not in single bench. A division bench has to consult whether the sentence awarded is just and proper and correct and it is a situation where it is rarest of rare case warranting nothing but death. This is actually the sentencing portion as far as the death reference is concerned. Because ultimately you have reached that conclusion and there will be many cases that will fit in. And we have taken a oath that without any fear and so and we will uphold the constitution and the laws. SO when that is there so, penalty prescribed under law we have to uphold the law. It is a situation warranting its application. So ideally on this also we conclude, one by one. Ideally to avoid or rather to reduce the delay it would be better if we have some grip, because we always ask our subordinate judiciary, go and prepare, have your case management, have ideas have your own what they call aaaa scheme with regard to number of cases, type of cases, how do you decide what is the type of case. So some reading of the file before you go to the court on a final hearing matter. I know many judges saying that don't read final hearing at all because you will be pre-judge, you won't allow the lawyer to argue, gone are those days for the only reason of

pendency. The long delay we are not actually serving to the interest of the lawyers who would be getting their clients also with them, they won't get their fees unless argue for 7 days or even 1 day, the poor man will not give the lawyers the fees. As my lord put it, you are in control of the court. So if we are in control of the situation, we should have the confidence as far as facts are concerned and we should also be convinced that this is the law applicable. Your confidence level would be very high if you have grip on the facts and the principle applicable in the case. So 19 of present here just have a reading of the files before we go for the hearing, so that we save lot of time and you will be in a position to guide the lawyer, if not take the lawyer. Any other member would like to say anything on the delay part.

Participant Judge- Sir, my view frequent roaster system is also delaying the system.

Justice Kurian Joseph- we discussed it in the chief justices meeting also, because there was time were aa there were 2 things aa lines of approach, one was that the judge should be made trained because he must know but aa those days are gone now, they are all become spare parts specialization now. Now specializations have come in. So in recruitment policy also there is another argument that, we must recruit judges specialized areas like- tax, criminal, pure civil, IPR. So if we have a specialist in that area, why because if we have among us there are a few who will be master of this subject before whom the lawyers will not dare to argue irrelevant things and the judges will have grip on the subject also, I think this is something which we will certainly in the chief justice conference. Any other thing on the practical point of view. So please don't delay the release of the judgment, ones you have pronounced you don't have the right to keep, it is illegal and immoral. On both accounts never keep the judgments which are already pronounced. And third have some preparation before you go to the court. Well how many of you have felt that here is a compelling need of distinguishing and then writing your judgment. That is also one area my lord just referred incidentally.

Justice Santosh Hegde- The area available to distinguish superior court judgment I think is hardly any. It may be totally wrong, but you are always bound by it.

Justice Kurian Joseph- they always ask this question on this forum, that if there are 2 judgments of the supreme court, which one to choose

Justice Santosh Hegde-Of course that is left to your this thing which on etc choose, both are coordinate bench judgment. But there are ways to find out which aaa

Justice Kurian Joseph- one way is if the earlier one has relied on the constitutional bench judgment and the later one is that which has not referred to that on this also I don't think anymore lecture is required, ample guidelines are also there.

Justice Santosh Hegde-And the tendency to repeat more and more judgements which could be covered by one citation should also be avoided.

Justice Kurian Joseph- I agree that in a judgment if on a issue, if you read aa Justice Sinha's judgment it is thesis of a subject. So my Lord is asking just lay hand on those 2 judgment and say that all the previous judgments have been discussed in it. I used to follow that, I write short judgments. NJAC also mine is the shortest judgment I have written 30 or 32 pages only because I don't find any reason to repeat whatever has been said already. And on this aspect also I always follow the latest judgment or the judgment which has discussed all the earlier judgments and then leave the judgment there. To me I will always say that to write a short judgment is more difficult to write a long judgment

Participant Judge-Sir, in all cases we need not mention all judgments, we can decide on facts, no judgement is required.

Justice Kurian Joseph- Problem is you are referred as a good judge unless you refer couple of judgments. This is the problem a judge should be in a position to analyze the facts and decide on first principles. To me I will rate the judge very high because he has a pure thought

Justice Santosh Hegde-There is judgment of the Supreme Court aaa in Zee TV v. the BCCI, whether the BCCI whether it is a state or not. Read and see how the 2 judgments referred differ

Justice Kurian Joseph- So aa these are also situation which you have to aware of also. Well I think that those days are fading away, you will not be rated on account of the mastery of the judgments you have referred. But a judge should be rated by his rational thinking and his right approaches and his ability to aaa dedicate the principles of law on the judgment. But at the same time, this is

a balancing view. But there are judgments which are binding on you, your wisdom says that you have to follow it.

Justice Santosh Hegde- In Karnataka, long time back, a judge said that these are days of dalda, no more ghee days. You have to take in consideration that quickness required in delivering justice. We have to think in terms of what is that a client waits for. It is not the reasoning, he wants his case to be disposed of in the best manner possible. Otherwise it is a very difficult thing. 7 lakhs cases in one court. You said that your disposal is more than you're filing and you have still 8 vacancies in that court.

Participant Judge- My lord in Lucknow 2 lakhs cases pending and a total 9 lakhs pending in Allahabad high court. But construction of new building some increase in disposal will have.

Justice Kurian Joseph- Another thing is that the other factors in the court should not affect you, like the body language of the lawyers etc. See now you are certainly in a position to see beyond that

Justice Santosh Hegde- Actually you are judge in a case and not should you bother about the person and manner in which he present it. Any expression which indicates your mind or which indicates your likes and dislikes leaves a bad taste.

