
SEMINAR TO ASSESS WORKING OF HUMAN RIGHTS COURTS IN INDIA

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VERBATIM PROGRAMME REPORT – P 977

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Seminar to Assess Working of human Rights Courts in India

SESSION 1

Cases dealt by Human Rights Court under Protection of Human Rights Act, 1993 till date

Dr. Geeta Oberoi: we want to know your name, from place you are coming, jurisdiction, high court or you are designated as a special court under this human rights court act. so..

Participant: good morning everyone

Dr. Geeta Oberoi: sit down and please introduce yourself

Participant: myself Dinesh, I am from Maharashtra posted as district judge I

Participant: Somanth, Kolkata high court posted as district judge there is no such court as designated as human right courts. ... Just POCSO act and courts these courts are designated as special courts but no human rights courts. Thank you.

Participant: J S Sindu from Chandigarh

Participant: ... Jalander state of Punjab, there are no human rights court in state of Punjab.

Participant: I am Ashok Kumar Sahu, from ..., I am working as district judge, and my court is defined as human rights court and atrocities court.

Dr. Geeta Oberoi: which place is this?

Participant: Chhattisgarh

Participant: I am Minakshi Gondale, high court of Chhattisgarh from and I am district judge as Surajpur Chhattisgarh. In our state all district judges' court are designated as human rights courts.

Participant: I am Muhammad Ajmal, district judge Raigarh in state of Orissa, and the Orissa high court I am also the special court under the POCSO act as well as the ST/SCPA act as well as the human rights court.

Participant: Madam I am T. K Chinna Ria, from Orissa I am district and sessions judge Naigarh, I am also having the power to try human rights cases, issue notice. ...

Participant: ... district and session judge Bhopal, MP high court as also designated for human rights court.

Participant: hello, good morning to everyone I am Anil Verma district and session judge Sagar, my court is also designated as special court for human rights but I have no case regarding this act. Thank you

Participant: good morning madam and ... officers, I am M R Sunita 1st additional district judge from Nalgonda and the human rights court is designated court for 1st additional district judge but so far no case has been instituted and it is very much to learn

Participant: good morning all of you, I am Radha Krishna from Khammam 1st additional district judge read as a human rights court for both the states of Telangana and Andhra Pradesh working on high court judicature at Hyderabad

Participant: good morning you all I am Haripal additional district judge ... Kerala, under Kerala high court. In Kerala all the principal district courts are designated as human rights courts and so that we have no jurisdiction in dealing with human rights matters.

Participant: I am John K. Adam from Kerala I am now working as special judge vigilance Trivandrum.

Participant: ... additional district judge Allahabad, Allahabad high court, I have no special court and human rights courts are not working in up.

Participant: good morning ever body I am Anant Bhandari. Session judge ... in Bhilwada Rajasthan

Dr. Geeta Oberoi: no but as you are designated as human rights court?

Participant: no, no, no, I am not designated.

Dr. Geeta Oberoi: no

Participant: he wants to say there is no designated court at all.

Dr. Geeta Oberoi: ok

Participant: no...

Dr. Geeta Oberoi: Uttar Pradesh

Participant... no he is not designated. ...

Dr. Geeta Oberoi: you are not. Ok

Participant: I am Anant Bhandari special judge ... Bhilwada Rajasthan.

Dr. Geeta Oberoi: you are designated as..

Participant: no I am not designated as special judge in human rights court

Participant: good morning all of you, I am R M Sehreen principal district judge Jamnagar Gujarat principal district judge is not designated in human rights cases but 1st additional district judge is interstates with the cases of human rights whereas in Jamnagar there is no human rights cases at present.

Participant: good morning I am Reeta Tejpal from ... under Rajasthan high court I am working as district judge special court at Jaipur. Rajasthan have not established any human rights court so far.

Participant: good morning everybody I am Sharda Bano, additional district and session judge Dehradun from Uttarakand high court, there is no such establishment but some of the session judges have been designated as human rights court.

Participant: I am Ravi principal district judge Pudukkottai my court is designated court.

Participant: good morning I am mark silver principal district judge Kanchipuram from madras high court, in our state all principal judges are designated with human rights cases for that I am holding special court for ST/SC prevention of atrocities act.

Participant: good morning everyone I am Jintendra Gandhi I am working under Bombay high court I am posted at Sangam Ahmednagar as district judge one, I am not designated court. Thank you

Participant: good morning everyone I am Prem ... district and session judge Kullu Himachal Pradesh in Himachal all district and session judges are designated courts.

Participant: morning, I am Mohammad Ahmed Choudhary additional district judge Jammu from j and k high court in our state no court has been designated as or under human rights act

Participant: good morning to everybody I am K. Bhudhe principal district judge Harveri in Karnataka state, I am representing Karnataka high court, in Karnataka all the principal district courts are designated human rights court, so far no case has been filed and I am also working as a special judge anti-corruption law, ST/SC PA act, POSCO act, human rights act I am also dealing with all the sessions trial cases and I am also looking after the work of state legal service ... mediation work

Participant: I am Vadley Vankun from lung Lia Mizoram Guwahati high court and we are designated as human rights special court and I am also dealing with POCSO as special court.

Participant: I am Lucy Lalramthai from Mizoram Aizawl I am district and session judge I am also holding the special court for prevention of corruption act, POCSO, and designated as human rights court

Dr. Geeta Oberoi : well I am Geeta Oberoi I am directing judge over here and professor also apart from Nikita is there Nikita is there, she will be here with you for this whole program, whole conference she is program coordinator of this conference and we of course have, I would like to say, Justice Akbar Ali ... (laugh) he is former judge of high court of madras senior advocate now

he is earning lot of money in supreme court of India (laugh) ... now judges also have alternate career after post retirement apart from arbitration. So role model for all of you and professor Ramesh would like to say something about himself, sir I would request you to say.

Professor M. K Ramesh: very good morning to all of you, I am prof. M K Ramesh I teach in national law school of India, university. I have founded three centers of excellence and relation to environment, a center for environment law education research and advocacy, a unique Indian and jurisprudence based organization called as common cell and third one which would like to anticipate and avoid conflict and relations environment a center called the environmental law cleaning apart from that a hold the chair from the government of India on urban poor and the law.

Dr. Geeta Oberoi: I was thinking that all of us are very glad that prof. Ramesh is coming as all of us could not go to take admission in national law school Bangalore, so we are calling national law school Bangalore over here. So it's a good strategy to get our self-reeducated from national law school Bangalore. So with this I will give it to Justice Akbar Ali to hide the introductory torch. Yes, tea breaks are for actually half an hour but as you known it's just right across this door so if we can even come in 15-20 minutes back it would be appreciated, unless of course you want gala long tea break, so with this I give it to honorable Justice Akbar Ali.

Justice Akbar Ali: Thank you. good morning to you all of course I know that, you know that 2 or 3 days back I was called by Geeta I have to be here in this program and human rights is already a known subject to everybody like I will say that we have been dealing with this matter from 1990s", 1980s everywhere, even from the universal declaration so these are all matters comes to one point as judicial officers and judges are we really sensitized on this matter and we are really doing something in human rights that's why that seminar on crisis on working on human rights courts India, you know the human rights act is 1993, section 30 came in 1993 and we are in 2016 and we are still wandering about whether there is a designated court in any state and even if there is a designated court whether there is any cases in the designated court and the procedure I don't know because there is no statics available, my knowledge is null statistics I can say. there are some cases of course I have come across that's how we, let us understand what

exactly, of course, this is known to everyone only to refresh our mind am just telling few things about the human rights so that we can start of some.

you know that the rights can be defined as rights inherit to human beings these are all known again and again we are reading about this, inherent on human beings about nationality, place, residency, ethnic, national all these are human rights are bond with. the rights with which we born with that's why the universal declaration would say all human beings are born free with equal dignity and rights they are endured with reason and conscience and should act towards one another in spirit of brotherhood, this were the universal declaration, so we know that in inter related and inter dependent indivisible, inalienable. It is inalienable, I was wandering about that can be alienate it because it's born with this so you can't alienate that rights. even section 2 of the human rights act also defines, what is human rights the rights related to the life because it is the statute that we have to know about this, rights relating to life, liberty, equality and dignity of the individual guaranteed by the constitution or embodied in the international consent and imposed court of India it takes both embodied in Constitution and convents to treaties or international convents but basically we understand these are the rights may be the right to live, no slavery, abolition of slavery, should not be any torture freedom to move, freedom of talk, freedom of expression, right to democracy and every other right insides under national international frontiers. So can you say anything more on this because I have come up with only right to live with dignity as Supreme Court has already said. Right to life and article 21, 14 wherever you go right to life is a fundamental right as well as human right that's what the Supreme Court has also declared. Anything coming in your mind apart from these rights can you say anything, anybody? ... Because it's a constitutional right, that why I said that the rights related to life, liberty, equality and dignity are guaranteed to the individual whether constitution. The rights guaranteed by the constitution must be fundamental rights and also related to the human rights. Anything else? A speedy trial, right to a speedy trial is of course is a constitutional right, so this is one part we were talking about, basic rights, human rights, it's only a list it is not exhaustive only some of the rights we deal about and we can go what are the offences against the human being as a human being. To violate the most basic human rights, that is what we always call as the violation of human rights under the heading to deny individual, their fundamental, moral entitlements to treat them as if they are less than human undeserving of respect and dignity. I

think this gives some closer look into what is human rights and violation of human rights. if somebody looks down at a person treating him as not a human being or any other manner by gesture, word, action, omission, commission whatever it is may be that brings in somewhere that what is offenders against a human being the dignity of a person, you know the dignity of the person I was talking about somehow the students of Rajiv Gandhi national institute in that about human rights, somebody asked what is dignity of the person. just remember have you ever been to temples, churches, masjid with beggars, have you ever watched a person who is ashamed of taking something, look at the face he feels the dignities violated if you throw something or ... I still remember the face may be that is dignity of a person even though he is beggar. You understand what, I think I have conveyed this. you remember the faceless may be, the faceless of a person though he has come to that level but still he holds and upholds his dignity and is not opening his hands but he takes with a shame. You remember? I think I have made a point. Maybe that is the dignity if that dignity is violated I call that it's a violation of the human rights.

Now there are, in India we look at this violation of human rights in India, may be generally we speak custodial death every day it happens irrespective of so many laws and relations and so many cases and supreme court directions and everything, custodial death Cases related to women and children we are going to deal with that, police assassins, atrocities on minority and Dalit, bonded labor more particularly bonded labor and by the action or omission by the armed forces, Para military may be, from the north east can still see a board access of armed forces and Para military forces. These are the cases which we deal as a human rights violation cases in India both in commission or we are going to expect in, if you are going to take a case in human rights court, if it is established or if it is intercede so then if you look at the cases related to women and children, we have female infanticide in the very beginning, even in the womb somebody want her to to in the citizen of this country, so the very first right that is right to born, right to life, born itself is put an end to. child marriage in the name of customs or despite of legal prohibition you know, the prohibition of child marriage act 2005 then the child labor, sexual assault of children as well as women, rape ,trafficking. See these are few from the many cases we come across in general in either the human rights commission or in human rights court or in general in India against women and children. So if you next if you go to the bonded labor we have very tough bonded labor and even now we have many cases of labor bondage in India. It

is there in various forms I can say in Tamil Nadu it is it will be in one form in Orissa, it will be in one form in Madhya Pradesh it will be in one form and there are lot of violations in debt bondage in India. you know what is the debt bondage, you know that we have a very classic in Tamil Nadu where the women, young women wither 14, 15, 16, or whatever it is are taken with the promise if they go and work in textile industry or ... then they will be provided with hostel, room facility everything and the end of it, the end of contract period they will be given 50,000 rs. or 1 lakh rs with one kind of serving for ... and with a promise that they will be taken by this agents to far of places and they will dumped without any facility, with all assault, sexual assault and all type of violation of human rights and we have cases of suicides, murder, run away and many cases against these women they call that, its atypical case that we have taken up and all the district judges were asked to go, visit all the textile industries in 2-3 district, ultimately we have to close all those and we had to drive the district administration and labor department to see this debt boundation, I mean it is type of debt boundation. for instance Orissa I think the sweet makers may be in Uttar Pradesh everywhere, everywhere there is bounded labor particularly debt boundation that you pay advance money, you take them as bondage that is what is prevalent in India, now we after looking into various concepts or the rights, what is basically going to to be the cases in India now we go back and see what the human rights court are doing because we are very concerned an out the courts and the theme of the this 3-4 day program is assess the working condition of the human rights courts and as you know that everybody is saying that yes every court is designated as human rights court but still we don't have any cases, have not come across any case from 1993 that's what I am very appalled because even you look anywhere I don't think anybody has any cases of human rights.

see the object of establishing the human rights court itself is for the purpose of providing speedy trial of offences arises out of violation of human rights the state government may with the concurrence of the chief Justice of the high court by notification specify for each district a court of sessions to be a human rights court to try the said offences provided that nothing in this section shall apply if the court of session is already specified as special court or a special court is already constituted for such offences under any other law for the time bring in force. So section 30 mandates the, it's written may, not shall, it say a state may or can establish a human rights court but it's not happening. Why? the object of this section id to insure speedy Justice with

regards to the offence against inhumane behavior ... the object and the strong motive is to ensure Justice to all mankind but unfortunately the construction of the section have made it impracticable, that's what many expert says if you look at nay article, or anything, any analysis on this, what does this section says about. till date many few states have set up human rights court now you say that all the principal district court are somehow the specified courts designated as to human rights court but still many of the states have not established the human rights court that's what I can show you latest judgment of Justice Thakur in the year 2015 directing all the states to establish a human rights court and report. There are arrays of judgments pronounced in many states ... including the Supreme Court, but all these pronouncements and directions it remains in the vague part the state had to establish a court. maybe I am still wandering about before this human rights commission was established may be in 1995, 96, 97 or 98 the human rights courts, some of the courts have been established in the sense that somehow the courts were designated, identified as a human rights court.... may be few cases but I think after the formation of the state commission or national commission of human rights court may be the people thought it's only the commission that could be inquired in this matter and not the court. Do you agree with this?

Participant: no

Justice Akbar Ali: so it's only the commission which has been set up by the state or by the national level. they have assumed or they have taken the entire responsibility on them to decide about all this or the people of India the victims they thought it's only the commission either the state or national is empowered to inquire under this matter, that's what my feeling is otherwise we have failed the judicial system or our Justice system or the courts, we have failed to sensitize them, look we are also here to look into this matter because for two reasons only that we don't know how to do it at least human rights commission or state commission will be dealing with, tomorrow also. at least the human rights commission have their own setup of inquiry they have one setup of investigation, they have their own set up and they inquire and investigate into it get a report and pass orders, and what kind of orders they pass it is re commendatory order to the government or sometimes the compensations are being paid by the violator to the victim that's why I see orders of this are sometimes the human rights commission comes out very outreaching and they pass many

serious orders also but I think is after this establishment of this commission, may the human rights courts may be the section itself has become redundant and nobody is approaching the courts. So what is wrong with the section then the section states offence arising out of human rights. see arising out of human rights it doesn't specify, like I said the human rights can't be specified because it is not inclusive list it is very exhaustive so I said that drains violation, even the fundamental thing, right to life with dignity itself is violated it is a human rights violation but what we are always thinking of the violation of custodial death or case related to women and children, police assassins major part of human rights violation will be police assassins, he is taken to the custody and tortured and this sub-inspector, or this inspector or deputy of police and they will be halt up to the human rights commission this is the basic thing we are dealing with in human rights violation but the section says the offences arising out of human rights violation it did not say what exactly, maybe it should have defined what are the cases that could be taken to the court so that we can apply other statutes like IPC special acts or anything like POCSO or ST/SC PA or any other act so that we can go beyond little and say that these are the offences committed and we can pass orders may be the draftsman have failed to the mention the Amit of this phrase because we don't know what are the offence arising out of human rights there is no judicial pronouncement also on this. the following has to be considered what constitute such an offence, as I have already stated that when we think something about the violation in India we have limited area and when we think about this section, offences arising out of human rights, what is exactly that, what constitutes offences, we have to discuss on that outcome, what could be offences that could be tried in a human rights court so that we could take it to the court or to the people or to the authorities to show that we are here to try all those type of cases, and we are empowered with under the statutes may be that one point I want you to discuss about, then ho can be convicted under section, who can be the respondent, who can be the violator, who, whether the police officer he has taken a person to the custody for investigation and he has violated or in jail, jail authority has taken somebody in cell and has violated and there are many assess under the thing what could be that and who could be convicted and what could be the orders, if it comes to the human rights court.

see I have seen and under any custody and as a session judge you have seen any custodial death cases where the investigation has been done either by the police, CBI or CID while filing charge sheet against the officers and conduct a special trial, sessions trial for custodial death because IPC doesn't say anything about custodial death its only murder. we have seen many cases of section 302 read with 149, 147, 148 whatever the offences that could be added into but major offence would be the murder offence of 302, a special investigation is done and they are taken to trial, can be take that as a human rights violation, I am just wondering I want you to enlighten me on this. Whether that case can be treated as human rights violation and human rights court alone can try those cases, because that is entirely different investigation and the police case. so what could be the order then the section says the sessions court to try the offence, if the sessions court is going to try the offence this question is been asked from 1993 I believe what about the cognizance, who shall take the cognizance, you know very well that offence under session court is the magistrate can take the cognizance and receives either police report or private report or if it is going to be tried by sessions court they have committal proceedings it comes to the sessions court because we don't know. However, except in the special act cases, where we can take the cognizance directly start with the trail. so who shall take the cognizance whether it will be committal proceeding or it is going to be cognizance taken directly, this also we have to deliberate.

section 193 unless specifically provided the court of sessions shall not take cognizance of an offence of a court of original jurisdiction, the dilemma of committal of an offence stands as a practical difficulty to commit the proceedings this has been , I have seen many cases, 2-3 cases, I will show one of the cases which is decided in madras high court whether there is going to be a committal, whether the magistrates are empowered to take cognizance and commit the ... or whether the sessions court or designated court to cognizance directly like in special act cases so this are also areas we have deliberate on this.