Justice Kurian Joseph- And in the written judgment also. I asked you about the rationality and reasonableness . See never write something in the judgment that will have repercussion on somebody else. We are dealing with a cause before us and not a cause beyond that. So let have the maturity , you should have that sense of fairness in your mind that your own words are going to affect somebody else either directly or indirectly. The quality of the judgement depends on this factor as well that you are in a position to limit yourself in the cause you are dealing with and the case before you. And there is more on recusal, was that discussed?

Participant Judge-No sir

Justice Kurian Joseph- Why do you recuse from the hearing of a case or when do you recuse from the hearing of the case

Participant Judge-someone related is there

Justice Kurian Joseph- someone means the person in the petitioner or the lawyer

Participant Judge-both ways

Justice Kurian Joseph- if the petitioner or lawyer is related you recuse them

Justice Santosh Hegde- That is no such thing, you are a judge and the other person is also a judge, there is no senior junior.

Justice Kurian Joseph- in the NJAC I have 2 parts. When I got to see the other side of the coin, I dealt with those aspects also and I found that there are certain situations where people recuse for other reasons as well as what my lord said. There are areas where you might be very happy with the roster. I just found that these are the few reasons. Case being very old, involving several considerations of law, time consuming, judges are not happy with the roster, judge getting unduly sensitive of his public perception of his image. I knew a judge who will not take any sensitive issue because he does not want his image to be affected by his decision by one way or the other. These are some of the areas where the judges are recusing from the hearing. What's our oath, you remember- without fear or favor or ill-will. So do justice to our oath. Some judges read out their oath everyday before going to the court, there is no harm if they know it by heart also. Just be a conscious judge and think that we are dealing with real life situations and if you substitute yourself in that, the person is trying for justice. So these are the areas which I thought of discussing.

Participant Judge-Sir one doubt, suppose if I feel that in a given case if somebody has approached you which I don't want to disclose, I want to recuse, is better that I should give a reason for that on record?

Justice Santosh Hegde- You not necessarily give reasons for recussing, you are the presiding officer. Whatever may be the reason, need not express your reason because it might embarrass some party or the other. But there are people who feel that in such cases should not recuse. They say let's hear the case, if it is in favor of the person who approached you then they'll say that since

he has approached you they'll send it to another bench. Otherwise, dismiss it so that he knows that every after approaching he will not get for it. There are many ways of looking at it but your conscience should say that whether you are going to deliver justice. One more thing I would like to say that don't venture to write more than that which is not necessary.

Participant Judge- Sir don't know whether I can ask this question or not. In most of the division benches, I come across the appeal filed against a single judge's order. The senior judges venture upon or comment upon the person, the judge. Is it fair? While deciding the appeal whether they can comment on the learned single judge.

Justice Santosh Hegde- That is not to be done. You are deciding a issue, not a person

Justice Kurian Joseph- And division benches shall never do it. There may be situation warranting some sort of a mending as far as subordinate judiciary is concerned but even then you cannot use a judgment in commenting on him in the judgment but referring it to the judicial academy and the judicial academy will take care of that. That is apart from the judgment not in the judgement. Judgment is a holy document which shall never be used for setting scores.

Participant Judge- I personally feel that if in open court he comments

Justice Santosh Hegde- No no open court or otherwise, according to me

Justice Kurian Joseph- I found a very apparent situation when I left the particular high court and the successor also made comments in the open court as to how I have been dealing with the petitions also. I just *chod do*, this also shows your immaturity because you are not an appellate judge that way and you are not a headmaster of a primary school. You are all judges of the constitutional court. As my lord rightly said that there is no question of junior or senior we call is presiding judge, brother judge. But otherwise we have all taken the same oath, we have the same constitutional privileges, rights and constitutional obligations also. There is no question of this way or that way. But let's at least ourselves form a view that we shall never ever make an adverse remark on the judge who wrote the judgment, unless you are so convinced and even when you are convinced of the conduct of the trial court judge. To me I think you should do it separately not as part of the judgment. I don't know what could be the observation of my lord on this.

Justice Santosh Hegde- First of all if it is of the same high court, never ever this thing. If you have found a sub-ordinate court judge has been persistently committing the same mistake for given reasons or what ever then I think you have to him on the right track. We should be very very careful over the use of words also.

Justice Kurian Joseph- that will in fact decide the destiny of that person. What could have bene the situation if that would have been used against me, one must think of that. So it has been treated differently that both of us have aa that you can refer it to the chief justice and who will inj tern will take it to the judicial academy. We have well set judicial academies now. So there the person can be called individually or even can be put in training on this issue and then given a personal correction also. But b=never ever do it, if you do it on the judicial side, you will never mend these ways I am sure about it, you are only going to toughen his stand because he has a feeling of hurt.

Participant Judge-Is it advisable to refer it to a mediation center in a case for settlement

Justice Kurian Joseph- Why not

Participant Judge-No because now the mediation centers are working, so

Justice Kurian Joseph- Cases where you feel that there are chances of settlement and in which you are able to pursue. Now lawyers will never agree. So you have to pursue them to take a chance because mediation, you can't refer unless both sides say. Conciliation you can do, arbitration and mediation unless both sides come you can't do it on your own. So the willingness should come from both sides, you can't thrust it upon them. But in mediation under section 19 when you have the right to see what the case is and what the areas or difference are and then you can put it to the lawyers consent and can ask them , just for the possibility of the amicable settlement. This is where the art of the judge is. A lawyer by himself will never do it but if you are able to just persuade him on this issue there lies

Participant Judge-In family matters

Justice Kurian Joseph- Yeah 100% because in family matters there is no question of husband winning or wife losing or the converse also and when there is a situation where one party winning

and another party losing that means the matrimony is lost. Ideally it should be a case of both sides winning. One side winning and one side losing that means the matrimony is lost. We'll go for tea now. Anything else or generally you would like to have a some sort of aa

Participant Judge- Discussion can go on my lord we can have tea here.

Justice Kurian Joseph- Side also or if you want to just move out and come. Just move out for 5 minutes.

SESSION 14

How to reconcile conflicting opinions

Justice Kurian Joseph- Shall we begin now, aa you don't require Justice KSP Radhakrishnan's introduction. Non to us all a judge in the aa senior judge in Kerala also. From there the lordship when the chief justice Kashmir first and then to Gujarat haan Jammu and Kashmir, there is a judge from J& K Walia is there. And t5hen Gujarat and then to Supreme Court. Presently, the lordship is looking after the road safety, couple of report shave already been submitted and you have seen the important and sensational matters, always dealt with by Justice KSP Radhakrishnana. And we are going to have a very interesting session on how to reconcile the conflicting opinions. Sitting in Supreme Court this is always a very difficult task aa for the judge in Supreme Court to consult the conflicting views. SO that experience will certainly take us a long way. Over to Justice

Justice KSP Radhakrishnan- so today's session, we have to reconcile aa conflicting opinions all of us sitting here. We have been provided with the report of the law commission, that is of aa 1990. I was going through the law commission report of 1990 basically deals with the conflicting judgments given by the various high court for central law. So there is s lot of difficulty for central government. Suppose one High Court interprets a particular provision as central act in a a particular fashion, another High Court on a a different aspect. The central govt, really in a fix which judgment to follow. It is not possible for the central govt. or the aggrieved persons to take all the matters to the Supreme Court due to various reasons. Suppose 1 judgment of the High Court for Eg- Karnataka High Court not obeyed by the central govt they can call up for contempt. Diametrical opposite view might have been taken by Kerala or Gujarat or some other High Court. They are to which High Court they have to follow. On same question of law different directions

are issued by the High Court. So this is a very serious issue so far the central govts. are concerned. So how to resolve this issue because several High Courts are interpreting a different provision for the central act. Now certainly it will be referred to law commission as to how to resolve this issue. One of the repeated solution is that to bring a legislation that will clarify the judgment so that uniformity in the interpretation of a particular provision of the central statute. Another is to take it to the Supreme Court so that it is binding on all the High Courts. So that was basically the task of the law commission. And the law commission in its concluding part has indicated in Chapter 5, at 5.1. Commission is of the considered opinion that the anomaly and incongruity on account of the identical provisions of the identical Central Laws being construed as having one meaning in some parts India and the same having different meanings in the other parts of India, by reason of the conflict of views of the different High Courts, needs to be straightened out for the sake of achieving uniformity in the interpretation and application of Central Laws throughout India, and for the sake of ensuring equality before law in this area, 2 steps deserves to be taken:- (1) Removal of existing conflicts by legislative measures calculated to clarify the law by appropriate amendments in a phased manner, and (2) To devise a Mechanism to ensure that no such conflicts come into existence or remain unresolved in future so as to obviate the need for legislative amendments in future. So this was the recommendation of the law commission but we are not concerned with this kind of an issue of course this can be done either, resolved only by taking the matter to the Supreme Court or by a legislative exercise, let it be like that. Now we are now concerned with a very very important aspect which is of seriously concern to not only to the High Court, to the Supreme Court as well continuous difficulty for the subordinate courts because they are faced with large number of decisions may be by High Court which is binding on them, and Supreme Court judgments also. Conflicting judgments of the Supreme Court. At times the High Court or subordinate courts find it difficult as to which judgment to follow, which ratio of the decision to be followed. So that is absolutely a necessary because in many a cases there are a lot of instances where the subordinate court applies judgement of the Supreme Court or High Court and decide the issue finally an appeal might have been taken, and there is a wrong decision taken, there is a contra- view taken by the another High Court or Supreme Court. Ultimately justice suffers, parties to the litigations suffers in some, probably not being able to take the matter to the High Court or Supreme Court. So there is lot of injustice done to the litigant public because of the conflicting views of various benches of the High Courts as well as the

Supreme Court. Now I would like to highlight 3 principles. Some basic principles, I just refer just for your this thing. Now we have to follow the precedents that is the law. So far as constitution is concerned there is Article 141, which says that Law declared by Supreme Court to be binding on all courts The law declared by the Supreme Court shall be binding on all courts within the territory of India. That is the constitutional provision. Now the difficulty arises what is the law declared by the Supreme Court, that we will discuss after sometime. Now, we do not find a similar provision, in the constitution with regard to the high courts are concerned. Article 141 confirms power only to the Supreme Court. There is no similar provision conferring the power to the high courts. The Supreme Court in 1 judgment 1962 SC 1893, East India Commercial Co., Ltd. ... vs The Collector Of Customs, on 4 May, 1962 AIR 1893, whereas the Supreme Court has interpreted Articles 215, 226, 227. 227 has given general superintendence power to the high court so far as the subordinate courts are concerned. Interpreting these 3 provisions, even though there is no provision like Article 141 in the constitution like conferring right on the high court. Supreme Court by a judicial pronouncement has held as follows, I'll just read the Supreme Court's judgement. After interpreting Article, 215, 216 and 227, it is implicit in the power of supervision 227 gives supervisory power to the high, it is implicit in the power conferred on superior tribunal that all tribunals under its supervision should confirm to the law lay down by it. Such obedience would also be conducive to the smooth working otherwise, there will be confusion in the administration of law and respect for law would be there to suffer. We therefore, hold, this is very important sentence, we therefore hold the law declared by the highest court in the state is binding on authorities or tribunals under its jurisdiction. So even though there is this similar provision like 141 in the constitution conferring power in the high court by judicial pronouncement the high court has granted the same power which confer on the Supreme Court under 141 to the high court also. That is why this judgment is very very important judgment that gives considerable power to the court. There is another gamification on this aaa ruling of the Supreme Court. Law declared by the highest court in the state, that is the high court, is binding an authority to the tribunals in a supervisions. So this is aa, while doing supervisory jurisdiction also the high court can give appropriate directions. That is why when we discuss this matter in state academies, we try to interpret Supreme Court and high court judgments because often the judicial officers raise this questions as to sir which judgement has to be followed. So this is a common issue which is to discussed in various state academies. In Kerala of course we have had a lot of occasion to consider