What is the solution now, so the entire exerciser is going to be what we are going to do about it whether we again and again read about what is women's rights, what is universal declaration, what is human rights act what are the provisions and leave it and again and again we will deal with what are the offence against women and children or Dalit or whatever it is and forget about it or we going to come up with a strong solution so this is how a human rights court has to be

established or this is how the procedure has to be followed or this is how the people has to be enlightened or make an awareness among the people look we are also human rights court where we can deliver Justice to those victims against violators and what we are going to or supposed to okay as a session judge like one of our brother said he is holding the post of session judge POCSO act, special act all, almost such responsible seat he is holding so one more designated court but without portfolio, you know the ministers without portfolio right? so we are also designated court but we don't have case or we are going to satisfy with that or we are going to suggest something to the state or something to the high court or academy that we have to deliberate upon. that's what we are expecting so coming back to as I was telling case before 2006 came up before the madras high court, the respondent preferred a complaint before the court of chief judicial magistrate which was formerly the human rights court under section section 2(d) of the protection of human rights act read with section 200 of the ..., what has happened in 1995 to 2006 in Tamil Nadu even the chief judicial magistrates were also the district judges , it's not a civil judge senior division they were also district judge, in fact I was the CJM when I was additional judge so I took cognizance of one case against ... because that time there was a judgment by the high court of madras where this was deliberated before the high court and the high court gave a judgment saying in all the cases of human rights court the procedure followed to be the private complaint case invoking 200. so the person has to go before the court has to file application under 200 and you know the procedures examination of complainant, witness and the court take cognizance of it issue summons to the accused and bring them and conduct a regular trial ultimately pass an order because still the times was there was no clear directions, pronouncements of what kind of order that could be passed but many of the courts we took cognizance that was prior to 97,98,99 those were the time because that was the time high court also gave a full procedure how to conduct a human rights court invoking section 200 then that was also a question arose the committal proceedings has to be done because it's a sessions case, then the high court said either it can be committal, if filed before magistrate if directly is filed before the special or designated human rights court it will be 200 the special court can go by 200 because its special statute. so may be that was the time CJM complaint was preferred, thereafter the entire record was send to the court of principal district judge which was not notified as a human rights court in the district of tanjare that is a district in

Tamil Nadu, then later chose to send the entire case to judicial magistrate one tanjore to adhere to the committal proceedings because the procedure is not been followed so that he sent entire matter to the judicial magistrate one tanjore to adhere to the committal proceedings as the human rights court was not vested with the powers to take up the complaint directly filed without the committal proceedings so that was the implement. so what happened the complaint is that the petitioner accused who has serving as a station ... he has entertained a false complaint given by one Ashok Kumar in connection with introduction of so and so that's not important but he was forcible taken to the police station and he was again tortured ... those allegations were made against the police officer, the complaint was not given as the accused was tortured and harassed for 8 long hours in order to obtain a ... so the compliant only left in the evening and after forcefully obtained signature on two stamp papers so this was the complaint given as the committal proceedings are on progress the present precedent that the high court was dealing under 482 quash petition, a quash petition was before the high court saying that any complaint regarding the violation of human rights shall be submitted only before the state commission constituted and not before a court under protection given under human rights against public servants will be in peril if such private compliant is entered, because the public servant come under sanction and other things. so this what the arguments are before the court, I didn't have the time to bring the case with me, the sum and substance of court and case is a single judge of high court madras in 2006 gone through all the provisions of the act and the object of the act and ultimately upheld the committal proceedings and dismissed this 482 obligation and asked the parties appear before the sessions court to undergo the trial, that's in 2006 it was upheld, so though there was a case filed under the human rights court and committal proceedings have also been initiated and after committal it came to the sessions court when there was an attempt to quash the proceedings the high court said it cannot be quashed it is the right proceedings which has been followed and it is under the human rights act and ultimately dismissed the application and asked the parties to go and face the trial. It was in 2006, even now I still I wonder there after any case has been filed before any of the court in Tamil Nadu, do you have any idea I don't know, no courts have filed. When this is the situation I can show one of the judgments of Justice Thakur also were again it is, I am sorry. ...

Can you read? So this is the case I recently came up in... This is again the, you know that D.K Basu v. State of West Bengal, you remember the case? In the same manner..., no I want paragraph no 24 ... I am sorry this is downloaded version

Participant: this one?

Justice Akbar Ali: pardon? This is D.K Basu v. State of Bengal decided on 24th July 2015

Participant: there are many D.K Basu cases.

Justice Akbar Ali: this is decided in 24th July 2015 by Justice Nakor This order passed in 24th July 2015, because series of order has been passed in D K Basu cases. ... there are many 24,I am sorry.... see there was a recommendation that brings us to the 3rd recommendation because ... formulating the human rights court in different thesis and terms of the protection of the human rights court act 1993, section 30 of the act provides that the state government shall specify with the concurrence of chief judges in India, chief of high court or each district headquarter session of human rights court so that the offences arising out of the violation of human rights are tried and disposed speedy it was submitted while the state of Sikkim has complied with the said provisions other states are silent in this regard. supreme court says in spite of every one of you saying a that in our state the principal district judges are been designated, I am designated, you are designated, but the supreme court says that the information given to the supreme court rather, I accept that the except for the state of Sikkim no other state has followed, there is considerable merit in the submission, section 30 of the act replaced and provides that the providing speedy trial of the offences arising out of violation of human rights the state government may be the concurrence of the chief judges of the high court by notification specify court of session to be human rights court provided that if the already and other things, one second. Denial of access to the mechanism contemplated under the act, reason of non-failings of vacancies directly, oh I am sorry. ultimately the court said it has given a time frame to all the states that is in July 2015, it has given time frame to all the states to establish the human rights court and report to the supreme court of India that is the direction given by the court, but still we are wandering about what is the human rights court, how it should be established, what is the procedures to be followed whether committal proceedings to

be applicable or the session court can take cognizance and what type of cases that can be taken to the human rights court when the national commissions and state commission are also discharged with same type of duties or whether we have any other power or still they all are grey areas which has to be addressed to. maybe that's why we all are here and we have to discuss about all these things and we have to, at least we can the field workers, we are in the filed so we know better what is our power what are procedure that could be followed how the people can be enlightenment on this, so that the human rights court can also be approached so that we can pass the order, with this few initial things I keep the floor open, ...next session...

Participant: hello, the section defined under the human rights act 1993 is not exclusive but inclusive, so what rights are human rights that can be defined, cannot be defined on the basis of the definition, human rights start from the birth of the child and ends with the death of that man and during this period all this rights can be regarded as the human rights

Justice Akbar Ali: even if the body is without dignity, I still feels it's the violation

Participant: yes, so if human right courts can be instituted and can be started, first of all we have to define that what offences, what rights can be regarded as human rights and violation of which shall be regarded as offence so, though it is not very task to start court, there must be some specification of the rights and those specifications can be made to start the human rights court without which it is impossible.

Justice Akbar Ali: brother says that there must be specification of certain category of offences or certain violations which has been specified, taken to the human rights court, to carry out the work this is his opinion is. How many of you agree with?

Participant: the offence under the human rights protection act is not defined, an offence coming under human rights act can also be an offence under the common law, so how to differentiate that, which offence should go to the human rights court and which offence should not go to the human rights court, like in case of custodial death or illegal detention, a simple complain to the to the magistrate under section 342 will also do, if that can be done why should one go to the human rights court, senior court, higher court or the court of sessions and in the

committal proceedings there may be delay in trial and all that procedural moralities will again come into play

Justice Akbar Ali: I will pose you one question, is that all the custodial death cases have been registered, investigate and brought to the trial

Participant: no they are not, what I am saying is it can also be raised in common law forum

Justice Akbar Ali: see there are 2 options, see when you say common law or IPC offences are available or special acts like POCSO or ST/SC act is available what the human rights court is going to try about?

Participant: how differentiate that

Justice Akbar Ali: yeah differentiate. I am only putting you to all one question that is the all custodial deaths, is it all the violations against the special act. Is it all the 100% cases are being registered, investigated, and tried. So what happens?

Participant: there is one more problem ... this will go the common law forum, then who I mean how one comes before the human rights court.

Participant: human rights court should be established completely separately, this is special powers and such and such, this type of powers should not be given to session's judge or to any other officer along with the power of..

Justice Akbar Ali: one second I clarify that, how many of you agrees with the brother saying that it should be a special court not given like one more power or something or additional power or something. It should be established and specified as human rights court or under the act will it serve the purpose that's what he is argument is.

Participant: it will come in conflict with some other law like the IPC, POCSO and other law

Justice Akbar Ali: I am just wandering, if there is a custodial death and there is police investigation a case registered and charge sheet filed under 302 and other offences also why

not simultaneously as human rights inquiry also this is what a common law and offence against a state is been committed a murder has been committed and there is there but why not the violation of the particular victim is violated, why not he take cognizance under section 30 and go to the human rights court and what are all the remedies he may ask for, he may ask for compensation, he may ask for any, back to the original state may be disposed or may be this that or go back to same position, why not you think about that, why not we take this to this court and this to this court?

Participant: then I think double jeopardy will come into picture. Section 300

Justice Akbar Ali: see if an offence is ... human rights commissions are doing, can anybody say the work human rights commission are doing?

Participant: I think that the act cannot permit the special court to hold an inquiry, as far as holding an inquiry is concerned the commission will be there in all states for violation of human rights and district judge will be the member secretariat to that commission and retired judges will be the chairman.

Justice Akbar Ali: I am wandering about what is section 30 then?

Participant: sir I think human rights commission as a wing which investigates the offences committed, so when that investigation agencies is there they can also file cases before the human rights court.

Justice Akbar Ali: you mean after investigation and after obtaining a report by the commission, commission can take up the matter to the human rights court instead of going to or getting the recommendation to the government you know, what is the recommendation of a commission, it may be or may not be looked into. It's a good point.

Participant: when question arises for giving compensation that would be referred to human rights commission and when it is the question of punishment then it shall go to court

Justice Akbar Ali: it is good suggestion.

Participant: sir another view that, whenever you say the matter of custodial death is there, the matter registered and investigation started one of the magistrate will have the jurisdiction on a particular area where the police station is situated or where the offence has been committed that he will exercise jurisdiction over the matter, now the human rights court if it is going in simultaneously in another jurisdiction there will be overlapping of jurisdiction then after investigation the case will come to which court, this will be a problem, so there must be an agency or authority which can chose that this particular case has to be filed this magistrate for committal proceedings or to this special court of human rights, there should be an authority which should decide considering the sensitivity of the case.

Participant: I want to say that like POCSO we have a provision, when we try POCSO cases there is a charge of IPC general offence also and at par this provision can be taken, firstly the offence under this act has to be specified, these are the offences of human rights violation and they can be then simultaneously tried by the court of session having both charges like having chargers against human rights offence and general law that could be made at par with the contents of the POCSO act.

Justice Akbar Ali: one second the question is what could be the jurisdiction of human rights court under section 30, now we have seen all the courts have been designated and we have also seen the supreme court has directed the state to consult with the chief Justice of high court and constitute a human rights court and we are talking about what could be the category, offences, procedure also

Participant: one submission sir, first the offences should be defined and then only the procedure can come into picture.

Justice Akbar Ali: instead of the offences can we change the word into, what could be the violation that could be taken to the human rights court can be defined.

Participant: but the act says the offences arising out of the violation of human rights.

Justice Akbar Ali: offences arising out of the human rights violation.

Participant: the term offences has not yet defined, they have not been categorized, and that is the problem.

Participant: violations are by the authority and the individuals, in case of violations by the individuals the cases are coming to the common law courts, in cases of violation by authorities, government officials that can be referred to human rights court. it should be demarcated, the offence committed by the authorities only can be referred to human rights court, otherwise all offences comes under human rights violation, almost all offences IPC 354, 376 everything is violation, so where is the question of constituting human rights court independently it's not possible. Violation committed by the authorities alone can be referred to human rights court, it can be defined easily, and simply saying human rights violation all offences will come under the act.

Justice Akbar Ali: but anyhow in most of the cases torture or anything the people down there are only find it by access of authorities, it's only the uniform forces. see by large if you look at the any violations or any commissions or any reporting of any violations, if you look at the, its only against the, see I have a case of an elderly women, who has a small house a single bedroom house and her neighbors are all well off people and she doesn't want to give that property and wants to live there but they have constructed there houses in such a manner that there is no ingress or aggress to her there compound walls are surrounding that there is not even an inch of gap to come out of her that was her, that was reported in the paper, it was then taken by the high court as PIL and high court ordered the authorities to demolish all these things and rescue her and give her the protection, see this is not a violation the neighbors how have put up their own wall, of course they have the right to put there construction ion their own way, what out manner and everything but they have constructed there houses in such a manner so that she was inside and was having no ingress is it not happening? these elderly people, under-privilege or have-nots somewhere or somehow also experiencing this type of violations also from the fellow human being, is not only the uniform forces it's also by uniform forces there is also violation by fellow human beings which every time cannot be taken as IPC offences, many times IPC offences and special act offences are same but there are those cases are also there, why not we think about that also.

Participant: that is only a violation and no offence has been committed.

Justice Akbar Ali: violation itself is offence. Right? Any violation is not an offence?

Then it's a serious problem, then why should be there protection of human rights act itself and why there should be two declarations, universal declaration and two treaties and two conventions and why we are discussing here. If everything is covered by the statutes, then why we are here?

Participant: sir in my opinion in that human rights commissions are working in an extraordinary manner and they are also exercising all power regarding the human rights court and therefore no scope is left for human rights courts. They are doing all things ... they are working like a court and overlapping the jurisdiction of human rights court.

Justice Akbar Ali: please consider this before giving this type of decision, are we responsible for this as judges? Aren't we to take up the responsibility of this human rights violation or should we say no go somewhere else. when there is a statute, provision, when there is going to empowerment and where there is simply because there is no procedure, we cannot define, see what I would say is...that I will come to that, see that's why whether to find out a solution to make an awareness to the people look I am also here, because they are not coming close our shops. You just tell me this? Or we say we will do good business saying we will make more advertisement, we will call the entire Bollywood artist and we will call everybody and say that look we are here.

Participant: that may be a temporary measure till the full-fledged human rights court are established these arrangements may be temporary measure but the problem is how to go about it.

Justice Akbar Ali: we started by saying, let us categories what are the cases, offences, human rights violation that could be taken into.. Yes sir?

Participant: investigating agency who ..., could decide whether it is a violation of human rights or not, if it is violation of human rights any offence comes on the way can be taken by human rights court, first it is to be decided that whether it is ...

Justice Akbar Ali: ..., procedures we can talk about, these are the orders we can give about, these are the things we can do. We want only that a positive way of looking at the thing to come out with solution at the end of the day or 2-3 days after hearing the professors and other people are going to say about various violations. And you know that prof. is ready with what section 30 says and I do not know how we are going to change our view but one thing that I want you to keep in mind is please look at the thing by statute we have been empowered with. some body is not coming to us that doesn't mean we don't have any work rather than I would say let us empower them, let us make them aware we are also available. it is not that no cases has been filed there are cases, the only difference is may be the one reason by Establishment of state commission national human rights commission, may be these people thought this is the only forum that they can approached. rightly one brother pointed out why not these commissions also refer the matters instead referring to government and asking for recommendations ask them to recover and pay to somebody, when there is an offence involved okay, common law, IPC offences, special act offences that can be tried any the police investigation where ever there is no such cases in fact. Or no investigation has taken up or nothing has happened why not we think about taking that matter as a cognizance and why not we think this matter under 200 or refer the matter to police authority because magistrate has power to refer the matter under 156(3) that can be done. see there are many provisions available for us to do many things the only thing is they are not coming but that doesn't ,mean we do not have work. Let us think in positive way so that we can come up with some solution at the end of the day, have a go about this.

Participant: being a special court the court can directly take the cognizance and precede accordingly, that would be I think the working formula and procedure of special court and special court can directly take cognizance and the time limit is minimized.

Participant: under section 30 of the human rights act, the special courts only have to try the offence nothing suggest that they can suo motto take cognizance or start investigation or ask police to start investigation it is only the case which comes to special court then it can try. So take up the matter

Justice Akbar Ali: we are not talking about the suo motto of taking any cognizance or investigation like the commissions do we are not taking about that we are only talking about how

if a person comes to me, or make the person aware we are available so that he can come to me and make use of this.

Participant: what is the object of human rights court sir, because we have spoken that to provide speedy trial for violation of fundamental rights but whether we have to punish the wrongdoer or we will provide remedy to the victims and first if that is clarified I think we can proceed further.

Justice Akbar Ali: we will have tea and come back so that we can listen to the prof. who is going to talk about the interpretation of section 30. ...we have provisions, court, pronouncements, do we have mind? (Laugh) we have break for tea and we will come back by 11-30 for next session.

SESSION 2

Interpretation of Section 30 of Human Rights Act

Ms. Nitika Jain: welcome back, we will start with the second session and before that we have a pre-training response preform that we have made it includes all the questions regarding taking of cognizance, the problem faced by the human courts, section 30 the cases dealt by the court so we will just distribute that and we request you to fill the pre-training response per forma and submit to us as soon as possible whenever you can finish it and submit it to us we are just distribute that and I request professor Ramesh to start with the second session.

Prof. M.K Ramesh: I really feel privilege to be amongst the Justices here in such a large number presided by his lordship Justice Akbar ail, the 1st session if I must say and put it in just on single sentence was inspirational, integrating and third provoking in fact when I just looked into the program design which was given to us before we made our choice to come here to interact with you the first three sessions were meant to be brain storming exercises and because of the difficulty in organization they have just juxtaposed the fourth session into the third otherwise the continuity was the 1st, 2nd and 4th together and I am assigned the task of initiating the task on interpretation of section 30 and role of human rights courts in two sessions, I do not want to distinguish between the two because there is an overlap between the two and no lectures from my side in fact the chair was asking me whether I am having a PPT or anything like that I don't believe in PPTs especially when I address a very well informed group like yours in a classroom I can do that, for a workshop and seminar I can do that, but not for the very well informed people interpreting a statute that's what you do every day and what should I be doing perhaps I would only be initiating a little bit of an ignition from which you can take off, even the ignition is not required I must say for the simple reason that such sweep of ideas that came through in the 1st hour itself would make us think, re think, review the entire act all over again not just us but those who have made the law for us and those in relation to whom this has been brought in force need to rethink whether this is the right instrument, right kind of an instruments, right kind of an institutional mechanism, right kind of a process and procedure laid down to effectively carry into realization of the objects the law intents to achieve.