this issue also. But I have not across the judgments at that time, I only come across only reasoning. So this is very interesting judgment. So, we are placed in a situation where, the high court has got the similar power, just like the Supreme Court with regard to the declaration of law. The difficulty arise elsewhere, that I will discuss later. Now this is regarding, Article 141 and the decision that I referred to has to be are in mind. Now, the real difficulty , now it comes. Suppose, there are conflicts within the bench, Conflict between the benches we will discuss later. We are at the first we will consider on the question of, suppose there is conflict within the bench. The classic example is the Kesavananda Bharti's case, the 13 Judges bench judgement, 7:6, the basic structure, which says that the constitution, the parliament cannot amend the basic structure of the constitution through a majority of 7:6, that is the law now. So there is a lot of aaa all the 13 judges wrote judgments in this case. Ultimately, it is narrowed down, it was difficult to find out who was supporting which view and who is against a particular view. It was narrowed down and 7:6 on this principle , majority view was there that parliament has got aaa cannot amend the basic structure of the constitution. If you read the judgement you will find many conflicting views within the bench, not views between the benches but within the bench. There is one judgement you have to go through. Then there is another classic judgement which is often quoted in various platform of the dissenting judgment of Justice H.R. Khanna, that Habeas Corpus case, I can give citation, Additional District Magistrate, ... vs S. S. Shukla Etc. AIR 1976 SC 1207. Where, long dissenting view is of Justice H.R. Khanna, interpreting Article 21, I will just read the words of words of Justice H.R. Khanna as it is, aa he lost his Chief Justice Of India ship because of this view, but this what he said which is very important, the power under Article was taken away under emergency. Interpreting Article 21 even if it was taken away at that time. [Article 21](#) cannot be considered to be the role repository of the right to life and personal liberty. The right to life and personal liberty is the most decisions right of human beings in civilized societies governed by the rule of law. [266 F. 302 H] Sanctity of life and liberty was not something new when the Constitution was drafted. It represented a facet of higher values which mankind began to cherish in its, evolution from a state of tooth and claw to a civilized existence. The principle that no one shall be deprived of his life and liberty without the authority of law was not the gift of the Constitution. It was a necessary corollary of the concept relating to the sanctity of life and liberty, it existed and was in force before the coming into force of the Constitution. [268 C-D] Even in the absence of [Art. 21](#) in the Constitution, the State has got no power to deprive a person of his life or

liberty without the authority of law. That is the essential postulate and basic assumption of the Rule of Law and not of men in all civilized nations. Without such sanctity of life and liberty, the distinction between a Lawless society and one governed by laws would cease to have any meaning. the principle that no one shall be deprived of his life or liberty without the authority of law is rooted in the consideration that life and liberty are priceless possessions which cannot be made the plaything of individual whim and caprice and that any act which has the effect of tampering with life and liberty must receive substance from and sanction of the laws of the land. [Article 21](#) incorporates an essential aspect of that principle and makes it part of the Fundamental Rights guaranteed in part III of the Constitution. It does not, however, follow from the above that if [Art. 21](#) had not been drafted and inserted in Part III, in that even would have been permissible for the State to deprive a person of his life or liberty without the authority of law. There are no case, to show that before the coming into force of the Constitution or in countries under Rule of Law where there is no provision corresponding to [Art. 21](#), a claim was ever sustained by the court, that the State can deprive a person of his life or liberty without the authority of law. So ultimately the dissenting view was found to be correct through the 44th constitutional amendment. There are many conflicting views between judges on various issues. I need to highlight that, aspect that is why I referred to Khanna's judgement as well as Kesavananda Bharti's judgement. In =case of conflict between 2 judgments, the latter decision should be followed, that is one view, by high court as well as sub-ordinate courts. Suppose there are conflicts between 2 judgments of the high courts, the subordinate court can follow the latter judgment. There are suppose conflict between co-equal bench, it is very important or the Supreme Court, the high court has to follow the latter judgment that i s one view. the second view is that if there is a conflict between 2 judgments of co-equal bench, the earlier in time is to be followed, that is the second view. The third view is that if there is a conflict between the co-equal bench of the Supreme Court or the high court, the one judicial bench which is more accurate, more appealing should be followed. There are judgments that support all the views. With regard to the second principle that we have to follow subsequent, we have to follow the earlier judgment. Now I will deal with the second principle first. That is whether you have to follow the earlier judgment or latter judgement. I have taken the second principle first because of one reason. I must confess that in one judgement I made up a mistake so I was honest to my mistake. In Sandeep Kumar Bafna's case, that is a interesting case where a person in Bombay aaa in Bombay a multi-storied building was collapsed because of the defect in