I compliments the NJA for getting you all here away from your day today routine and high pressure work you are engaged in you are in retreat and quite unlike the offices you hold you are free from that kind of shackle, four days you are here to really think freely from the office you hold, position you hold, from the kind of trappings that actually bind you from thinking independent t of what you are doing so lets out of every mind as law persons you the practitioner of the law and interpreter of the law, and I as a law academic and researcher in all to start reflecting on that, in fact that was exactly the idea that chair came up with in 1st session how sensitive are the judges to issues related to human rights and their protection. he did not mean you obviously not and certainly going by the one hour of experience that we had I think you came up with the issues, questions that even solutions, some of you even came up with solutions for the lawmaker enforcer and against whom this law is targeting, so that way the 4 way exercising that we witnessed in nutshell in 1st hour itself, not just section 30 or the role of human rights courts but the gambit of the law, you covered in one hour, in compiled of observations made by you. One observation why do you interest the responsibility to the same court which has been made to do 100 and other things our friend from Karnataka was trying to raise that for you. you know better than me given the pressure of work you have every now and then you has to give a report as to what the progress is made, how many convictions, how many acquittals and things like that and you are required to give answer in 2-3 months' time and many a time the government operates in such a way that those who are in bureaucracy thinks that judiciary is just yet another extension of the bureaucracy which is not, it is independent, autonomous and a professional having its own ethics, grammar and rules to the game than the usual burro crates will function but unfortunately many a times people talk about targets, how many cases you have disposed and things like that and also complain about do cut explosion whether required facility and those positions are filled or not no one bothers this is almost just like asking a commissioner of IT last year you got 10K crores how much you are getting now, you only have 5K crores and hardly another 28 days left and what are you going to do in 28 days to reach 10K crores, you should get more than that that kind of thinking and mindset actually cripples creative thinking and I must and dare say more than any other wing of the government judiciary is one of the most creative and productive one we have, otherwise you cannot think of the entire body of law of torts emerging the failure, inadequacy and inequity which is there in existence system of law the Lex cripta I.e. the written law actually made the judiciary innovate and come up with a

whole body of law and from that body of law comes so many others law. so going by that the creative mind gets taunted and stultified if you are going to burden it with problems and asking a particular target been fixed within which you have to achieve certain things but quite in contracts there is this observation from another friend here who did says that issues are quite simple and it does not require rocket science to understand and what is this concept means and conveys and how to reach the court and we judges are quite competent enough and capable enough to handle those situations. yes there are difficulties in the entire law making process and administrative process, you cannot expect the lawmaker to have put down everything in writing giving all the details of the procedure I as a judge I will innovate, I will come up with solutions. Well both of you do represent large part of the truth in the exercise, what the law contains, facilitates and what it does not contain and facilitate is very well explained in this one hour. My idea is essentially to initiate that and put things in context and then see can we have a look at section 30 in a different kind of light altogether that is the question.

Let us revisit the questions that you posed, when we know that under the constitutional law of schemes we have constitutionally granted rights and in protection of which you have writs, the writs jurisdiction by higher judiciary, and nothing prevent the government of India to even assign to the district court the writ jurisdiction under the constitutional scheme so thereby the higher judiciary takes care of the rights of all of us then why a prepare law of human rights and its protection. one question, and not just that just look at the profile of this law and the dramatist person involved in giving life to the law NHRC, SHRC very high profile body former CJI to head that and judges of highest court of the law and higher judiciary to be part of it, is it worthy exercise? should we really think of that and if that is the case that there is need for such a high profile body there must be something missing something problematic the 3rd one is to amplify the ideas expressed by one of you that having a special court as many of expressed, may be perfectly in order with very well laid down processes and procedures which clear the definitions, descriptions and all that so there is no confusion taking cognizance, committal and all those question you raise, rather than asking the same judge to do the one more thing will it not be a back breaking exercise jurisdiction over burden that is the expression used quite often, I think for all this we need to really look to the concept in which this law is made because the entire interpretation of the law is the content and context, what does the law state and in what sense the

lawmakers meant when he used it there, the problem of law is as you know better than me the one who makes the law is nowhere available to explain and answer things for us because he makes the law and it's in response to a felt need and later much later somebody else has to enforce it. so the one who makes the laws doesn't enforce it and one who enforces doesn't know who has made the law and what was the legislative intent or mind and it becomes the responsibility of the professional in you, the really interpreter of the law, you are the only one entitled I mean any one of us can come up with any interpretation but that will not have the stamp and recognition of law unless it comes from a law professional and a judge and that becomes a precedent and law of the land. so that way the problem faced by a judge always without any single exception is he is not the maker of the law he is enforcer of law but it is his lot duty job and mission to really make sense out of what the lawmaker had said to make sense what the law enforcer has done and if there is some nonsense about that correct it because ultimately the courts of law through this interpretative process uses this as tool for Justice because law for Justice , law for empowerment, you cannot think law for already empowered, the basic tenant under constitutional scheme of things we have in India is law is for empowering the disempowered and if that be the task that be the goal how do we really understand the human rights act and how do we really understand section 30 here. we know very well, I am putting it in context now, that whatever the difficulties we have in the wording used in any law for the time being in force in India the higher judiciary has done its approach so much so that they have extended in the understanding of fundamental rights in fact they have added quite a few to whatever there was in the text of the constitution, some of them are derivative rights like right to life, just a few words in article 21 and how it gets extended right to live with dignity, freedom from want, right to healthy clean and wholesome environment as an adjudged and integral part of life has not come from the constitution, it doesn't flow from the constitution at all, it comes from the judiciary and have become the law of the land so, in a way the unique position of higher judiciary s you know, better than me and I need not have to elaborate on that is that in a way it is unparalleled unlike the courts of law in anywhere of the world, the higher judiciary is in unique position of being an interpreter of the law not just a court of law but court of Justice and in pursuit of Justice have expanded in the understanding of the constitution and they have actually and they alone can say what is the basic structure of the constitution and no one can go beyond that and so when people talk about judicial activism I don't think they are talking about law, they

just don't know what the constitution is, there is nothing like judicial activism, judicial restraint, judiciary is meant to render Justice that's it, that's what the constitution ordains and assigns the task and role and responsibility to give life to, right to of every one of us, so given that fact why think of human rights act separately then? If the constitution is the power house which confer all kinds of right and realization of that, why should we start thinking about a separate law in human rights and protection of human rights because the higher judiciary itself said that...

Now when the when you think of a felt need in a law it should either come from community of people who come from the door of court of Justice or it should come from any of those aspects of government that there is some kind of weakness, shortcoming or inadequacy and we need to address that and so we think of a new law now it come from judiciary itself the high judiciary itself has said many times and what some of you did mention was already amplified by the higher judiciary that this is something which is the basic , minimum thing which should be guaranteed by the administration, you don't need a magnifying lens to see the commission and omission of administration here when you have an administrator you expect the administration to perform its duties as and when required under law, rule of law means that. you have been given an assignment as an administrator you should have performed, you don't perform and not only the authority does not perform it acts in such cri precious way as to remain unaccountable, irresponsible and that is the reason why many other states including Karnataka as you must be knowing came up with something known as administrative procedures act, detailing what exactly, step by step an administrator has to do when he is charged with certain kinds of task and the absence of which the courts actually invented the principles of natural Justice, isn't it? it's court's invention that there should be *audi-alterum-partem*, audi is not something which came from administration, see before you take a decision you hear the other party just because you are put in the position of administration it doesn't mean that you should apply mechanically a provision of law in given situation the way you like it, so administrative discretion acquired a different dimension when courts of law intervened time and again to correct the administration there but how many times you expect the courts of law to be the monitor, policemen, policing the police, administration all the while a24 hours job, cannot think of internal vigilance of the part of the court to have do so many functions to perform and you expect the court of law to do this kind of thing and for everything you come to the higher judiciary of this kind of thing there has to be

some way whereby we must have people who will have focused attention to this and who should be able to address it. This is an internal racing of a need. then, there is an international racing of a need it is because of the fact that India became a party to the charter of rights and relation to every human being started with the universal declaration of human rights in 1948 to the twin covenant the civil and political rights covenants, economic and social and cultural rights covenants and this is the year we are celebrating the golden jubilee of that it is very fitting that we sit to reflect upon this particular thing after 50 years of the inauguration of this twin international covenants, why should we think about that because we are party to that and on international law if you subscribe to an international covenant there is a commitment on part of your government that you will adhere to the terms and conditions laid down there and a commitment to confirm, comply and ensure the observation of whatever you have taken there and we have undertaken as a sovereign and independent nation that we will protect and promote human rights, constitution can't do? it can but the only problem is as mentioned by the courts themselves that is is not something that can entirely handle by the highest levels it should be handled at the place where the offence is done taking Justice to the doorsteps of the one who has been offended , the delays, procrastination, confusions all would actually render Justice at travesty so the needy will find Justice at the very close quarters of where the offence occurs or the violation occurred who does that well as you know the famous saying power corrupts and absolute power corrupts absolutely, that you have in system of administration, authorities been given so much of functions to perform I as a lawyer and you as a judge we cannot call of power we only refer to as functions because each institution has been created whether you are an IAS, IPS officer you are creature of law, law has created you and so you cannot exercise power you can only perform function, that's why they are called public servants. so in the course of discharge of the functions abbreviations do occur and when these become the general rule violation occurs in such a manner in a magnitude that the law itself become incapable in handling those violation and so a solution has to be found this is actually the felt need that you have problem of accessing Justice, avoidance of delay, this is said in cases by courts of law, I am very happy that NJA has come up with delays, procession, procedural, in accessing Justice, in making the concerned answerable and accountable and the kind of pressure which is put on the court of law all the while which might not have been address any of these very intricate

issues either because of lack of substance of the law, the right or the procedure whereby it could be realized and because of that the need.

In 1993 act as you could see if you go to the preamble reading of section 30 is meaningless unless you reads the preamble amplifies the idea what does it says an act to provide for the constitution of a NHRC, SHRC and human rights courts for better protection of human rights and for matters concerned where with and incidental thereto, the emphasis is on better protection of human rights, it is nobody's case or argument that human rights are not protected, the lawmakers are also very clear there is nothing defensive about that, the lawmakers says that every law that we have made under the constitution including the fundamental of the land is a human right instrument no doubt about that but we have certain difficulties in realizing those rights so for ensuring better protection of those rights we are coming up with this law and we just look to the material that is gone beyond the making of this law the parliamentary debates and things in relations to that both in India and abroad is essentially to give life to whatever we had committed yourself in 2 covenants, civil and political rights and economic, social and cultural rights, that whatever kinds of law we have do not really, very effectively convey those ideas which we have agreed to in international levels and so we need to have a different mechanism here. so the real target as you could see from this law is nothing to do with conceptualization of human rights just at the definition, which makes it clear, very broad based all fundamental rights included and all those international legal instruments which we are party to dealing with human rights are the human rights we understand here, what is the target here? The target is the one who comes in the way of protection of human rights that is the target, to address the problem created by that which is actually rendered by the prescription of the law and the tools and mechanism of the law blunting it, to sharpen that we have this law, sharpen what? to sharpen in form of clearer and prescriptive way so the lawmaking sharpen the very missionary of the implementation and that's the reason why entrusting it to the existing courts perhaps, you can reflect on that I am just hinting on that, and thirdly if there is a need to create a separate bodies and that how the idea of NHRC and NHRS or SHRC is not very ordinary body, the very fact that you get the very best of the legal brains in there is a clear indication that law makers are very serious that this is something we should have done earlier but we are doing it now in 1993, so understanding section 30 and 31 and chapter 6 of this act needed to be presided by this kind of inquire, to have

the set as judges what you do when you are asked to interpret any provision of law or proposition of law you always apply this rules of interpretation and in applying the rule you talk about the plain meaning but unfortunately the language of the law is not that plain here and when it's not plain what you do you get a context, you get into the background, 1st you try to find the answer within the law itself, you must say and you will always say the law must be read as a whole don't take section 30 or 31 in isolation it is to be read with other provisions to give meaning every word that has been used either out inadvertence or advertence the law maker has used certain expressions till the law is in force, it is our job to interpret, to give life to it, see somebody has not given life to law, you are giving life to law, you are the life giver of law and giving life to law you interpret it in accordance with letter and spirit of law. so section 30 and 31 when you interpreting it, obviously you are not interpreting it in isolation with other parts you are actually interpreting it if when it comes to institutional mechanism because the next session is on the courts as to institutional mechanism, what it has got to do with human rights commission. one observation which was already was made by NHRC does so many things and his lordship very wittily observed that this are there then why you have human rights court, I need you need to reflect on that.

So there must be a reason as to why you have not only thought of a high profile body but also thought of something which will also take care of the nuts and bolts issues, which is the real matter here, let us just visualize the whole scheme of things here. let us look into the institutional arrangements the national and state ones, you look into those functions we are not going to deal with that because that's not the assignment here because Muralidharan and few other judges who would be here with you will deal with that because you have separate sessions on that but just to to give a hint on that the idea of this commission are more of think tanks, drain trust, advisors to give a new vision and a sense of direction and to bring in correction to the highest level we talk of protocols, the state government at highest levels years, if at the district level some smaller entity were to advise or anything like that I don't believe in the hierarchy of courts under the constitutional scheme you only have primary judiciary and high courts and supreme courts so there nothing like superior or lower at least under constitutional scheme but still in terms of protocol you expects that advice should come from above and who else but a retired judge of the supreme court or the retired chief Justice of high court in this commissions would be able to take

the government task and government cannot take them lightly, when it comes from such functionary in the Justice dispensation hierarchical order, one cannot take it lightly, you may brush aside a media report, an opinion of an academic like me, opinion of an activist but cannot brush aside the a judge, his opinion because we live in a very small world now, words go all around that look what are the current state of affairs in India now, they make a grand declaration in the international level that we are champions of human rights we are the most populous democracy in the world and looks what happening the judges themselves takes these guys to task so there is something seriously wrong with the state of affairs in India and so government cannot takes things lightly in fact I am going to reflect on couple of thing when government has taken even CJI lightly, I will come to that later, but yeah that's a problem more such problems arise and it becomes all the more reason as to why the judges need have to strengthen themselves and be more assertive and I think 4 days exercise is essentially to make the judges more assertive better empowered than whatever they should feel that way , that's the idea I feel the NJA is contemplating in the 4 days exercise with you, and you have already started that kind of reflection in the very 1st session, now just get to section 30 very simple, plain, in of course set of expressions I think one of you can read because I am only supposed to initiate, I am not supposed to give any opinion or judgment, any of you can read, and what does it convey we will together reflect upon, instead of I giving my opinion, let it be an interactive one.

Participant: For the purpose of providing speedy trial of offences arising out of violation of human rights, the State Government may, with the concurrence of the Chief Justice of the High Court by notification, specify for each district a Court of Session to be a Human Rights Court to try the said offences. Provided that nothing in this section shall apply if Court Session is already specified as a special court or a special court is already constituted, for such offences under any other law for the time being in force.

Prof. M.K Ramesh: so the quick reading of section 30 makes it very clear it puts in a nutshell there is to why we have made this provision speedy trial of offenses that means there is lethargy, delays and so to fast track that we are contemplating this measure not all cases but cases where violation of human rights occur, is it a rocket science to understand why and when the violation of human rights occur, possible but also possible to overcome that you have definition of different human rights and the one in whom the particular right inheres is not in

position to realize in its fullest there is some deficiency the problem is to find out where and how, who is responsible for insufficient, inadequate realization of these rights and for that you are thinking of missionary it is not to investigate but to carry out the trial, speedy trial of offences, that's means you are characterizing any deficiency in the rendering of all those measure which are required for realization of right is an offence and we lawyers we know what an offence means being tried in criminal law and we have interpretations of statutes as far as criminal laws are concerned they need to be strictly interpreted and you know the reason as to why they have been strictly interpreted because it's quite possible that one may allow one's imagination to run riot and try to bring anything and everything under the sun to bring in with the purview of the law and criminal law doesn't allow that, because it's essentially based on one very salutary noble principle that even if 1000 offenders escape one single innocent person should not suffer, so you should be very precise, very accurate, very clear in determining the nature of the offence and things like that, but anyway just again continue further here whether we have the difficulty of definition here or not we will postpone it for little later but 1st the requirement it is to ensure speedy trial offences arising from violation of human rights at least we are clear that any and every violation of human rights is an offence and should be subject to speedy trial, that is the object, how to find a mechanism and who should do that it is a state government of course the state government with concurrence of CJ, why do you bring state government because the state government should undertake this task, creation of entity is by the government the state government should have to create the institution, to create the institution the state government should be convinced of this particular thing of what? convinced that there is something called as human rights there is some kind of an assurance to the protection of protection of human rights and there is some aberration here and it necessitates this particular measure so the state itself should be convinced of all this, after that only the next step approach the CJ of high court and get his concurrence, it would not be difficult to get his concurrence actually many a times CJ of high court and supreme court who have actually demanded, boarded, directed, needed the government see look at the tragedy in India, the government itself must have initiated it and courts initiated that and Justice ail refer to the fairly recent judgment of the higher court of law it is not just the court is acting on the request made by the government but the courts in its own are asking the government you should have done it earlier, why don't you do it now, you should and report back to us in 6 months/ 3 months

or whatever but the letter and spirit the government should initiate that step with concurrence with CJ and it get actualized through a notification of course, look at the wording here may through a notification may.. may must, should , mandatory any other interpretation here specify for each district the court of sessions to be a human rights court, is it to take cognizance no, it is to try the said offence at least this is clear in the law and there are exceptions, that if there is already a special court to that effect you don't have to go by that, how does the special court come, the state government must have already done that, then the job is done, you don't have to worry about it, but if not done you should consider this as state government because you are already convinced that there is violation, there was a protection that should have been accorded to somebody with regard to his or her rights that is not been done, the state has a duty let's just go back again, state has duty to protect rights, constitution says so, it's a negative obligation the state should refrain from doing anything as to violate our fundamental rights, I don't want this to be constitutional discussion because my learned friends would come and discuss with you about that much later, but it's very clear I don't think it's very clear that we have any objection to that it's an obligation imposed on the state that you shall not violate the rights of people there can be reasonable restrictions, you cannot impose constitution already imposed so within that you can act and anything that is done is a violation, so the state either by itself has been the cause for this complainant or on accounts of his declaration of duties has allowed some private body, khap panchayat or whatever to violate rights of people, here exactly the relation between the people the agency the state comes in very clear the expression used herein is the state government not referring to state but to the government many a times people in the administration and government always equate government with state they make a very wrong, inadequate, ill-informed interpretation of the constitution referred to Article 12 and 13 and they say that these are interchangeable expression, let's be clear that in fundamental parts of the constitution state and government are used interchangeably only to impose restraints on them these are used interchangeably and in a very proactive way it is used interchangeably in the DPSP because it is obligation of state to ensure welfare of state. So whether it is political or civil right or socio, economic and cultural right the duty, obligation, liability, responsibility is on that on agency the state the operative are on the state. just look into the relation between the state and the people we have no difficulty here because the constitution already declares we the people of India have solemnly, blah blah that

means the state is the people and on behalf of the people you have this missionaries governance and there job is 1st not to violate but should there be some kind of violation with them or somebody else is allowed to violate then it's their responsibility, it becomes responsibility with concurrence of CJ to think of establishment of this body. Sir you raised your hand sir please go ahead, you want to say something? I have no problems because in my law school I make observation and hands get raised.