the construction. About nearly 40 persons died. The cause was that the person on the ground floor made many modifications and therefore there was no sufficient strength on the building so it was collapsed. So he was arrested, the litigation is going on even now. The one question that was raised was, he filed application for bail, not in subordinate court but in the Bombay high court. The high court rejected the bail application on the ground that you cannot approach directly to the Bombay high court, you have to go to subordinate court. He surrendered before the high court, still the bail was rejected. So the matter was taken up before the Supreme Court. It came before us. So one of the argument raised before us was, if one of the person surrenders before any court in the country, court can record his surrender and release. If appropriate case, can release him also. That was one of the argument raised. And the case is he surrendered in the same state, not in the subordinate court but in the high court. So how to resolve this issue, so the arguments were raised from either sides. The high court must ask him to go to the subordinate court for bail and he must surrender before the magistrate not the high court. So one argument was raised that he can before the high court also. The matter came before us there were 2 judgments of the Supreme Court, all were of 3 judges bench. The first judgment was, Niranjan Singh case, that is by Justice Krishna Iyer, 1980 2 SCC 559, I will just read the ratio - he can be in custody when the police arrest him, produce him before a magistrate. He can be in judicial custody when he surrenders before a court and submit to its directions. So here is a accused person whose is surrender to a jurisdictional court, it never indicates whether subordinate court or high court. So it was argued before the Supreme Court, the high court has the power to release him on bail or to send him in judicial custody or police custody. So high court was wrong in rejecting his application. This is one view. Then another view of the 3 judges bench of 1994, subsequent judgment, Deepak Mahajan's case, let me read down the judgement, then we will try to understand how to resolve this conflict- 1994, the Supreme Court has said, I'll just read down the ratio- The court gives power of arrest not only to the police officer and the magistrate but also under certain circumstances or given situations to private persons. Further when an accused person appears before a magistrate or surrenders voluntarily, the mind set is to take that accused person in to custody and deal with him according to law. Needless to say that emphasis to the arrest of the person is condition precedent for taking the custody thereof. To put it differently, the taking of a person in judicial custody is followed after his arrest by the concerned magistrate, surrender will be appropriate at this stage and to not that every arrest etc. So there is conflict between the judgement of 1980 and 1994. So we have followed the earlier

judgment. Now I feel that we were not right. Anyways but I feel that we should have followed the later judgement, the reasoning is that it is presumed that judges deciding in the latter point of time is aware of the earlier judgment. But jurisprudentially it would have been better if I would have followed the view of the latter judgment. What I say has some legal basis also, the Supreme Court in the celebrated judgment of 4 judges, 1964 Sc case, there is aa AIR 1962 SC 83, Jaisri Sahu vs Rajdewan Dubey, where a very important principle laid down by 4 judges bench, Law will be bereft of all its utility if it should be thrown into a state of uncertainty by reason of conflicting decisions, and it is therefore desirable that in case of difference of opinion, the question should be authoritatively settled. It sometimes happens that an earlier decision given by a Bench is not brought to the notice of a Bench hearing the same question, and a contrary decision is given without reference to the earlier decision. The question has also been discussed as to the correct procedure ' to be followed when two such conflicting decisions are placed before a later Bench. There is another decision also that is AIR 2002 SC 2940 the court has observed as follows- inconsistent and contradiction in the orders passed by the same court, on the same point regarding the same scheme cannot be allowed to be continued or perpetuate. It is a cardinal principle of the rule of law, the inconsistency and contradiction in the orders has to be avoided at all cost to bring about certainty in the minds of the sub-ordinate courts and the litigant public. Now I will refer to some other decisions also and another aspect also aaa in case of conflict. There is a very well-known proposition in face of conflict whether the 2 judges bench can directly refer to a 5 judges bench, or to 3 judges bench or is it to be placed before chief justice of particular state or to the Supreme Court for referring to larger bench. One of the judgment which I like to quote when I was sitting in the full bench in the Kerala high court, Peter vs. Sarah, 2006 4 Klt 219, where also the Jaisri Sahu's case was referred. Even in many a cases the subordinate courts says that the judgments of the Supreme Court are In curium or sometimes they will try to distinguish. So that is not a very healthy practice and that has been pondered upon by the Supreme Court in various judgments. I will come to the third one later. Now what are your views? You must educate myself. I am not judicial officer now, you have to deal with this matter every day.

Participant Judge- Sir whether in Deepak Mahajan case sir, whether Neeranjan case was considered or not that is also relevant.

Justice KSP Radhakrishnan- I don't think that it was taken into consideration. But it a law that the court is presumed to be aware of the earlier judgments.

Justice Kurian Joseph- But what is the situation where the former judgment has followed a constitutional bench judgment on the point and the latter judgment not noticing the same.

Justice KSP Radhakrishnan- No suppose a larger composition, definitely there is a law. Suppose the constitutional bench takes the view. Suppose I am dealing with a situation where same composition, 3 judges bench same composition. Suppose in a situation a case has been referred to a constitutional bench or a higher combination. Then of course there is a law, we have to follow that, there can be not doubt about that also. We are in a situation where decision take by a co-equal bench, either 2 or 3, in such a situation which is a better proposition for the earlier one or the latter case. problem lies with the subordinate judges. We have to find out some solutions . According my mind one solution is to follow the latter one, by all the courts on the presumption that the latter bench is aware of the law laid down by the earlier, previous benches. There are some judgments supporting my view, there are few judgments opposing my view also. That is why I have put it to the house. To have your views on that.

Justice Kurian Joseph- One escape route for a subordinate judiciary could be section 113, reference to high courts subject to such conditions and limitations have been prescribed. Any court may state a case and may refer the same for the opinion of the high court and high court can make such order. I am only referring to CPC not in the realm of criminal.

Justice KSP Radhakrishnan-Some of the subordinate judges have overcome these difficulties, which in one way cannot be appreciates also, saying that they used In curium, they used the expression distinguishing. So find out a escape route

Justice Kurian Joseph- can the subordinate court can say that one of the judgment is per.

Participant Judge- Yes sir, in Karnataka while deciding the case ST/SC case, the act was upheld by the honorable supreme court by larger bench. Subsequently, [Justice KSP Radhakrishnan-Shall I intervene] yes my lord

Justice KSP Radhakrishnan- Per In curium what I understand the subordinate can only in one situation. Suppose the judgment has overcome a statutory provision or by a larger bench otherwise you cannot say per In curium. They are bound to follow it. Another judgement, the senior must be knowing *Ganga v. Laxmi Ammal* where the Kerala high court in 2008 2 Klt 306, in a criminal case has come up merely that Supreme Court judgements per In curium. It cannot be appreciated, however erudite the judge may be. You can't say that Supreme Court judge is per In curium. Only a escape route I say is a overcome by a a parliamentary legislation or a state legislation otherwise you are bound to follow it. Now there is one more 5 judges bench judgment that is important, that is the judgment of the Madhya Pradesh High Court Jabalpur Bus Operators association v, state of Madhya Pradesh 2003 MP 815, it is a five judges bench. They have laid down one principle. i will just read out that one principle they say- in case of conflict between 2 decisions of the apex court, decision of the earlier bench is binding unless explained by latter bench of equal strength in which case the latter decision is binding unless explained. That is one principle. No decision has been brought to our notice, which hold that, in case of conflict between two decisions of equal number of judges. Latter decision is binding in all circumstances or the high court and the subordinate courts can follow any decision, which is found to be correct and accurate to the case under consideration. High court or subordinate courts should lack competence to interpret decisions of the apex court since that would not only defeat what is envisaged under Article 141 of the constitution of India and also limited the hierarchical supremacy of the courts. This is what the full bench says. Then with regard to the view that the decision where the judgment expressed the view that the decision latter in point of time will prevail of the earlier one. There are few judgments also, I just refer to that because the latter judgment, because I submitted that the latter judgment will govern. There is a full bench judgement, I think Kurian, That was a case headed by Justice Savant, when we were in Kerala. So that was case related to a land acquisition Act, interpreted Section 18. Suppose a case when you are given an award you have to raise a protest, because the law says that unless you protest you cannot be paid higher compensation. That was a case, without raising any protest, he filed an application under section 18. Mere filing of application under section 18 for enhancing compensation will amount to protest. That was the main point raised in that case, where the full bench has taken the view that the latter judgement will prevail. There are few other judgments also. This is since a full bench judgment 2001 1 Klt 958. Then supporting this view that latter judgment will prevail there are few judgments of the high courts also including the Supreme

Court in 1991 4 SCC 139, where the Supreme Court has held- that the latter decision must prevail over the earlier decision in a situation where an apparent conflict between the earlier and latter decision of the apex court by benches consisting of equal number of judges. So there are lot many judgments either way supporting the earlier view. But the Supreme Court in one judgment 1994 139, expressed the view that the later judgment will prevail. This has been followed by various high courts including Bombay AIR 1980 Bom 341, then AIR 1980 Kar 92, AIR 1987 Pat 191 and so one. In Patna Judgement, SS Sadhanwali, chief justice, h expressed the view, it is a very important passage, I will read out- In one case the court extensively dealt with the ancillary aspect, ancillary aspect is also important. I will just read out that observation. In Raman Gobir's case, court extensively dealt with the ancillary aspect which have a bearing on the main issue. So you have to find the ratio. Subsequent judgment is only obiter, that you are not to follow. So that is a very important dimension to this issue. Another view which was strongly taken up was whether, in order to do substantial justice by the subordinate courts or the high courts, are they not bound to follow a judgment which is more appealing to them on facts. Leaving aside the law apart. It is not that court is bound to do substantial justice between the parties, suppose he is convinced on facts. In such a situation to do substantial justice either follow earlier judgment or latter judgment leaving aside both the principles. This view has been seriously convinced and these views have been upheld by many of the foreign judgments including UK judgments. I will just refer to a few judgments for your understanding. Now, I will refer an English judgment supporting the third view. There is choice for a subordinate officer to choose between judgments, can we give such freedom, in what situation can we give this freedom. Can we give this freedom to subordinate judges to give substantial justice. Some view is that it is possible. one celebrated case of court of Appeal, 1944 1 King's bench 718, N v. Bestowed aero plane company limited, the court of appeal has expressed this view- The court is entitled to choose between 2 conflicting decisions. So these were the 3 points that I wanted to highlight on conflict of judgments. You have to choose which is the best principle. I leave it to the house, which is the best principle, the earlier one, the second one or choose between. Second is aa the latter will be more appealing because that has logic in that they are aware of the earlier judgments. The third one is very difficult to choose between. This is a very interesting subject, i have not done justice to the subject due to the constraints in time. I hope the academy would hold another conference because this is a very very important aspect especially this difficulty is with the sub-ordinate courts not the high court or Supreme Court. I

think we can have a conference of the subordinate judges also. So I am not taking much of your time, so if you have any questions you want specific views on that you can do it. Most of you have just entered the judicial service isn't it, a long way to go. SO you can just think over and express your views on it. Three views I said which are all supported by judgments as well, I cannot bring all the judgments. So I am not taking much of your time, so if you have much of thing to contribute and say on subject please do. Thank you very much