Participant: we should appreciate the statutory lacunas in the act.

Prof. M.K Ramesh: I will come to that, I am on with you on those lacunas in fact his lordship also agreed with you in the 1st hour itself but still just try to unravel this mystery and understand the text and see whether there are ways out, not that we will find ways out within in one day, in fact the 4 days you should be crucible that journey whereby several ways out may emerge and we may give lead to that, we may attempt that but 1st let us just see what is plausible under the law, many a times we just read the law as it is and then say that there is something defective about that, be assured no law in this world is perfect especially in India, no law sets out the perfect procedure, step by step implementation of the any law if that would be the case all our bureaucrats would have been reduced to clerks and all our judges, advocates had no job to perform, you cannot think of that kind of the thing. in fact long time back one of the greatest legal humanist is that we have by name C.K Alan did say that in idealistic state we need law and governance to ensure state of affairs will continue to operate and just to maintain you need lawyer, to have vigilance over that, to ensure that nobody would stray you need a judge, so given that kind of a thing we are referring to of course, it's no body's case here this is not an imperfect law, it is an imperfect law but still can you really bring life to this law and what is plausible with it, I am just trying to get into that kind of an exercise.

Participant: Sir, from my understanding we are trying to make section 30 of the act effective, how do we go about it, being designate as the human rights court, so from my reading on how to make it effective my understanding is that being a district and session judge, we are trying the criminal cases plus being a human rights court we have to ensure that the criminal cases we are trying are speedy tried you know doing it both way, I am under the idea under the IPC

section will try the case but being the human rights court we have to ensure that these cases are tried speedy, you know because that's the speedy trial of the cases.

Prof. M.K Ramesh: I think you have touched a very sensitive card here, although I did not want to touch that, as it would call for one day full exercise I will tell you why, but I will put it in one or two sentences here I think you raised a very, very important issue here, what are you referring to speedy trial of human rights cases, can that be distinguished from so many other legal process that we have, are you hinting that speeding of the process of criminal Justice system, quite possible, is this a trigger for bringing in reforms in criminal Justice system, possible. that means the lawmaker for whatever reason he made this law of course he has given justifications he did not go with the required preparations in the 1st place, what is required before you think of using this expression in this law you highlight it the inadequacy in this, there are many more I also can highlight but just move on and continue to be positive there is so much of negatively about this we know and the more we think about it the more we amplify what is not possible, let us see what is not possible. so one requirement is that this government can entrust this responsibility of speedy up the processes of trial to an already existing sessions court, when you say entrust means what? once again as a students of law we all know what a trust actually means, it means reposition of confidence, in whom you can repose confidence, you will have confidence over someone whom he gives you the impression that he can be considered as believable and trustworthy and the one who has the trust is the one who has all the qualifications of the trust what are the qualifications here? Whether state entrust the responsibility? you have the equipment, facility, capacity, processes and procedures in command and the power of command need to do that, what personal you get, special PP that you get in section 31, that's what the law says so, in the assertion of the lawmaker the state will have to make up its mind that there is a problem, number 2 having made up its mind will have to consult and obtain concurrence of the CJ, number 3 if it is not already done or established a particular court for such offences under any other law enforce if they are not there then entrust it to the already existing sessions court in every district, this is what the law says. now let's just get you into the problems, the interpretation of the law on the face of it is this now, how do you operationalize the law so interpreted, we get into the second stage of analysis here what is the big deal, there is already a court in existence the sessions court why did you entrust such

responsibility so it cuts the cost for the government and second it has the entrust in the judge that means the judge is competent to deal with such kinds of case third the judge is the facility to do all this, are we not getting into a conjunction here? Are we not assuming things? The state appears to assume these things. when it has made this law it has assumed that it is already in place, who says so the law makers says so and if they says so then it is his responsibility to ensure it to be so, but has it done that? after making the law they have forgotten it, no rules framed, once again when you come up with a statute, what is expected from you is come up with the laws to operationalized that because the statute us is coached in such a language it only gives a frame and what is this protection of human rights act in its entirety as students of interpretation of statutes all of us can without the exception say it is more a skeleton law or a framework law, which just gives the frame the form and substances needs to be infused in it, but it is not purely a skeleton law there is some substance already there is reference to rights and it is not put in vague terms the rights are already listed or cataloged in the constitution, civil and political rights covenant, economic, social and cultural rights covenant, and so I must say that this protection of human rights act is not a protection of human rights of only civil and political rights but economic social and cultural rights as well, there you get into the difficulty and you all are right in saying that it is not been properly defined if this is the broadest definition you are going to agree upon because there is no other way you can define it other than this in the absence of a clear definition you have to give as broad interpretation as possible because that's the legislative intent that all human rights are included here. look at, I am stepping back a little and getting into the practical aspects, look into the NHRC and SHRC functions over a period of time by enlarge the focus is on political and civil rights, you know why? for the simple reason that there are former clearer easy to realize, I have a right to vote in an election I have been denied, so the denial is clear the nature of the right is clear and so the relief should also become clear, but economic, social and cultural rights are of a different make, there are .. I will take two minutes and will conclude because the next session people are ready, just 2 min to wrap this up so that I have initiated and continue in next session alter after lunch that there is a difficulty here, for the simple reason that even the constitutional scheme this economic, social and cultural rights come in part 4 of constitution they are not there in part 3, let's not talk of judicial interpretation or innovation and enterprise there what the high court and supreme court have done to in telescoping DPSP into fundamental rights we will come to that later that is interpretation by

court but the text of the constitution does not say that, and in fact says that these DPSP are not justifiable and here is the human rights act which takes on, and if I can use a very crude expression here Donk Mayotte taking on the windmills, taking on such a mighty thing and what is the weapon that you have given an uncertain, unclear, imperfect legal document. It is an invitation to disaster, incompetence, non-performance with this note let me conclude now let me see a shaft of light when we resume after lunch.

Justice Akbar Ali: thank you professor, I know that you may have many questions to ask but we have another session to go. Before that actually we have one hour tea break now, we believe in one hour nothing goes inside, next session will be taken by Elizabeth and Sunita, before I forget I have a question to ask to the prof. which came to our mind something different, speedy trial may be section 30 says all the courts which have the criminal trial go for a speedy trial that is the idea, where speedy trial is a fundamental rights and delay in trial is violation of human rights. Is that the legislation is suggesting? prof. I am asking this question is the legislation is suggesting for the purpose of providing the speedy trial of offences arising out the violation of human rights, we leave the state government specify each district a court of session to be human rights court to try the said offence, that is the offence arising out of the human rights violation provided that nothing in this section shall apply if court is already established for same purpose because that would not be the intent of the legislation because act itself is 1993, intention can't be there presupposing, there is already a court established already specified the next is a court is already constituted for such offence under any other law for the time being in force, see that is any law time being enforced or special enactments we have POCSO, ST/SC act those special enactments also construe to be violation of human rights in essence and therefore the special acts offences against women and children act, the mahila courts that is entirely different

Participant: yes, special court for atrocities against women and children.

Justice Akbar Ali: fast track mahila courts where offences against women are tried may be those courts are already been constituted under special enactments which has to be also termed as human rights court, where I was showing the offences of custodial death, torture, those trials which are pending in many courts has to be brought to this court so that the human rights court

alone will try this so that speedy trial can be done and given. Will I be wrong in interpreting in such a manner prof? I am not sure.

Prof. M.K Ramesh: I have quick response, but I won't elaborate, I will do it in a next session. Let's accept it's a clear drafting blunder. We will continue.

SESSION 3

Rights of Women against Sexual Harassment at Workplace- Human rights of Women in danger

Ms. Nitika Jain: shall we begin with the 3rd session, so we have with us Miss. Suneeta Eluri who is national project coordinator at ILO and Prof. V. S Elizabeth, the first 20 minutes would be taken by Miss Suneetha Eluri then presided by Prof. V S Elizabeth.

Ms. Suneetha Eluri: Good afternoon everybody, my name is Suneetha Eluri, I work with International labor organization as national project manager I deal with two projects one is working with domestic workers and other is promoting gender equality at work places, so we generally do trainings for employees organizations like FICCI these kind of people and trainings for trade unions and others. let me tell you it is the 1st time I ever attempting to address, have conversation with judges, I agree with Ramesh ji that you are experts in your area you no need to be given PPTs, so the PPT is for me not for you, for my convenience, so basically I will deal with little, mam is also there so we divided the presentation, I deal with overall framework will be understanding sexual harassment and specific legislations which was enacted in 2013 and also what are the challenges in implementing this particular act. I always begin my presentation with anything to do with gender is something more of unlearning the learning we have to unlearn whatever we have learnt through our social conditioning so far in order to understand gender, promote gender equality that is my first take on that, and then it is also a new learning process even for me, we do these trainings, for me it's always something new to learn in each training session that we conduct something always new dimension emerge, in order to understand gender from here I will start my presentation, I will not get into much of how it is human rights violation, mam will take care of it, but why we need to talk about sexual harassment, in particular thing I want to talk about, bring some statistic to your notice, when we were doing this we are trying to formulate a guide for understanding sexual harassment at workplace we were looking at different studies which were done in different countries to understand the prevalence of sexual harassment. let me tell you it's not only in India, it's not a disease which is not only peculiar to India, you see the cases of sexual harassment believe me all over the world, the so called advanced countries, developed countries where women are supposedly treated equally as

men there also there are several cases that sexual harassment is a problem, if I can use the word epidemic that kind of problem, not getting into details just for your understanding I am giving this thing and if you ask me what about India, there is one study done in few states in India which includes Mumbai, Bangalore, Chennai and Kolkata, Ahmedabad 400 women were interviewed to know whether they have faced any such sexual harassment cases in their workplaces among them 166 of them mentioned that they have faced and in that 102 cases are physical, nonphysical and rest 19 cases are physical, why I am saying this is there are different forms of harassment, the traditional and very understanding of sexual harassment is something to do with physical touch, it's not that the more the technology is advancing the more new forms of violence and harassment are emerging unfortunately so there are also nonphysical forms of harassment and physical forms of harassment, verbal forms of harassment I am just getting into that, so it's a universal problem not pertaining to one country or the other.

I will just talk about how one need to understand sexual harassment, the way Bollywood pictures project sexual harassment is not about a friendly behavior, one shouldn't take it as a friendly behavior so it can be taken just like that, and it's not about, the key word to understand sexual harassment is unwanted, unwelcomed conduct, whatever the person who is committing that may feel but the women who is receiving it is feels that it is unwanted and it's unwelcome it amount to sexual harassment and the study shows that sexual harassment happens mostly in cases where when women are in lower position than men, most of the study shows that it happens with the co-workers, it's the co-workers who perpetrates sexual harassment and it also happens in unequal power relations, particularly to women in vulnerable employment conditions example people in contract labor, people who constantly fear termination of work may happen if they complain and this thing so most of the time when we go to talk sexual harassment many of the enterprises units and universities and all actually there are no cases of sexual harassment in our workplace, our workplace is free from sexual harassment but actually does can in Indian context can we take it as no complains is equal to not having sexual harassment at the workplace, we know what kind of stigma is attached to the person when someone tries to come out in public and try to file a sexual harassment case, I studied from JNU, so there is a down the line, 10 years back there is a committee it's called GSC, gender sensitization committee against sexual harassment, so there use to be cases filed, girls use to file cases, irrespectively of losing the case

are winning the case are winning the case, girls use to disappear from the university even I use to think this particular lady won the case of sexual harassment, why she is leaving the university is the social, you all know the societal stigma attached to it, you may win but the way you are viewed in day today in the university or wherever that makes you to leave the university, the bright students, who have potential to get into, pursue their careers, many people have to leave because of this to leave the universities and go so what I am trying to say is there is lack of complaint in any place it cannot be automatically can be understand as that there are no cases of sexual harassment, I think mam will speak more on that I will just touch upon there are different kinds of sexual harassment as I mentioned verbal, physical, visual, non-verbal harassment, you all know that, even starting a person constantly also amounts to sexual harassment, so there are different forms of harassment and this particular act also which I am going to talk now also recognizes this forms of sexual harassment. And then what are the effects of sexual harassment and victims I need not mention you know very well victims will undergo physiological, physical suffering and it will lead to the ...

what is human right how is sexual harassment is related to human rights, in my understanding human rights is nothing but proving opportunity to every human being to exercise their fullest potential to the plausible, I should be allowed to exercise all my mental, physical ,emotional capabilities to exercise to achieve my highest order that is what human right is but when my human right is curtailed when I am subject to sexual harassment, I am subjected to psychological, physical suffering which will hamper my growth, career, equal participation in the society so these are the things that a women undergo when they face sexual harassment I the society and there are also when we actually talk to the enterprises like organization medium and small and big corporate also, when we are trying to sell this act to them and tell them that you have to constitutes these local complainants and internal complains and committees what we have to.. we have to talk in a business language, it is also true it's not only talking that sexual harassment also hampers the image of the society for example after Nirbhaya case in 2012 the tourism industry has gone down in India for some time and all international and national newspapers Delhi is seen as a rape capital being staying in Delhi for past 10 years and somebody finds out and started saying where are you staying Delhi oh it's a rape capital, it pinch me somewhere , it hurt me somewhere I don't want to hear that, but it's truth, so it actually put the

image of the nation, country, company in a very low value and that is one thing. These days' big companies are very cautious about having committees in place, taking measures against sexual harassment because they are worried that there is something called as ethical trade practices so people are consumers are observing, no more consumers are thinking that I don't bother where it comes from, this particular product, what it is? they are bothering about whether fair labor standards are there, discrimination is not there in producing this particular product. so consumer conscious is increasing they are looking into the things which are fairly produced, without any discriminatory practices, without employing any child labor and all, in this context also society these days employees are little conscious about that we need to place this committees in place so that sexual harassment will not occur in respective work places, then I need not to tell you know very well what are the negative implications on the society if sexual harassment is continuous phenomena in nay society not only in our society, any society so this is a session which I am going to talk in detail, there are certain standard s in understanding sexual harassment see like when we are trying to understand things related to gender, several things operate in our thing the way we are brought up, the way we are conditioned, I am from a small middle class family in Telangana in a small town so my brought up and the way in which I was conditioned that told not to laugh loudly in public and the way I was told not to walk like a man, walk like a woman, put your shoulders down and walk these things I was told, I was conditioned from the beginning, so anything contrary to that I won't realize that I am subjected to some kind of violation or humiliation or whatever at the same time I also started assessing the a person by same standards anybody walking brave, being laughing loud I will think that, that is not a thing to be done, so you understand these are certain social standards which unknowingly, consciously, unconsciously we imbibe throughout our upbringing which we reflect when we try to access, understand, judge certain things, these things operate so I wanted to say there are few standards which one need understand to sexual harassment for example quid-pro-quo it's a Latin term which means this for that, generally sexual harassment happens like this, it happens like this, you do this for me I will do that for you, this for that for example I am a person in a company, I want a deserved promotion I don't deserve an increment but still I was given an increment or promotion and told that you pay my demands and I will you this that is one way the other way is you do this sexual favors to me, if you don't do that I will demote you, cut your increment, there are several cases in schools and colleges which will come like people teaching higher grades are

demoted to teach lower grades so the consequence of your action, rejection, support will lead to these favors. so see we have this feeling that when we were, most of the times when things were, sexual harassment cases were understood, it was understood like this okay, he asked you said no and there ends the story, but what after, what I am subjected to after that also amounts to sexual harassment, that is also 2 sides understanding of quid-pro-quo and in cases of sexual harassment is not about the intent of the person who commit the offence, it's the way how the recipient received it so for example, I am making sense? ok it's not about the person who is doing it, it's about the person who is receiving it so it's like people coming and saying actually I don't mean that, you do something, one of the famous case in our university in Hyderabad central university when I was doing my post-graduation, one of the professor who use to come and do some gestures which students use not to like when they go to complain to the dean he will come and say I don't mean that I just with the rose flower on her cheek, I don't mean I do it with every student so I did it to this student also how does it matter, of course it matters it's not about what intention you have done with it's about what impact it showed on me that is what the standard to access the sexual harassment so when, it's like, how to explain this, some people coming into the workplaces and saying that in my previous workplace I have done this, that, this is the way I hugged and kissed the woman colleague nobody objected that's a norm there, so same way I repeated here so there shouldn't be any complaints, no it is not done, you may have done anything in previous workplace or experience, janam but here if I object what you are doing then that amounts to sexual offence that's one way of understanding and reasonable victim point of view, this is also one of the standard how we access and understand sexual harassment, it's not like if there is a woman who is coming and putting a sexual harassment one shouldn't see that is this women can be harassed this women is coming and filing a complaint for the second time is it believable, no that's not the case, it shouldn't be like this, this man is 60 years old can he ever commit sexual harassment, no, if a woman is saying that I am sexual harassment, humiliated, sexually offended then that should be taken from her perspective why this woman is complaining let's examine from here instead of thinking that oh this woman is very overrated, she is very vocal, bold, articulated and this thing and this man looks like old 60 years man he cannot commit, one case happened that in Andhra Pradesh, there is a realtor who is from, Bal Reddy who took almost 400 Dalit women from Andhra Pradesh, Vijayawada to abroad put them in different restaurants and with his friends, business and all and one girl happen to die in an

accident then the whole case came out, he and his sons abused them sexually and that become a big case and he was given 8.5 years Justice so when the case is happening in US Berkeley in Andhra Pradesh there was a discussion that time I was still in college I think, in the college there was a discussion that is happening in Andhra Pradesh assembly that this man is very respectable he has constructed several medical, engineering colleges, he is 60 years old he cannot commit this kind of crime, people try to judge him through this kind of thing, so that is very wrong it knew to be looked to the reasonable woman's point of view why women come and file a complaint, is it easy to come and file a sexual harassment complaint, mean woman wanted to file a complaint, I agree there must be some false cases, there may be one or two percent of false cases and somebody may be trying to misuse the act but let me tell you sir, which act in this country is not misused, the threat is there for every act not only particularly sexual harassment act, misusing, abusing, misinterpreting the chance are there for every act and only for sexual harassment act so that risk is there, so it is important to look into the reasonable point of view in case of sexual harassment and the most important thing is prior awareness approach shouldn't be there which is something like this, for example there is one famous case that happened it has nothing to do with sexual harassment, as of now that is Arushi Talwar's case, teenage girl who was murdered in her house so when I was, when we were watching TV with other friends and all people will come to conclusions very fast they will say what kind of mother she is, she is not crying when she is giving interview, they expect her to cry practice victimhood, if somebody who is not practicing victimhood, somebody who is standing for their rights we tend to theories that there is nothing happened there, there is something wrong with this person that kind of prior awareness approach shouldn't be there dealing with these cases. we don't know what happened in this case, judiciary has to come up with a final report saying what happened what didn't happened in that case, but our social conditioning, our perceptions, our dominant societal this things we try to draw conclusions whatever we see from thinking that she is not behaving like a victim there are cases where there was a woman who filed sexual harassment case and apparently she happened to be seen by the committee members smoking outside the committee member concluded that she is smoking she is characterless so this complaint can't be true, so what I am saying is there should not be prior awareness approach, principles of natural Justice need to be given to alleged perpetrator and aggrieved woman and case need to be dealt with whatever the evidence is possible from there instead of thinking this woman filed the

complainant third time so, it is habit for her so we need not to take it seriously, that kind of approach should not be there and other important thing in cases of sexual harassment cases is that, proof beyond reasonable doubt is not required in sexual harassment, you know very well the sexual harassment happens, though it happens among the close circles it happens most of the time in close room. nobody will tell you that I will harass sexually so that we all will go prepared with camera and everything to shoot, everything happens in close room and almost proof is impossible unless it is a repeated incident, there are also subjected to that along with you, it's important. so in these cases the act specifically says proof beyond reasonable doubt is not needed these are few standards of understanding one is quid-pro-quo one is determining factors whether intent of the person and impact it caused on the person and reasonable point of victim and repeated or single incidence doesn't matter, whether the incident happened once or 10 times, doesn't matter. Incident happened then it should be taken to the legal courts.

then these are some of the key international standards which talk about the sexual harassment explicitly and implicitly one is universal declaration of human rights 1948 you all know about it and ILO discrimination employment and occupation convention this convention talks about every other discrimination not only sex discriminations, sex, race, ethnicity discrimination it talks about then, international covenants on economic, social and cultural rights and UN committee on all forms of discrimination against women, UN declaration on violence against a woman, ILO declaration on fundamental principles and rights of work, for us how it is important, I am here as an ILO representative for us it is important that we give, ILO view sexual harassment is one form of workplace discrimination, it is a discrimination which is purported against the woman so ILO declaration on fundamental principles and rights of work has the, sexual harassment is mentioned in that and indigenous people tribal, conventions, occupational safety and health convention, ILO decent work for domestic worker convention, blazing platform of action and ILO HIV recommendation all these have sexual harassment mentioned in them and that we know, how much time I have left? 5 minutes ok, I will briefly talk about the act you all might be knowing this act already, we know the how the act came into practice, there is a social worker ICDS worker, aganwadi worker who was working in Rajasthan, her name was Bhavri Devi, who was gang raped by the village lords

in the village and then she is the one..., because of that lady we have today this legislation in place, her case was taken to court, high court and later to supreme court when in local court her case was dismissed as she being a Dalit woman cannot be raped by upper caste man, another discrimination and then again the court went to higher courts and finally it went to Supreme Court and Supreme Court came out with verdict saying that all the work places it's employer's liability to protect woman working in any workplace, any, private, public, quasi-public, semi-private whatever, health centers, hospitals, sport complex everywhere this act need to be implemented and this act came into force in 2013, December 19 and the focal of this act is ministry of woman and child and this has 14 and this act has rules in 14 and 15 of constitution, article 21 listed and the act define all these things, aggrieved woman, workplace it has a very broad definition of workplace, including the lift which are used to reach my office, the transport if the employer had provided the transport and I am using the transport even that comes under my workplace, even there my rights, it's employer's liability to protect my rights in that place, very broad definition for the workplace but the irony is that I am not sure but I need to find out from madam also the act came into force because of the aganwadi work who's case brought this people aganwadi workers who works in large scale in very state are not considered as workers, they still working on honorarium, so when this comes to implement this act for them I don't know what are the challenges in, they belong to informal they are not even considered as workers they are considered as honorarium this thing, so that is one aspect to it and then this act actually specifies constitution of internal complains, committees, local complain committees when can be monetary contribution can be given what are the interim protection orders, what is conciliation when it can be done, when shouldn't be done, how important it is to protect identity of the person, who are the appellat authorities and there is a very dangerous thing which I personally don't agree is that the prosecution of false and malicious complaints, these are all part of this act, I don't have much time to get into this but we can discuss in question answer session, I just want to mention about this prosecution of false and malicious complaints which was not there in Vishakha judgment which supreme court has issued but which is very much there in the new act which says that, if there is a woman in workplace, if she filed a false complain she can be punished but there is some solace to it, as I have already mentioned how difficult it is for people to come and file complains in spite that you give a clause like that, false complains are punishable then it's not easy for woman with this fear to come and file, there is very thin line

between false and unproved complains, there is a danger that all unproved complains may take as false complains as I already mentioned when there is no evidence available it is not possible to prove the complaint and the complaint would be unproved compliant and such complaint can be taken as in false complain also but law also provides another this thing I there is a complain which is unproved and that particular man wanted to pursue it further that it is done with malicious intention , by interest is harmed then again the committee can take it and that's man liability is to prove that this was a false complain and done with malicious intent then the woman can be punished that is there in the act and then comes powers of ICC and LCC these are the powers which LCC and ICC is also having but only in summoning and enforcing the attendance of person aggrieved person examining both, every employer has to constitute internal complaint committee there is no option, these are the responsibilities of employees and ICC, I am quickly saying this because we don't have much time. so this is the procedure given according to this act given to 6 copies of the complaint be given to the committee and no lawyers are admitted in committee while dealing with this and report should be submitted within 10 days, nature of punishments also defined in the act, written apology warning reprimand o withholding promotion termination counseling the last one makes me feel pain that community service these are nature of punishment and there is conciliation procedure which can be done by the committee members before getting into inquiry before conciliation is done woman consent is necessary, without which it can't be done. interim protective orders if woman feels it difficult for her to continue in the same workplace because of presence of the person and inquire is going the employer has to give either 3 month leave if she ask a stranded of either of the person man or woman or give any relief woman ask for, monetary contributions can be done, it cannot be done in conciliation process, it is given to victims amount of psychological trauma, expenditure they incurred in healing there wound, suffering these things has to be taken into consideration. confidentiality clause is very important in this act, which should be followed there are cases where committee members failed to follow this were dismissed from the committees, appellant authorities, generally wherever the service rules are in practice, the person who is responsible for disciplinary or grievance committee are appellant authorities in this case nut the thing is law doesn't specify this specifically it need to be come out specifically, we are talking with ministry of woman and child and labor and employment to come with clear notification on who constitutes appellant authority and time frames are given so this is what, I mean I was talking

about particularly law and understanding sexual harassment mam will explain in human right's context how it is relevant, how you will deal with this. Thank you so much.

Professor V S Elizabeth: good afternoon everyone and thank you to prof. Oberoi and Nitika for inviting me here to share from my experience research and otherwise on the issue of rights of women against sexual harassment in the workplace, the human rights of women in danger, this was the given to me when Nitika wrote to me and Suneetha and I would be probably be overlapping in some areas, something will be repetitions but I have done it with the focus of human rights of women in danger, I teach at the national law school this is my 25th year there, I used to be the coordinator for center for women and law from 1994 to 2012, I was sexual harassment policy advisor there and all my research on women empowerment relates to violence against women particularly domestic violence and sexual harassment at the workplace, so that's the point from where I come and why I am here to with all of you who are very well versed with the law and has a long experience in doing a job as judges I have great deal of respect for you, all I am doing here today is will be sharing my perspective what is sexual harassment and how sexual harassment at the workplace violates women's rights to be human beings, bear with me if there is some amount of repetition but I am sure that I don't have the same kind of experience as miss. Suneetha and therefore in that sense how we will be doing it will be different.

The most important thing to understand about sexual harassment is simply this is it is unwelcomed and sexually determined behavior and this has roots in the fact the society is the world over, because we live in male dominated society so when Suneetha presented all those data's from around the world whether the countries are advanced, in west, east in south, in Asia or Africa wherever sexual harassment is prevalent throughout the world like any other crime against woman the status of women throughout the world is lower than status of man throughout the world, that's simply because we live in a male dominant society with few odd exceptions here and there with small communities of tribal people who pursue ways of life and have different culture now in such a context the to understand is that sexual harassment happens because of the inability to accept the fact that women have a right to be in the public place, woman are assumed, as Suneetha was giving explanation that we are all brought up from when we are young to perform some kind of gender roles, boys have to behave like this, girls have to behave like that

men like this, men like that so certain things which are acceptable for a girl are not acceptable for a woman similarly for a boy which is acceptable is no longer acceptable when he becomes a man, now in this context some of the things which are there with reference to how women should behave is with the idea that women should not be in a public place by themselves, the idea is that women should always be accompanied by the man to whom they belong because again the notion is that women are not autonomous human beings, not persons in and of themselves, a woman is always somebody's mother, wife, daughter, sister and in fact in Bangalore where I come from we have posters that have been put up the wake of the increasing crimes against woman including sexual harassment and rape police put up posters saying she is somebody's wife, daughter, mother don't give her pain so in other words the idea that a woman by herself should not be subject to pain is seems like too far for us to accept, we should not cause pain because she is somebody's wife, daughter, mother, sister, you understand? therefore why the idea is that if a woman is in a public space by herself then she belongs to no one and therefore she becomes public property, you know when I was younger the notion that use to be was the woman who are sex workers or prostitutes were referred to as public woman because they don't have a husband, a father, or a brother to protect them right? whereas the good women always belongs to someone a husband, a father, or a brother or a son and so this notion that a woman in a public space by herself is a public woman and you know what happens to public property, right? the government property whether its buses or anything the moment there is a strike or a riot everyone destroys because it is no one's property we think public property is nobody's property and similarly the kind of notion we have about the woman who are in public places so there is a reason why it is very important to understand these two separate words that are there in the law in 2013 act as well as supreme court 1997 decision in the *Vishakha case*, unwelcomed sexually determinant behavior and this of course is again taken from the international conventions for the elimination of all forms of discrimination against women, in its 90th report it explains what is sexual harassment where again these words are used unwelcomed sexually determinant behavior we have a great deal of difficulty to accept 1st to accept a woman as human being is a person who is autonomous and therefore she can move around and be in spaces by herself 2nd thing we have difficulty in accepting that the woman can say no, so whenever woman say no the interpretation is she actually means yes, so may keep saying no but you have a crime committed against a woman whether it is rape or sexual

harassment because a woman's no is interpreted to be yes, idea is that she doesn't have the capacity to express her opinion so somebody will do it on her behalf, when she express it, it is not considered valid enough but the law is very explicit on that it says unwelcomed so it is not to say man and woman should not have sexual relationship in the workplace it is just that it must not be unwelcome or the word that was used by miss. Suneetha when she used the presentation, it got to be mutual, healthy sexual behavior and healthy sexual relations is when it is mutual, consensual if there is no consent and it is not mutual it is negative sexual behavior and sexual harassment is that and I disagree with miss. Suneetha on the point that it is a disease, no it is not a disease it is a crime, it's not because they are mentally diseased they are doing this it is simply because they are criminals that is the thing we need to understand and also in the light of the amendments that we make in criminal law 2013 sexual harassment today is a criminal offence under section 354 A, it is very important to make that connection because sometimes we can continue to look at sexual harassment like in the past we did even though it was not a law to treat it as merely eve teasing, eve has nothing to do with the culture of this region yet we use the term, it is not teasing at all, it is not fun, it doesn't make a woman laugh when she is subjected to sexual harassment, like they show in all the movies the woman doesn't fall in love with her harasser in all the movies which ever language we watch and I remember from kuch kuch hota hai when Rani Mukherjee comes as a new student to the college you have Sharukh and all the other gunda's of that college surrounding her tease her and you can see the fear and discomfort on her face but the movies turn that 2-3 scenes later they are fallen in love, in real life it doesn't happen you don't fall in love with somebody who instants fear in you, in fact you come to abhor him its similar to the situation when somebody rapes you, you don't want to marry him, somebody is sexual assaults you, have sex with you without your consent you don't want to marry him but this is how you know movies depict the entire thing and says that's the only way to save her. So it's very important to understand that sexual harassment is unwelcomed and it's got to be sexually determinant behavior. there are various forms of discrimination against women sexual harassment is one form of discrimination against women and in this context we are talking about this form of discrimination at the workplace, because sometimes people mix up other forms of discrimination with sexual harassment they think it is sex in terms of a gender and therefore any kind of discrimination against women sometimes people see it as sexual harassment no, sexual harassment is very expressly sexually determinant behavior, and supreme

court have clarified it in Parallel Export case very clearly it is not got to do with actual sexual relationship but anything that tantamount to touching a human's body without her consent because that's the other the other problem we have the idea that a woman's body and space around her is her, that she determines who can touch her body and where and who can come into that space you know, *Rupan Deol Bajaj case* about that, Mr. Gill couldn't understand that Miss. Rupan alone can determine when she could move where she could move, whether to sit or stand, he in spite of all who is reputation otherwise obviously couldn't respect a woman's space and opinion on this, so this is unwelcomed so if a woman says no it is no, if she says don't touch me it means no touching if she doesn't put out a hand to be shaken you don't shake a hand, if she doesn't want to talk or crack sexual jokes then one doesn't crack sexual jokes she might do that with bunch of sexual friends people she trust, who is knows are not making any sexual innuendos that it is not meant for her that they are just sharing a joke, she might do it with them but it doesn't give anybody else the opportunity to say something like that or touch her, a friend of her might hug her, but she can refuse to shake hands with somebody who she knows will hold a hand longer than it is warranted and will treat a hand as if it is sex object, trust me there are men who can convert a handshake into sexual act. This is the reason why we say it is unwelcomed and the person who decides is Miss. Suneetha was showing is the woman, so it is not intention of the perpetrator but the impact upon one who is subjected to sexual harassment that is relevant in law and it is got to be sexually determinant behavior or to put it in this way any conduct that is sexual in nature and unwelcomed.