Justice Kurian Joseph- Thank you brother. You could not have done any better and the reference was made to aaa my elder brother Justice Hegde was aaaa. Just 1 sentence to add to. We commit mistakes in this area for 2 reasons. One reason is that I think I am the master of this branch, that is the starting point of committing the blunder if not a mistake. Second, that fellow does not know anything. This is another problem, we think that we only know, that is a big mistake but the bigger mistake according to me is that the another one does not know anything or we have this disposition in our mind that he has come from service what does he knows about this branch and that branch. well it's all on ones you become a judge you develop a framework of your mind as to how to analysis the facts and apply the law, these are 2 things. Well that is actually as Cardozo has also said, is actually the judicial process and the mistake we commit because we are the authority on the area and also because the other one does not know anything about the process. aaaa two reasons because the branch is so vast and is ever growing also. Interpretation on the very same subject progressively come. You must have hear Prof. Madhava Menon on Social Context Adjudication, social context definition, decisions, these are some of the merging trends also , now coming in . One reason why the central laws is applicable to various parts of the country, where also because of the social context in which this law is made applicable in that region or in that part, particularly regarding the part time service or night hours or child labour . Several facets of the law emerging also on various, depending on the regional realities of the country if not diversities. SO never should have the feeling that I am the master, any case should never had that because I am never the master. After I die some people may say that I was a master but not for me to say that I am a master. Never ever criticize others for knowing nothing. Now we have come across of the practical problems of your decision making on account of conflicting decisions or any other factor or area also. Because the brother has quite exhaustively dealt with this conflicting judgments and the conciliation thereof. So any other area where aa because we are going to end the session.

Justice KSP Radhakrishnan- How many of you have come from subordinate judges to the high court. So you will have lot of experience to share to us with us, unlike those who who have directly come from the bar to the high court

Justice Kurian Joseph- At that you could not have spoken so this time you can speak. So you can speak

Participant Judge- When the case becomes contentious then it has to be sent to the district judge. So in one case I have come across a decision of the Apex court that , the objector party if he enters the court and if simply says that please give me time to file my written objection. This is enough to construe that the case becomes contentious. So the district delegate does not have any right to hold the record but to send it to the district judge. Simply intention is mention then it becomes contentious.

Participant Judge- In criminal law lots of decisions are there and the difficulty arises which case to be applied with the facts of the case. Probably a a more complex situation will come when our high court has taken a view and the other high court larger benches have taken a totally different contradictory view. That will create some problem

Justice Kurian Joseph- How ever large the quarrel may be there is a persuasive value.

Participant Judge- but it is not necessary that we consciously agree with that view, or we refer to ask the chief justice to refer it to a larger bench

Justice Kurian Joseph- Before I forget and even when you distinguish also, don't comment on the judgment, this is some mistake which we do, that does not look proper. You may distinguish on the facts, you may opt to follow as brother rightly said, the latter decision also. But never ever comment on the earlier decision saying that the bench did not look into this aspect, the bench might have not done with that , this is not discussed etc. etc

Justice KSP Radhakrishnan- It is not a platform of showing your prejudice to a judge but I have seen in many occasions that has been done by some of the senior judges

Justice Kurian Joseph- On the contrary find out some good expressions to why the other judgement was rendered like that.

Justice KSP Radhakrishnan- One point I just remembered. See there is that one view, suppose you are not following a judgment of the Supreme Court or the high court but you are bound to aa suppose you are like the former was more appealing to him but you can express your opinion in the judgment but follow the latter one even if it is not accepted to your conscience. You can express your view, there is nothing wrong in a a legal issue, you can express your view in your judgments, even a subordinate judge can express his view. But you follow the one which is binding on you, that is latter in point of time.

Justice Kurian Joseph- Expression of the view and comment on the judgment you should in a position to distinguish. Yes

Justice KSP Radhakrishnan- for example Hindu succession Act there are lot of judgments under section 13, 14, it is very difficult to understand, it is a very difficult area also. One matter I argued in the Kerala high court but after arguing even I didn't know what I argued. hahahah because some of the legal provisions are so complicated, it takes lot of time to understand. So there is nothing wrong in academic discussion, in expressing one view of course without offending the, judicial disciples aa you are bound to follow the latter judgment but you can express your views on that. That is my personal view. Sometimes some judge may not like it also hahahah

Participant Judge- may we distinguish it in the way that according to the facts and circumstances the question which is to be determined in hand was not the question for the determination in the precedent

Justice Kurian Joseph- there is one coming for 1 week for commercial; matters, training of judges on commercial matters

Justice KSP Radhakrishnan- But this is a wonderful platform where they can meet all the judges. Even after retirement it is of great satisfaction for us otherwise we won't be meeting enough you. You can also interact with all the high court judges from every corner and even subordinate judges are much more benefitted. I am told by many of the subordinate judges either in Kerala or in north

east, they say we have got friends all over the country because they have been here for every 3 days 4 days, so whenever we go to north east, you got lots of friends there, you are not a stranger there. I am Justice Hegde have been here since it was being inaugurated. It was inaugurated by Kalam. I came her for the inauguration of NJA. Now judges from various countries, from Bangladesh, from Sri Lanka, they are coming here for training. Now it has become the most internationally recognized institution all over the world this Judicial Academy. It is doing a great service to the community. Another platform where we all can interact, exchange your ideas, you can enhance your wish on various subjects and the type of subjects we are dealing here we normally doesn't deal with it in the courts also. That will enhance your knowledge. Some of the subjects are totally unheard of but it will enhance your knowledge on Intellectual law, cyber law and so many emerging fields. The library is well equipped so you cannot find any excuse now. So we can cope up with any of our counter parts in the world also. Yesterday I attended a conference at Delhi Judicial Academy they said the judges from Sri Lanka were there for 20 days. So all the neighboring countries judges are coming here and also Delhi judicial academy. Thank you for your patient hearing.

Justice Kurian Joseph- Any other area connected , unconnected also

Participant Judge- A lady litigant lost her case, so she started taking out the books kept in the courtroom and throwing before the judge and My lord was just seeing her quietly. Then she lastly, while she is leaving the court she uttered. I congratulates your lordships coolness under the fire. I mean to say that my honorable brothers and sisters may adherer to this sublimation the way the judge had.