Kinds of sexual harassment that can be there, Miss. Suneetha put down physical, verbal, non-verbal etc. but the ways in which it can be done as blackmail, you had a sexual relationship with somebody long time back you ended the relationship but continues to blackmail on the basis of that, that would be sexual harassment, threats, pressure and it can be manifested directly or indirectly in acts which range from subtle behavior to open sexual aggression it would be very very simple and very subtle without it being directly about that person or it can be open aggression in terms of actually forcing himself on her so you have various range of sexual harassment like in all crimes we have gradation of crimes the reasons therefore by murder we say manslaughter, self-defense, murder etc. similarly for sexual harassment it can be subtle or it can be open sexual aggression, this is the act, it is defined what is sexual harassment and this is

again taken straight from the convention for the elimination of all forms of discrimination against women this is exactly what the supreme court defined sexual harassment in the Vishakha Judgment and that is the same thing which is retained in the 2013 act as well that it includes any one or more of the following unwelcomed act or behavior directly or by implications, what are they, physical contact and advances, all of understands that, a demand or request for sexual favors or making sexually colored remarks showing pornography against the will of a woman or any other unwelcomed physical, verbal, non-verbal conduct of the sexual nature, this was included the Vishakha Judgment, it was not there in definition and this law retains it any other in this day on age it's important to have any other as technology is changing rapidly so we don't know what form it can take, because you have people who hack somebody's Facebook page and put up pictures and comments on it, you have emails, sms, mms all kinds of stuff which is beyond my ability to understand but which are there which are used as means by which sexual harassment is carried out and the Supreme Court in its wisdom therefore has included this line not confined only to 1st four, any other unwelcomed physical, verbal, non-verbal conduct of the sexual nature, unwelcomed and sexual nature these are the keys that is always remembered when we are dealing with sexual harassment cases, the acts goes on further to say that, no woman shall be subjected to sexual harassment at any workplace and in fact you look in the act, it describe ... prevention, prohibition and redressal so the purpose of act is three fold, prevent sexual harassment, prohibit sexual harassment and then provide redressal for sexual harassment and section 3(1) is exactly that prohibiting sexual harassment, no woman just like Article 17 which abolishes untouchability in our country similarly section 3(1) of the act prohibits sexual harassment at workplace no women shall be subjected to sexual harassment at workplace and then it goes on, these are examples which miss. Suneetha already has given, so I will not get into that these are circumstances in where it says if it occurs and is present in relation to or connected with any act or behavior of sexual harassment it may amount to sexual harassment, what is it implied or explicit promise preferential treatment in her employment and the parallel I will draw is to bribing we go to get a driving license we have failed the test or have even passed the test even then also they ask for bribe in the end to just give you that license, so the person who ask you give me so much money and I will pass you, or your license will be issued it can be done either implied saying something for you know our work or labor or you can directly say give me 500 rs. so it can be implied or direct similarly in context of sexual harassment, somebody may

not explicitly say give me sexual favors I will give you promotion, somebody might just even imply that, you know tomorrow I am discussing your increment why don't you come for dinner tonight now he has put a fact that your increment is going to be discussed making that point for you to think about suggesting that if you don't go for dinner tonight there may be consequences, it is implied promise of preferential treatment otherwise it could also be explicit promise of preferential treatment second implied or explicit threat of detrimental treatment, you don't come for dinner tonight you will not get the promotion or implied that if you don't come to dinner tonight I will not be in right frame of mind to give the promotion, third it could be implied or explicit threat over her present or future employment status. you complain I will see to it you don't get a job anywhere or it could just be an implied threat about the present or future employment status, interference with her work or creating an intimidating, or offensive or hostile work environment for her so while the Pachauri case is sub-judice, I will talk about that but assuming that similar case is there and somebody is guilty and now the thing people have said about the case when you read in newspapers is, woman who joined TEERI were warned by male colleagues to be very off the director now that would fit very well in intimidating, offensive, hostile work environment. so as I woman I have to be worried and I have to fear for my safety in my workplace, nothing may have done to me directly but there is this story after story of the different woman worked there who are subjected to sexual harassment so if I am called into the office I am going to be afraid that is intimidating environment it is offensive the fact that I am coming to the workplace I am not in sex work so if I am going to be treated as a sex object that is offensive work environment hostile when constantly I am subjected to this, this is like when we are in school and there is one bully or a teacher who is always harassing us you do not want to go to school, we either have experienced it or we have children who refuse to go to school because there is one fellow who is coming and pinching, beating or taking away my things or a teacher who is always humiliating me that is hostile work environment, women who are subjected to sexual harassment, experience a similar kind of physical mental, emotional trauma when there is sexual harassment in workplace, law says that is also sexual harassment. when there is interference with the work, I am sitting here and you now my co-worker or my boss comes and leans over me that is interference with my work like in parallel imports case , she was typing her report and he sat down next to her and when she was typing he put his hands upon her, so all of that would be examples of interference with her work

or creating an intimidating, or offensive or hostile work environment, then there is last one section 5 says humiliating treatment likely to affect health or safety, because when you are treated as a sexual object, that is humiliating please keep in mind what our preamble says the purpose of our constitution is to uphold the dignity of the individual and the Supreme Court in several cases have told us very clearly that right to life in article 21 is not merely a right exist but the right to live with dignity and sexual harassment trust me takes away the dignity of the woman in fact it happens as a consequence of objectifying a woman not treating her as human being but as an object for sexual gratification. now why does it happen these are some reasons, but the most important factor to remember is the second point because of the unequal power relation between man and women in society because while there are a few man who are subjected to sexual harassment there are often subjected to sexual harassment by other men, very rarely by another woman I know of no cases but there may be exceptions just like there are men who are raped by woman, so there are, it is not to say that it doesn't happen at all, it does, but the majority of the cases of sexual harassment is by man of woman and man, why does it happen simply because there is no equal power, because women are treated as objects and are socially, economically and politically treated as inferior to men therefore the reason why sexual harassment happens, which is why sexual harassment is not about sex as much as about power, it is a mechanism which is used to debase the role of woman in the workplace, it's like you know there are women judges out here, if somebody is to go out to a woman judge and say you, you know you are looking so pretty in the sari, she is a judge you want to compliment in a workplace, compliment her on her diligence or consciousness hard work how pretty she looks she is not in the beauty industry if she is was in the beauty queen competition then somebody went up to her and said you know you are looking beautiful in sari then that's the compliment but not, so it's like me as a prof. a colleague wants to come up to me and compliment me on the clothes I wear and how I look that is completely humiliating that's why people do that to tell a woman at the end of the day you are just a woman I am a man we have bank offices which have told us how, when we are sitting and you know you have peons to take files from offices to office and one of them have brought a file to her office and put it on her table and stand in the corner and as Suneetha was saying just kept staring at her he is peon, she is an officer but he was making very clear to her big deal you can earn more than me you may sit on that chair I am a man I am better than you, I have more power than you. so sexual harassment is not only about sex, these are not

the men who can't control the sexual urges for a simple reason we are human beings, we are dogs and cats they can't control their sexual urges we do otherwise it would be a crazy world to live in otherwise all men will be sexual perverts and perpetrators and they are not it just a fraction of men who commit such crime it's not about sex or sexual urges, it is about power the fact that as a man he has better status in society, and he is letting a woman know this is your place and this is to demean and defame her professional capabilities her leadership abilities and to draw attention to their sexuality and at the same time undermining the exercise the power and authority by woman, woman do not protest, resist we have only 20% of the actual sexual harassment which takes place which is reported only 20% in this country, in UK its only 5% because there even it is worst kind of environment women are not trusted at all so they just don't report it they just endure it in our country at least 20% of the woman report it why don't they 80% report that's simply because of a social conditioning even though a women says no she will not say no stop it, I don't like your behavior she says no please getaway don't like I, assumption is she is shy she wants it but saying no because she is shy, that comes from the social conditioning, you know this is the problem we teach our girls not to be aggressive, bold, confident and then we expect when a crime is committed suddenly they will become Durgas' only Durga can be Durga she is goddess rest of us are ordinary and that's why behave in a way which is been taught, not been taught to be asserted they do not resist and report the intimidation and coercion also when you are going to school and colleges and subjected to sexual harassment, you come home and tell parents, how your parents response, they might say don't go to that bus stand don't walk on that road or they might turn around and say why did he harass you what were you doing, you must have encouraged him, why are you dressing so nicely and going so what happens over a period of time a girl learns not to complain she just bears it and she doesn't realize it even when there is a law and there are redressal mechanism she will not complain, because she is always afraid on how people will react or respond so socialization has lot to do with why woman do not complain, resist or report instances of intimidation and coercion also some of the reason why it is increasingly happening is in the past where you all that the tribal, Dalit women, working in the fields were subjected to sexual harassment but at that point of time it was never considered as wrong, it was considered to be right of upper caste and rich to commit such crime, but with modernization, industrialization and as more and more women get into all areas of work you find that the crime has increased because men began to feel threatened by the

presence of women and it is method they use to put women in their place and those who indulge in sexual harassment see women as sexual objects existing to provide them sexual gratification there idea is a women in a public space is only for that purpose a why do we need to address it Suneetha has already done that and I will come back to this later, just remember one thing that sexual harassment jeopardizes equality of opportunity in workplace article 19 and right to sexual freedom violates constitutional, fundamental and human, I am quickly going to that in 5 minutes and there are a little miss facts and all I am not going into that, again fundamental rights all are familiar with so I won't go into that and get into human rights and quickly in 5 minutes I will finish it just bear with me please.

What are human rights? They are rights every human being poses is entitled to enjoy simply by virtue of being human so the first challenge is to accept that women are human being, they have rights and are entitled to enjoy those rights and freedoms, second thing there is a group of ethical principles which has a legal dimension so this is not about moral or ethical it has a legal dimension human rights have a legal dimension our constitution our fundamental rights section is legal and that is where legal human rights are derived from, they arise out of the need of each and every individual to enjoy the conditions essential for decent life, so what do human rights do they give us the conditions which will help us to live a decent life and the supreme court in several cases interpreting right to life has said right to life cannot be there if you don't have clean water, air, right to education, live with dignity and so on and so forth so what is decent life in context of sexual harassment it is a right to live with dignity to be free from even the fear of sexual harassment occurring in the workplace and if I am joining a workplace, I am coming here to the seminar I am here confidently and coming before a bunch of judges who know, the law whose duty is to uphold the law and therefore they are not going me to subjected me to ridicule and humiliations but if I would have to go to a college full of engineering students I might be little vary and construct carefully what clothes to wear even not that clothes should be the reason why I should be subjected me to sexual harassment but the idea is that if ok I am wearing a sari and if I have long hair then you know they will treat me as their mother they will look at me as a mother and not as somebody who is sexual and therefore be subjected to sexual harassment, so when we talk about decent life and going to a lecture the basic minimum I expect from I expect from a decent living is that my students will respect me for who I am and not

subject me to sexual harassment that is the condition I need to live with a decent life within the environment which I am, and this is important like when you come to a court a lawyer will expect that the judge will treat her with the dignity you know we have unfortunately few examples here and there when somebody tells a woman, you know calling her sweetie and things like that, we are taking away the dignity of that person who is before you and this is the kind of the thing when we call decent, what are the conditions essential for a decent life and sexual harassment violates that, that's why when we say it is violation of human rights or danger to human rights, it is in that context we are saying it endangers human rights because it violates the human rights because it violates a woman's right to dignity equality etc. and human rights are for everyone doesn't matter what your color is, size is, height is, whether you are Dalit, Bahrain, Christians, Hindu or whether you are from north India, south India whether you are working as a domestic help, judge it doesn't matter who you are human rights are for everyone irrespective of all these restrictions and all human rights are universal, right to equality can't be separated from right to life and in the 1993 world conference, the fact that we have such difficulty in recognizing woman as human beings is asserted by this we got the convention on elimination UDHR, human rights for everyone why do we need a special women's right convention simply because in spite of UDHR people found it difficult to access as their rights as human beings belong for woman so we had a separate women's convention that happened even then they found it still as a struggle to get states and government to recognize women are entitled to the right to quality, life freedom etc. so in 1993 in Vienna conference once again they asserted that the human rights of the woman are the duties of the state to protect and promote such rights including the right to freedom from violence some of the human rights which are violated right to identity, right to affection, right to preach an enriching personal relations right to protection, personal development, social and political participation, freedom of expression Suneetha was telling you how traditions says good girls shouldn't laugh loudly I remember once in the corridors of the national law school I can take lots of examples because we do a whole bunch of things that are not right but I remember once I was brought up by a father who did not restrict me in any way, my father brought me up in the same way he brought my brother so he never told me you must not lightly and must walk like this, talk like this, sit like this and all that, he just let me grow up as I naturally was meant to be so he never restricted me on the way I laughed so I joined law school and I was 311 years old and when this incident happened I must have been in my late 30s I was in my office and

somebody, some of my students or colleague said something I burst out laughing loudly, 1st of all my voice I loud as you can make out and on top of it I am laughing freely I just burst out laughing, a very senior prof. in the law school he know he was so shocked and turned and said you shouldn't be laughing so loudly at that time I was talking in corridor with my students and talking loudly and another visiting prof. came to me and said you shouldn't be talking so loudly in corridors I am prof. in national law school he is a visiting faculty and he has the audacity to tell me I shouldn't be talking loudly in the corridors of law school, this is what you mean by saying women have right to freedom of expression will you go to a male colleague or faculty member and tell him not to laugh loudly or not to talk loudly in the corridor so we do this because we think women are lesser than us. The committee on the elimination on all forms of violence against women said this in 1992 that gender based violence which impairs or nullifying enjoyment by women of human rights and fundamental freedom is discrimination. gender based violence again simply that the violence is perpetrated only because you are a woman, sexual harassment it's not because of what I am wearing, behavior, lack of good behavior it's simply the fact that one is a women one is subjected to the sexual harassment, domestic violence, it's not because of what she did or did not do because whatever she does she will be subjected to violence its simply because she is a women just like sexual assault on children, why are sexual assault on children taking place is this because they do something, no simply because the perpetrator knows that the child is helpless, physically, mentally vulnerable you can overpower the child easily, all those who commit sexual offences are not pedophiles they are exercising their physical, mental strength over the child and therefore doing it so the child it happens only because she is or he is a child with women it happens simply because that they are women that is what we mean by gender based violence and these are some of the human rights which are violated which when sexual harassment occurs, right to life, not been subjected to torture, to cruel in humane or degrading treatment because sexual harassment trust me can be like torture when it happens every day continuously and all the time right to liberty and security of person right to equal protection under the law when we don't have a law or when we don't implement the law this human right to equal protection under the law is violated, right it just and favorable conditions of work, it's not only having good lighting, good seating protection against dangerous machines, it includes freedom from sexual harassment at the workplace and in article 11 of the CEDAW it says

women are entitled for equality in employment and equality and empowerment can be seriously impaired when we are subject to gender specific violence like sexual harassment in workplace I will stop there just to give you at least a few min. for any questions comments or clarification. Thank you.

Justice Akbar Ali: thank you prof. of course as everybody say that we know but as judges that if you have many questions in this relationship in the what is the human rights violation when there is sexual harassment or women rights are affected the empower I think we have to more concentrated about because the entire exercise is going to be the human rights violation and how we are going to address that in our course or now some of you are presiding officers of Mahila courts? right, it's in offences against women and some of you are also taking case in other area where the victims are women or witness are woman on many cases what we have to keep in mind is that their vulnerability in the society, position how a man looks at her and rightly said, both of them, is whether we are looking at a person is very essential like we say that a child is dependent on his father during childhood as wife and husband later as mother and son when it has to go and independence and interdependence has to come, whether they are ready to give that judgment, men has to ask themselves whether they are ready to give, looking at woman, anybody can entertain impulse on that and one can have such an idea, I was discussing about this, may be little sensitive you remember sometime back some of the high positioned and mam was accused of a law student or something like that then we judges were talking about it and we were telling one of the judge may be in that age he could have controlled the desire then the supreme court judge a sitting judge now he busted and said what do you mean by control, it should not have even occurred to him right, at that age or may be any age or anything so it should not have occurred to the person.... idea of a person when we look to a women , that we have to keep in mind and apply whenever the case is coming for offences against women. Any other question you can ask?

Ms. Suneetha Eluri: ... only one last point I would like to say, with regard to human rights violations how the whole act and why whole sexual harassment discourse, the role you have as judges mam, also slightly talked about this. the human rights violations reported in conflict zones either it is in north east or in Kashmir that is about extremist left out organizations whatever the conflict zones we talk about there you find a lot of cases against, more than harassment its actual

sexual violence cases so in that kind of cases whoever the perpetrator so trying to show that you are woman, is your property I am violating your women, abusing your woman by that I am taking over you so that kind of concept is not necessary of sexual satisfaction, a desire or whatever its about showing that your women is yours property and I am violating your property there comes the role of judges to understand the nuances under it and judge this kind of cases that is only link people you being the judges can play. So thank you so much I have to leave now I wish I could have stayed for question answer session but thank you.

Justice Akbar Ali: thank you prof. we will take lunch and meet here.

Ms. Nitika Jain: we will have one hour lunch then we have prof. M K Ramesh and J. Akbar Ail with us for 4th session.

SESSION 4

The role of Human rights court under 1993 act

Prof. M K Ramesh: or to give us a different kind of understanding and interpretation to that as he rightly mentioned many a times in the parliament it's hands up and head's down most of the time and not many really participate in meaningful deliberation in that, somehow I have a feeling that it is an insertion by the drafter by way of abandoned caution, I don't know caution was uncalled for the simple reason it didn't exist and that is the reason why this provision was thought off, so I would rather consider this as a legislative oversight as to the second one I call it as legislative blunder, a special court is already constituted for such offences under any other law, this is really serious if a special court is already been set for some of those catalogs of offences concerning human rights why should the state be allowed to refrain from either restricting the power in a the usual court as has been mentioned in the provision or create a special court it deals with atrocities against woman ok, but what about the other kinds of violations so this gives an escape route for the government not to set up one it is almost an invitation for the state that you are trying to find excuses we will provide you one, I call it as a legislative blunder, but blunder, galore is very much evident in this particular body of law we will come to that a little later but has been the mandate and requirement 3-4 things and I will stop, one is how the judiciary has looked at the very design of this law and how it can better work that is the 1st observation that I have to make, second one is to really look into the defects of this law, I call them as manufacturing defects, you know in case of goods you get in the marketplace under the consumer law, you talk of manufacturing defects there are legitimate expectations a pen should be a pen, it should be capable of writing if it doesn't perform that function it has not performed the legitimate expectations of the consumer same thing with regards to this law, you have manufacturing defects, I will refer to some of them which you did mention in the 1st session itself maybe I will amplify a little bit, the third one is apart from these effects what a judge can do that's a few reflections on that and finally any scope for innovation is it possible and with a kind of indignity that our judges have displaced even in the district court level, I will refer to one later how you as judges can meet that kind of a challenge and some closing observations, some 4-5 points. first one is what is the judicial take on this I just refer to some 2-3 things one is already mentioned by his lordship when he referred to J. Thakur and J. Bhanumati's decision in

D.K Basu case, I come to the latest on 10th Dec on the human rights day the current CJI J. Thakur he was one who delivered the keynote and the setting were something like this Justice Cyriac Joesph the acting chief of NHRC he comes up with the remark there are as many as 679 instances of violation of human rights not acted upon by different states, despite NHRC and some other SHRC having some did with the state government and he comes up with another remark we have been reduced to a paper tiger and people are laughing over NHRC as having become a paper tiger, see coming as it does from such a high judicial functionary I think it is slap on the face of the government if they really had any kind of, a little bit of sensitivity as his lordship was mentioning they should have acted and J. Thakur says it's too much that NHRC is made to comment like this, it is time, high time that human rights courts in every district should be set up within a particular period of time, this comes on 10th Dec 2015 look at this sorry state of affairs 1993 you make the law quite unlike in the west especially in the US and UK as many of you may know before making the law they make all the preparations for its implementations they set the procedure they create institutions, they provide the budgetary requirements, they provide the personnel, train and equip the personnel before they get into the job, I will give you a simple example a legislation was coming in Cannes in US wherein the authorities work very clean and raising the standard of production, quality with regards to automobiles so, engine designs, some fuel quality they were looking into and for that they were coming up with regulations, they called the captains of all the automobile industries and in that meeting they said that in two months' time we are coming up with these regulations, do you have anything to say? you know what the industry people said we will be out of business in 2 months if you bring in this regulations and our entire automobile industry will be taken over by the Japanese people because they have this ability and state of art required in this regard so our domestic industries will be in ruins, then the government asked them is that even what you want to do, they said postpone the implementations by 6 more months, we assure you we will confirm by all your strict norms, see the kind of preparation that goes to in the making of the law it's just not that you make the law for the heck of it, you want the law to be effective and to be implemented here it is not one of instance, I can quote plenty number of laws making exercises in India which define logic of every kind no preparation, nothing you make a law because you have committed yourself an international meet and then make the people face the music like you people are made to already being overloaded with work and being entrusted with some more responsibilities

without actually equipping you, see this is the kind of a thing that J. Thakur was reflecting upon and he went even ahead and later I will come to that, but before that there is another wonderful decision given by the Supreme Court that's also of last year this is by J. Madan Lokur and this is a writ petition and this has its origin in a letter, a letter send to Supreme Court by no other person than former CJI J. Lahoti, he sends this communication and this is about inhumane conditions in 10383 prisons, can the court do anything about it this is what he asked and J. Lokur picks it up and said I transform it into a PIL and he list 9 issues facing prison that need reforms, like overcrowding, delay in trial, torture, in humane treatment, ill-treatment, neglect of health and hygiene so on and so forth 9 issues are put up, nothing new, actually a consolidation of the present conditions in different parts of India the way they are managed and how careless, indifferent and irresponsible and unaccountable the prison administration has been, and that actually stems the question of human rights violation, this is a fit enough case he says and he demands this requires immediate attention and a need for therapeutic approach in dealing with criminal tendencies of prisons, he calls it criminal tendencies of prisons and he says there is hardly any scheme for reforms, for 1st time offenders and prisoners in their youth, because they are clubbed with hardened criminals and that becomes a training round to become a hardened criminal and so he calls for certain reforms, prison reforms leading to at least some kind of safeguard against human rights violations within the prison, this is the second observation that has been made.

The third one is the need for coming up with a proper manure and I refer to the manufacturing defect here, you have referred to some of them, the act refers to offences, I have noted it down that's why I am just repeating it, the act refers to offences arising out of violations of human rights without defining or describing them this is one manufacturing defect you have, this is actually a guidance to the lawmaker that set our house in order put it in better shape and form so that it becomes implementable, second the act doesn't clearly indicate the types of offences that are to be tried by human rights court this is although, however much I tried to elaborate on the understanding of human rights, this is just an interpretation but why give scope for interpretation when you can put it down clearly in plain terms as to what is what and how these needs to be handled by that particular court, the third the rules under the act does not exist there is a serious problem the rules of practice for the human rights court not formulated, to deal with the

procedure for the following no. 1 taking of complainants from individuals, how do we take complaints nothing is stipulated, taking cognizance of the offence, you mentioned it and third a warning of sentences, I think if these three become an integral aspect of the rule, I think the judges although overburdened may breathe easy at least we know what exactly we have to do and what exactly we have to proceed on that, although the session court at the district concerned is considered as a human rights court under the CrPC, the session judge cannot take cognizance as you know under the law he can only try cases, committed to him by the magistrate, till than what you do, so unless and until it is sorted out it becomes more and more difficult for a session's judge to deal with human rights violation it very easy to say, set up in every district a human rights court or designate one a session's court as one, but apart from that, it's only the beginning of the story but the real accomplishment and actualization are what you are looking for, under this law is plausible only when you set the roadmap in very clear terms so that it becomes functional, effective and goals realizable that is second observation that I have about the manufacturing defect and what needs to be done, a kind of a guidance for the law maker. the third one I come to you, given this state of affairs what I as a judge, I am not designated as a session's court or even if I am designated there is no clear guideline coming no blueprint of the action plan made available to me no rules so how do I really function, given the kind of pressure of work that I have and how do I really function in this regard for this my simple observation is and submission is there are variety of ways whereby a judge can take cognizance without making it appear as it is a case of a particular human rights violation, you can take abbreviation as there are so many other procedures which are need to be confirmed by the administrator which he has not done, like in the policy custody there are certain norms that need have to be conferred to by the officer in charge and non-observance of which should invite legal actions, you need not have to call it as violation of human rights but that is at the back of your mind and still would take him and pull him up and ask as to what you have done, and what you should have done this happened to be in slightly different way, I had a training program for district and session judges on environmental law and I am just giving you this analogy so that in this 4 days you can think of means and ways whereby you can come up with better solutions which I can suggest. this refers to certain special legislations there is something called as water prevention and control of pollution act, there is air prevention and control of pollution act, under these laws the court doesn't have any jurisdictions normally within the law, there is a provision that the state can

establish an appellate body which in turn deals with the violations under that, but there is only one avenue that is possible it's called citizen's suit where in I as an ordinary member of public I see something which is obnoxious, polluting, happening I complain to the pollution control board and it's like almost a notice to the pollution control board within 60 days they have to act on that as per the law, supposing they don't act on it in 60 days I can go to the district court, and submit a petition for violation of this law, there is a problem here, problem of procedure, I present it before the judges that if I as citizen, if I submit the case before you as a judge, what you look for, that came the reply we look for evidence, and what evidence I can produce I have no evidence, because in law it is written in the law, the procedure in the law that evidence which is adduced only by the PCB that is entertain able not otherwise, what kind of evidence PCB can adduce take samples, get it tested in particular laboratory, set up for the particular purpose, get the report on the basis of it analyses and then take a call, that is evidence admissible in evidence of the court so the judges said our hands are tight we can't do anything about it, in fact that was the break I raise this problem for half an hour we discussed it and we had the break and during the break I took few judges aside and asked them will you please find a way in your CPC and CrPC whereby you can still perform a proactive role, so we brought those legislations and we started looking into order, rule and all that, I knew the answer but I wanted them to search for it, then came the reply and they said absolutely no problem, you as a citizen you don't have access to information, you don't have evidence but doesn't matter I can summon this PCB that I am going to come and visit the spot, I am empowered under this law of procedure, I will come for the spot inspection, right now we go there and find it out for ourselves, how proactive one can be in fact there are cases concerning water pollution which has traveled all the way to Supreme Court for 20 long years without Justice if that could be done at the district level just imagine the kind of benefit it could reap, anyway this is just a thought I leave with you, think about it whether similar such thing is possible regarding this, I am quite sure it is possible and maybe we may have a couple of very detailed sessions whereby we will take the procedural law with us go through those provisions and then see there is an opening available or in your experience you can share it, because the idea here is networking amongst you that one of you can give the good story as to how well innovative that you have become, to see that tis human rights violation is effectively checked even though you didn't had the government support, even though you are not designated court or even though designated but you are not given the equipment that is required,

so think about it. So in final I would like to submit with you, this is the final observation of mine. human rights becomes real, reliable only when without an exception judge, common man, advocate, academic or anyone or the lawmaker or law enforcer everyone takes human suffering seriously, the root of human rights lies in human suffering, they have not taken human suffering seriously, if something happens to the elite we are really alarmed but when it happens to the common man it is just routine, normal thing that kind of sensitivity or sensitization is what his lordship wanted that if we really care for the other fellow human being, what is human rights after all, right to be a human is a basic, fundamental, inalienable right, I would not even call it as a right I would rather call it as something which is like your shadow it has to be with you otherwise without that the human being loses his personality, someone without a personality is a vegetable, so the choice of all of us here and certainly you, as judges the elite of the state who can influence in a very positive way in the path to Justice, if you can really think in terms of finding that space the hidden space in the existing law, through innovative interpretations without doing an offence to the letter of the law, without actually violating any of the procedures, you don't violate procedures I know, in conforming to the procedures if that's possible you should do it, there are instances where people have done that, there are instances I have found I can make quite ample no. of environment cases where invariable people will say at district court level, all people talk about right to environment and all it's for the high court and supreme court because they have way and means whereby they can infuse it right to life or right to equality or anything like that but we cannot do that, we are not a constitutional interpreters we go by the statutes and we apply that, but I can give you an example where in one district court it happened in Pune, they river range system was being affected by a particular plan in the part of local authorities in setting up of some kind of, it's not a casino but some kind of a commercial complex that's what they wanted to do on the river bed and judgment is with me it is a 64 page judgment how the judge has very innovatively has applied the existing law, without doing any violence to water prevention and control of pollution act or air prevention and control of pollution act, applying laws of nuisances and then extending it to a particular situation did really bring this people to, it would have done Justice J. Krishna Iyer proud that quality and that caliber a judgment it is, why go too far to open right here it happened in Bhopal, you remember the Bhopal GAs Tragedy in 1984, it is the district judge who brought the multinational industry to its knees by just applying the existing, people call it as arcade law, people called our law of

nuisance, negligence and all those criminal processes as arcade but he applied the same and imposed penalties on that, although it's a big story later that the former CJI goes to the trial court in US and pleads before the trial court that our legal system, judiciary and legal profession is not capable of finding solutions for the problem of this magnitude , the 1st industrial environmental disaster ever in the world, so you the trial court you should help us, why you should help us because the headquarter of this industry is in your country so please help us, of course it is a strategic move to get ore compensation I am not faulting the point of CJI but the point is you have space, and I fully agree with him that was his open remark we have space, only thing we should have is eye to see the space which is available in the existing body of law, I go back to y earlier observation that no law is perfect, no human crafted law is perfect because it is as perfect as a human being and it will always be the case, it is divine law we are talking about human law and this human law being imperfect it is left to the imagination, skill, proficiency, capacity of judge to see the hidden meaning give effect to the soul and heart to that to make it work, making the law work itself is a fine art and judges have demonstrated right here in India, I am referring to the primary court, I am not referring to the higher courts, in higher courts we have.. I am referring to the district courts where they have done that and you can be the torch bearers of the future. Thank you.

Justice Akbar Ali: thank you sir, thank you for concluding remarks, there we have to start of course, I am not going to leave you, mind it I am not going to leave you, we will go back to recap what has happened from the morning, and we were discussing about the human rights courts and its inability that many of you said that though we are designated as, specified as human rights courts but still we do not have any work, then what is the problem with this human rights courts and what could be the solutions and of course we came up with the solutions but our first barrier itself is section 30 and section 30 we want to know, what exactly section 30 talks about so we had the last session that, we were trying to find out what exactly section 30 is talking about except notification of court as human right court, on what type of various sentences gives, what type of interpretation we can give, than about the functioning of the human rights courts also from the morning we have been talking about something that yes we can do something, and what expectation of Supreme Court also, showed you one judgment of madras high court where committal proceedings has been upheld for human rights violation against police officer

for a trial another case of the Supreme Court of July 2015 where present CJI J. Thakur has said, there is direction to all these states to notify a human rights court a letter followed by, in Dec 10th of course I want to mention that also where the chairperson, acting chairperson of the NHRC commented that NHRC itself has become paper tiger and so many directions are issued to the government and nothing has happened, what is the duty of the commission is entirely different from courts, at least one thing I now understand, under this act establishment of HRC national and state and also the establishment of human rights court so that, at least the legislative mind had two intentions, one is the commission which is recommendatory body and investigating body or what is given under the act to do certain things within the power but exactly the human right courts are something different where it had to exercise its power to try the perpetrators and give punishment according to the law, whatever the punishment, whatever the offences they are trying to with, at least we can understand that is the specific purpose of to incorporate section 30 as establishment of human rights court, even in the proviso because we, as everybody says we are, nobody is happy with the drafting of section 30, now I go back to you can we know within 10-15 minutes come out with some sort of idea, recommendation , where they can present a paper, or Nitika can prepare a paper so that we can also give certain ideas, so that we can also go ahead and also within the role within the procedure we can follow, I come up with one if possible I would say there must be definition for what are offences arising out of other human rights maybe that because section 30 says offences arising out of violation of human rights at least there should be some definition or we have to define our self what could be the offences arising out of the, the human rights violation, as I was telling you about there are, we have categorized these are the offences, custodial death

Participant: that is not enough, punishments should also be there.

Justice Akbar Ali: coming to that, punishment also please, then that could be one if you agree with me, that could be one solution for effective implementation of the human rights courts and there is some sort of a clarification for section 30 like you said, we classify certain offences and we also classify apart from the what are the offences of the common law, particular accused is tried off and also offence under violation of human rights according to the magnitude of it may be a violation, maybe a violation of a torture, infringement of any other right or dignity or because we has variety of human rights violation then whether a session judge can also

be given set of..... to impose a punishment or impose a compensation or impose something. can you just think about or we can do it because we already have power under IPC, special acts, to impose compensation because victim compensation is there under the new enactment and we have our power to impose a fine that can be used as a compensation under the CrPC itself so whether that could be one of the solutions or if you want to core a little more detail into it, can be do another thing is awareness, because people out there still thinks that it is a violation has to be taken only to the SHRC or to the NHRC why not these human rights courts also to be, you can approach the court for whatever the violation, whether it is torture or access by the armed forces or or by human, fellow human being or by public servant why not we take that also into consideration. Yes sir..

Participant: 1st of all definition should be amended that has been noted down, secondly punishment should provide, this act itself should provide punishment, thirdly the commission should have own investigating and inquiring authority, agency and after when a complaint shall be lodged or comes to the knowledge of commission, commission should start inquiry through the inquiry authority and commission if consider in that case complaint can be filed to the human rights courts and procedure of complaint should be allocated.

Justice Akbar Ali: complaints case that is 200 to be adopted, see if you look at 200.

Participant: I think this is the only, to me this is the only solution and the solution..

Justice Akbar Ali: if look at 200, complaints to magistrate, all they had to do is in the special statutes they may say for the procedure under the human rights court the process that is adopted in chapter 15 of complains to will be adopted by the session's court that could have solved all the problems, may be in the, maybe session judge or others, (all speaking together), another suggestion instead of the session judge it can say the special judge....procedure to be adopted....then can it suggest, what the brother was saying about the section 17 of the procedure of the commission, section 17 deals with the procedure by the commission inquire into the complaints, during and after the inquiry procedure with respect of armed forces and recommendations of orders

Participant: 18 A II

Justice Akbar Ali: 18 A II

Participant: to initiate proceedings for the prosecution or such other suitable action as the commission may deem fit.....

Justice Akbar Ali: so that gives an answer, the commission has to initiate the proceedings for prosecution and forwarding such complaint to the human rights court for taking the prosecution.... 18 A roman II, HRC can initiate proceedings for prosecution by forwarding such..

Participant: I think state commissions have forgotten this provision, in no district cases has been filed under this provision by the state commissions

Justice Akbar Ali: initiate proceedings for prosecution and that can be human rights court can be, court, where at least the HRC can deal with the offences arising out of human rights, and they can recommend those cases to the... you have objection for following 200 any other other suggestion?

Participant: Special courts to take cognizance of the.....

Justice Akbar Ali: like any other special act directly taking cognizance (all speaking together)

Participant: if the court has been designated as special court it gets original jurisdiction.

Justice Akbar Ali: original (all speaking together) special courts...

Participant: POCSO act ST/SC PA act, directly taking cognizance either on police report or by following the procedure laid down in section 190 CrPC, on basis of final report charge sheet or on the complaint or suo motto section 190 CrPC.

Participant: it is as good as challan, final report

Justice Akbar Ali: that can be, but the procedure will be like a private complain because there is no charge sheet filed, investigation, no charges framed, it is like a summons case, complaint cases

Participant: 200 CrPC

Justice Akbar Ali: the procedure will be of a complaint cases, where the 200 will be followed.

Participant: warrant trial case

Justice Akbar Ali: warrant procedure

Participant: warrant trial procedure

Justice Akbar Ali: warrant trial procedure

Participants: speaking together

Justice Akbar Ali: other than the police report, warrant trial, other than the police report. that could be better procedure to be followed.

Participant: I suppose there is one way. ...

Participant: my lord, giving shape to the act by this amendment is one aspect, now we are considering the aspect of speedy trial, as a principal district judge as told in the morning I have been entrusted with. Class no. 14 I am dealing with special court of anti-corruption laws, there are many old cases are pending, cases of arising out of POCSO act which mandates the court to dispose of the matter within 2 months. there is a statutory mandate on the courts, then ST/SC PA act 1989, session's cases arising out of IPC, chose more 400-500 cases are pending on my part, apart from other laws in which accused are languishing in jail their human rights is also involved, ultimately after 6-7 years if we acquit the accused..

Justice Akbar Ali: hmm... already undergone the sentence

Participant: then civil appeals arising out of suits as an appellate court then huge no. of execution cases arising out of arbitration award, they are being filed in the district court

Justice Akbar Ali: 34

Participant: original arbitration cases

Justice Akbar Ali: section 9

Participant: then cases arising out of industrial disputes act

Participant: every day 3-4 cases has been filed in my court, then criminal appeals

Justice Akbar Ali: Judge which district is that?

Participant: I am in Haiwara district in Karnataka, my lord

Justice Akbar Ali: chuckles, so many cases

Participant: criminal appeal arising out of judgment of conviction and acquittal from magistrate court, then criminal....

Participant: one min.

Justice Akbar Ali: everywhere.... then 1st recommendation would be..

Participant: my lord I have got one suggestion

Justice Akbar Ali: yes

Participant: J. Shetty commission, it has recommended for an establishment of court as per the population wise, one judge must be entrusted with minimum 500 cases, if that recommendation is implement in its true spirit by giving directions to all the states, we will not have any problem in disposing of the cases, priority, speedy trial either the cases out of human rights or POCSO act or IPC, we don't have any problem as judges.

Justice Akbar Ali: creation of exclusive court may be one solution.

Participant: not only a creation of new courts, they are creating the courts by way of new notification, government it entrust with the principle judges, apart from all these cases we have Motor accidents claims also..

Justice Akbar Ali: that is chuckles... for the norms purpose I guess (laugh)

Participant: there is also a recommendation before Hon'ble Supreme Court by Justice....

Justice Akbar Ali: unless you do not have those cases, we do not reach norms (laugh)

Participant: ...