Dr. Geeta Oberoi- Thank you so much. first of all please give a big round of applause to Honorable Justice Santosh Hegde, Honorable Justice KPS Radhakrishnan and Honorable Justice Kurian Joseph all the judges have come and blessed aaa and giving their discourse about and also asking you about your problems, they were not just giving you speech but they were asking you like , how you felt about issues. So, they have encouraged participative learning and this is a platform where you can actually so ask whatever you feel like. So with this I hope all 4 days aa we had given you enough opportunity to open you heart and aa yeah we started with meta-cognition and aa of course it was aa I think different subject. These are not the subjects that you study in your

law schools. These were not the subjects that you daily discussed actually because as Cardozo said that we do something but we do not discuss what we do and this was aa and the whole program was actually designed on the book as I told you in the introduction itself, Cardozo's book on Judicial Process. As to what judges do when they do the decision making. So I hope that this was of some help to you, I don't know how much but some help aaa some use to you in aa thinking about your thinking actually. So with this aa thank you very much all of you. And if aa it is possible, if we can have aa like aa maybe we can go for lunch now all of us and then if it's possible for you to come for 4 minutes only, not more than that to give oral feedback on certain things. I was thinking if they can go for lunch and while going to the rooms they can just come for 4-5 minutes. Feedback we aaa okay and also pre-training proforma has been given by everyone, okay. If there is something, please let us know if there is something you want to speak about the programme as such.

Participant Judge- if possible the same combination of the judges may be called again so that we may express our experience, how I applied on the practical side what we learnt here.

Dr. Geeta Oberoi- The whole problem about nomination is we as national Judicial Academy does not have any say in that matter. So aa many judge shave told us for example, we had economic crimes and judges said no no you call our batch again. SO we have no aaa I mean no audience in that actually, we cannot tell the registry that no no the judges that were sent earlier, they should only be sent

Participant Judge- Request can be made to the chief justices of the concerned high court

Dr. Geeta Oberoi- No nomination is the prerogative of the chief justice of high court

Participant Judge- The request can be made to the Registrar General and he can place it before the chief justice.

Dr. Geeta Oberoi- Okay we'll do that. But they may say that why not give benefit to others

Participant Judge- including others then the number of the judges should be increased that way.

Dr. Geeta Oberoi- Yes yes they can send 4 judges, we have no issues, yes. One aaa two who participated and two others. We will do that, we will writ ea letter to that effect. We will take permission from the Supreme Court and write a letter to that effect to chief justices

Participant Judge- my suggestion also, I have made a last suggestion this one

Dr. Geeta Oberoi- yes sir, we will do actually because aaa we can try that there is no harm in that. Any other issue

Participant Judge- Mam definitely it was a very good programe, very informative one but there is 2 things that I would like to just to ponder on. One is that there are certain topics which we felt that there was slight overlapping of topics and then secondly, is it possible to compress the programe to 3 day programe because every day after 3:30 we are sitting here we have no other thing except the library and the computer training programe which is an optional one. Is it possible to compress it all in 3 day programe, so that we can save 1 more day

Dr. Geeta Oberoi- Yes it can be done. In fact earlier we used to do one and a half day programe, we had no issue about that, the lesser the better for us.

Participant Judge- No no we do not any subject to be culled out but still we can think of having one more session carried forward after 3:30, upto 4:30. Now 3:30 we are going back to the room.

Dr. Geeta Oberoi- Yes but then that is followed by 4 hours gap and then we are showing you a a movie actually and the movie also part of discourse of learning but nobody takes it seriously. Nobody comes there.

Participant Judge- I actually saw that yesterday, there were only 2 and day before it was only 4

Another Participant Judge- Yesterday movie was on Khaap panchayat

Dr. Geeta Oberoi- Yeah Khaap panchayat, it was on honor killing. So we thought everyone will learn. Even Judge the movie was good actually but aaa it was part of our discourse. We thought of to give you rest but if you want to continue I have no issues

Participant Judge- 10:30 to 4:30, we work in court. We can have 2 continuous days so that we save judicial time.

Dr. Geeta Oberoi- yeah we can do that, definitely, no issues about that. So since no suggestions are coming so no point in holding you back over here and wasting your time, judicial time. So let's aaa break for aaa okay yes

Participant Judge- I know there is no photographer officially today but we have honorable 3 judges, that is arranged very good

Participant Judge- One more thing mam

Dr. Geeta Oberoi- Yes

Participant Judge- Would it be possible to consider, it's a related matter what are pitfalls that should be avoided by a judge. Could you include something on that also for may be future batches.

Dr. Geeta Oberoi-Yes we will do see, we will take note of this. Things to be avoided yes.

Justice Kurian Joseph- A few things we said here also. First thing is that one should avoid that I am the master of the art. Second thing is that nobody else knows anything. Third thing is that I am a headmaster and fourth thing is that one should have the inner eye to see the cry for justice and an ear to hear that also, see the tears and hear the cry. And the committee, this is one thing slowly eroding our system according to me. The the fellowship, we call it among ourselves brothers and sisters but this committee is not seen in respecting others in judgments also there and we should always avoid comments on other judges. This I is the fifth thing that we discussed here today. We may disagree but never use any derogatory remark with regard to the judgment. And sixth thing that we said when we sit in admissions also, always aa never keep in mind only one who is present before you but having mind the one who is not present before you. These are things which we discussed in the 2 hours session, but it is good. The don't not only the does also.

Dr. Geeta Oberoi-So with this can we say goodbye to each other. Thank you so much. And it was really good all of you really good. Thank you so much

Justice Kurian Joseph-Thanks to Director, programme coordinator.

Dr. Geeta Oberoi- yeah Paiker also, she is always very good. Thank you so much sir.