Justice Akbar Ali: ok chuckles.

Participant: that's a most important lacuna in this particular act

Participant: at the end we have to deal with administration work of entire district

Justice Akbar Ali: once again...

Participant: that's a most important lacuna in this particular act is, this act is in procedural nature, this is not substantive, that is most important lacuna, there is only some procedure but there is no substantive law.

Justice Akbar Ali: it's not a substantive law

Participant: either portions has to be incorporated, specific procedures also to be incorporated

Justice Akbar Ali: it is only to create a commission, court and define what their functions are, it's not a substantive law, enactment

Participant: then it has to be linked with HRC, because cognizance has to be taken on the basis of the recommendation of the HRC, it can be inferred from the preamble and from combined reading of section 17 and 18 of this act, otherwise human rights courts are filled up with complaints, because under the sun everything is in human rights violation

Justice Akbar Ali: in a way you are right

Participant: because it must be on the basis of particular recommendation HRC as national or state commission or it may create district wise also commissions may be established in future

Justice Akbar Ali: yes, so I take it a point it should be emanate from section 17 or 18 so that it will be referred to the human rights court, procedure will be warrant right procedure

Participant: it has to be a private complaint filed by the public servant if that so, we can debate on so many procedural lacking

Justice Akbar Ali: judge is right, because they have already done an investigation, have statement and other things why don't we take that as unreported case

Participant: of course we have pure private complaint time loss will be wonderful

Justice Akbar Ali: again I think it will be...

Participant: one of the question

Justice Akbar Ali: one second, I think NJA has called both the commissions also together so that we can discuss on this act, whether we can come closer.... no it's a good idea one eminent from other

Participant: sir, as if the act is enacted only for the purpose of creation of NHRC, court is very limited (all speaking together)

Justice Akbar Ali: we will see, we will after this deliberation of this before noon and afternoon session we will have a paper get ready and submit to the academy and we will also submit to the HRC and also submit to the National school and Supreme Court, so that we can have an idea that's what as a human rights court judges, or designated we are not dealing with that and we are ashamed of it, we want to deal with that, give us the tools or give us this procedure inadequate decision

Participant: sir it is lightly stated, sir, sir,

Justice Akbar Ali: yeah?

Participant: sir, in light vain you said that, act is for creating certain rehabilitation center

Justice Akbar Ali: I will say like any other act, this is enacted because we of, we are signatory to the covenants and they wanted an act to be enacted so in a hurried manner they enacted. Right sir?

Participant: they used the expression *dikhava na*? That should not happen, it's very sad.

Justice Akbar Ali: so we will, direct Nitika, who is coordinator here come up with paper and if you have any other suggestion you can write it down in point or something like that or whenever, whichever comes to your mind and pass it on to her or we have a suggestion calls also in this year so we have established a human rights courts and what are your suggestion on this. so you can also give it as a suggestion so that we can also incorporate and out of our deliberation this has come up so that we can present a paper after circulating to you also.

Participant: this is fantastic, afternoon sessions are always dull this is very vibrant

Justice Akbar Ali: chuckles, now do not want to go home (laugh). Any other suggestions?

Participant: sir, 190 CrPC, allows to take cognizance of an offence.... other than complaint of police report, now one of the question that is being asked every day or day out how many, in a year how many human right violations are brought to your knowledge, your court is one of the, questions in the feed back

Justice Akbar Ali: question no? How many human rights violations are referred to you?

Participant: question no 7 sir, approximately in a year how many cases of human rights violation come to your court, though not in the form of a case. As a judge everybody comes across human rights violation in every criminal prosecution.

Justice Akbar Ali: the problem is see this 1st few questions will be, I know you will be writing nil because no cases coming, not dealing with the cases, no but based on this what we could do will be coming later.

Participant: sir I am just elaborating on that, every judge comes across cases of human rights violation when is actually handling a case, now if the judge really complains to a magistrate, a

judge would really complain to a magistrate as in when he comes across a violation of law, magistrate or even otherwise when comes across any human rights violations it being an offence it would really take cognizance

Justice Akbar Ali: under 190, yes of course

Participant: yes, and he can process the complaint if it is judge referred compliant and we have procedure for that.

Justice Akbar Ali: I think the idea is... ..they all are Supreme Court judges....

Participant: if human right is violated without any offence being committed, then what would be the course?

Justice Akbar Ali: see this is a good question but you see the problem is certain human rights violation would end up in commission of an offence under common law, or the special enactment right? certain, women right violation will not fit in this common law or anything because there will not be any 323 or 324 302 or 307 or ST/SC act violation or any other special act violation anything like that, but there will be a violation. see that violation alone we want to define not covered under any other law as an offence which is punishable the court has to give a power to impose a punishment up to these, compensate up to this something like that.... we can only want an empowerment from the legislature because the violation will not fall under any other law as an offence, what could be degree of punishment or what could constitute an offence, what could be the degree of offence, punishment which we..

Participant: can he go for.. High court, also as because when it is violation of fundamental rights he can also...

Justice Akbar Ali: I think this has been beaten black and blue the approaching the higher judiciary the question is how, what, in what manner, and what are the circumstances in which the primary judiciary can be more actively engaged that is the idea High Court and Supreme Court they innovate, obviously have that liberty. So let us not get into that, only up to this level. How it could be done reflect on that.

Participant: sir, regarding human rights violation there can be any type of cases in which human rights can be violated so there is, it is very difficult to define what is human rights violation my suggestion is at the time when the case is filed before the police station and investigation is going on the investigating agency or higher authority may identify such cases to be human rights cases and put a red flag on that this is case should go to human rights court and after maybe there should be a controlling authority within the investigating agency that it should be going to a human right court, subsequently when investigation is complete charge sheet should be filed or going to a human rights court and such provision can be made easy.

Participant: it's about anticipation and avoidance.

Participant: any example of human rights violation can marked at the national stage.

Justice Akbar Ali: all speaking together.. brothers you all have many ideas, I am only suggesting is put it down you have a paper with you and you can specify what change you want, or what manner you want legislation to be, so that we can compare that and see it as a paper and submit. Thank you all for cooperation, we will meet at 9-30 tomorrow morning.

Ms. Nitika Jain: thank you all, tomorrow we will start the 1st session at 9-30 and after this we have computer skills and library reading if any of you want to refer any of the books they can go up to the NJA library and go through those books. Thank you.

SESSION 5

Human rights in conflict with other Rights

Ms. Nitika Jain: a very good morning to all this is the second day of the seminar and we have with us Justice, Akbar Ali and professor Moolchand Sharma, professor Moolchand Sharma is the vice chancellor of central university of Haryana. He has also been the vice chancellor of NLI, Bhopal, and he has been the vice chairperson of the university grants commission. So the first session is the human rights in conflict with other rights, and Justice Akbar ail will start with the session.

Justice Akbar Ali: good morning professor, really it is very honor to be along with the professor Moolchand Sharma a renounced jurist. Good morning to all, I hope you had a pleasant night yesterday right. Hope you are enjoying Bhopal? Away from your regular works and tension and today's morning you need not to worry about any orders or bail orders which will be scrutinized and worried about. Yesterday professor I was talking about the subordinate district judiciary. I always the sub ordinate. District judiciary what they call is a play of snake and ladder. Do you understand what the play of snakes and ladders is? You put the dice go to the next. more snakes and less ladders, and if you wrongfully play your dice and end up with the snake and come down again and again and there is no way to go out . So that is what how I look the sub ordinate judiciary many a times that I may be sympathized, because unless they play their dice properly, carefully and in the manner in which they are expected to do. Then will be always a downfall and it is very difficult to go out. Once you reach, I know that you have to run fast to stand still that is also there for the judiciary. It is very long pathway to reach the pinnacle but anyhow we have to do our duty and that too in context of the human rights nowhere. We have been deliberating yesterday that what the human rights court is. Many of our professors many of the judges over here or either the presiding officer of the human rights court, or they have, they are dealing with many of the cases that are coming for women rights and children's rights. Yesterday we were all talking about the human rights courts are? Though it has been notified and established. Everybody's knowledge there is not even a single case filed before a human rights courts and actually we are also notified that despite this there is human rights court but there is no case. So that we were talking about why should the section 30 of the human rights act is there and what we can do about it. So yesterday we had a very good deliberation on how to bring in

certain procedural thing into the act and how the courts can tell the people that we are also aware about the filing. so that you can approach the human rights courts for any remedy and whatever a man wants to know. so that was yesterday's deliberation and followed by that and human rights, rights and our working. today we will have a session on conflict rights between the human rights and other rights, then there is a conflict sometimes it conflicts with each other, then we have dilemma which one to uphold, before ever it was that it came to in my mind that *Keshavnanda Bharti's case* where supreme court observe the universal declaration of human rights may not be a legally binding instrument but it shows how India understood the nature of human rights at the time of constitution was adopted. remember when we adopted the constitution in 1950, by the time 1940, ... was already available, because did not elaborate, but if I look at universal human rights declaration article and many of the articles of the constitution of India I see a similarity almost it has been taken out by the UDHR and put into our constitution. Universal declaration of human rights and article 1 all humans are born free and equal in dignity and rights, they are endowed with reasons and conscience and act towards one another in spirit of brotherhood. preamble I can say that the Preamble of the constitution of India says, everybody is entitled to all the rights and freedom set forth in its declaration without distinction of any kind such as race, color, sex, language, region, political or other opinion , national or social origin , property birth or other status. If you look at article 14, under part III called as fundamental rights, equality before law. The state shall not deny any person equality before law or equal protection of law within the territory of India. The provision of discrimination on basis of religion, race, sex or place of birth and if you look at article 3, everyone has right to life, equally to 21 right of life and personal liberty. article 4 no one shall be held in slavery, of course slavery is not here, but abolition of untouchability I can compare that with the article 5 no one shall be subjected to the torture or human degrading treatment. Article 7, all are equal before law, that was equal to article 14 and article 19, and more particular article 9, no shall be subjected to arbitrary arrest and detention which is exactly the article the article 20, 22 of the constitution of India. So if you look at this UDH, human rights and our constitutional rights which all we were talking about, that almost we have taken many of the articles from the UDHR into our constitution as constitutional rights guarantee. Now if you take article 22 which can be relevant to our today's conflict of rights. Article 22 everybody knows provides safeguards against arbitrary arrest and detention. The safeguards are three. Even the arrested person must be informed about the grounds of his

arrest, he must be given the opportunity to consult the lawyer of his choice and he must be produced before the nearest magistrate within the 24 hours and his period of detention cannot be extended without the magisterial order. Such safeguards are however are not available to an enemy alien and persons detained under preventive detention. The most contentious part of article 22 is the provision for the preventive detention. The constitution empowers the state to resort to preventive detention that is to detain persons without trial and to deny the rights under the article 19 on the four grounds, that is security of the state, maintenance of the public order, maintenance the essential services and defense foreign affairs and security of India. Any person arrested under preventive detention or any of the above grounds can have no right... right to liberty, visualized under article 19 (1). it will be little conflicting when we are talking about human rights, right to life, liberty everything, now at the same time we are also talking about certain privileges given to the state where he can be detained. so that I can take this as conflicting where human rights in a way under conflicting right. Where sovereign of the state is now important. so if you look at this basis only and only I am giving an example, if you look at this we have many conflicting rights. see I can show you the example law legalizing the abortion under certain conditions, is in conflict with the right to life of a child, who cared about a child which was about to or any reason may be that it is a female child or may be for any other reason or that the parent doesn't want a child or even this was a topic when the population control was imposed also. so when we talk about human rights in the, and we talking about in a way it's a conflicting right also. There are many instances that I can, we can come across, which has been given by the book. so as a judge or a human rights judge whenever you are dealing with the certain matters and I think you come across this conflicting interest also can anybody respond to that? Can anybody respond? Anything coming to your mind as a judge when there is rights and there is another right and another right. Can anybody come up? Just think about. Any how

Justice Akbar Ali: that is what you call. Fundamental rights... what the brother wants to say is opening of liquor shops by the government itself, because now we... how many states we have liquor shops owned by the government?

Participant: Karnataka

Justice Akbar Ali: Karnataka, Tamil Nadu I can say, Pondicherry, Kerala, you know some, what do

Participant: access vendors are there, they are granted license by the government

Justice Akbar Ali: see I have seen Tamil Nadu, Kerala, Karnataka, I do not know Andhra also. ... in Tamil Nadu it is called tax mock.. Tamil Nadu government liquor shop.. so I used to wonder where we are talking about the total prohibition where we are talking about this drinking which the 65% of the society, that what 65% of the society you know who I give you a picture about, I will give you a picture about, did you undergo same exercise before in this judicial academy? There used to be an exercise, see this society is like a primate and just imagine a primate, and we have the 5% of this society is filthy rich. You know the filthy rich? You know who? Of course you and I never be that filthy rich. then we have a 10% of the society as a rich, may be again you and I will not be there and we have the famous Indian famous the middle class, the 10% of the upper middle class and 10% of the lower middle class which all are, may be you and I may fit in aspiring group to go, struggling to go to the next stage. so the another 30% of this society is proved to be this, this statics prove to be this poor, where we have daily wages, where we have seen this our office assistants or whatever the name we call the fourth grade people or everyday wage earners or something. When you have 35% of this society is below poverty line. You know that you just go out and you can see, if you go out you can see even on the platforms they will be living or sleeping or road traffic junction you can see beggars or whatever it is. so 35% of this country is below poverty line, so 65% of this people we are talking about the 65% of the people or not have notes, have no and somebody was telling professor and you that India is a democratic country of multi storied building without staircase or a lift so whoever remains there remains there, whoever remains in middle remains there, whoever remains in the bottom remains there, but somebody said no no no our constitution is a staircase. not even the lift, it can be termed as staircase. So I was talking about the stars mark, where this stars mark case been consumed by these 65%, the persons from the 65. So the entire remedy for the..... then what is the human right? What is the human right of the particular person? instead of a welfare state which has to give shelter, food everything to the commonwealth mmm civil society, then what is the government is actually doing and with law, under the law because they are entitled and the it is not conflicting interest between the human rights of a person under light of state or light of a society. Can you come up with any other example on this?

Participant: sir! Say generally we perceive rights of a women as human rights, ok? Now the population is that in case of a will, when it is written by a testator, he has two wives, four children, two are male and two are female, he makes out a will in favor of only a male members of the family and then, gender Justice is not equality clause been violated by.

Justice Akbar Ali: did you get the point? See the brother is talking about when there are two females

Participant: three females and two male members.

Justice Akbar Ali: to inherit the property, when he chooses the man right? Under law... and denying the right to the female. And where the gender equality ... is this is not conflict in law with whatever.. See it is not inherent itself... out testamentary is itself in conflict to the human rights law, where something is happening, happening like that.

I can give you another example of right to education that is right to education act. This is also not true that right to education and we also have, states licensed private schools which pinches this people with lakh and lakh of money for a study of a child in the school, so I know because I am a chairperson of fee fixation committee for a state, Pondicherry, Pondicherry. I know that schools are charging lakh of rupees for a student, even for a kinder garden. so see there are lot of conflicts, everyday but should be the role of a judiciary or a role of a judge of a human rights court that what could be the balancing act, just anybody could enlighten or deliberate on this?

Participant: because we have many conflicting, the next one I see the deception of women of violence against women, has risen a difficult question of Sense ship of free speech and expression , see you know sometimes back in Karnataka, they had a universal model show or a fashion show her something and there was a big agitation against it , because you see the women wanted the showed her beauty it's her right may be and if we want to impose a law that it is depiction of a women in such a manner is in against a social evil or something like that, then what is the remedy available? Who could be protected? Who should be protected? Many of the things not even the religious things. We have the cultural things whenever there is a custom or a religious thing or religious customary thing or cultural thing comes in then it is not conflicting with our fundamental rights

Justice Akbar Ali: say for, gay, it's a very... Section 377 decriminalization of 377, is it a human right or is it against law? Can anybody?

Participant: now, there is... For making basically lawful it is not against right to life,

Justice Akbar Ali: pardon sir!

Participant: euthanasia... Making euthanasia lawful, now there is,

Justice Akbar Ali: chuckles... it is not taking away the life, taking away their life is prohibited under the constitution or human rights or whatever it is. It is not euthanasia is a human rights... any other.. Euthanasia..

Participant: in the bank of Yamuna river, about cleanliness there is lot of arrangements are made and the country they are permitting art of living

Justice Akbar Ali: ... that's why we are cultural... nothing wrong in discussing that, see we are not praising anything, nothing wrong in bring out these differences . The conflicts are there. So if you look at this the power to determine what is obscene or indecent could curtail the use of media to interrogate the instance rape. so if you say the society has to be enlightened about what is there in criminal act, or evils of the society or the offences against the society, then naturally the media will media to take up the matter, but at the same times the media goes media depicts something or then we against the media and say it should be curtailed, we put certain restrictions on media also. of course may be article 19 may speak about reasonable restrictions areas, but still there are certain areas where we have to look into this. the responsibilities of a researcher that is another point and impact of publishing research finding has been the initio in the ... case where research published in September 1999 became a subject controversy nearby 2000, research on AIDS under local community use the response of the sample of responds who spoke about the sexual practices in that area, from where male migration for work is very high even look at that, so the male migration being high so only the females are there in the village, so how AIDS and other thing, then they found out the sexual relationship, the need to publish the search paper, there was a protest and you know the NGO, the researcher was put inside the jail. because of the publication of the research paper, because they wanted to save, and this what happening, and may be they want to decide these people has be rescued or these people must be reformed or these

people must be given some help or something like that, instead looking that manner we say it's a conflicting against the human rights conflicting with the other rights, so

Justice Akbar Ali: ... but the society is deterrent. The friend is different. ... and the polity, political will is different, the political will goesyah of course they have many defenses available many laws available but the reality is something different... so these are the conflicting interests and again in the sex work or in the prostitution, on one hand the demand is the sex work will gain as a real work because they demand it as labor, who do you worry about, it's not see prostitution *pre se* is not an offence. prostitution *per se* is not an offence you see because immoral traffic act, only it will say who are all the traffickers who all are earning, soliciting, who all are doing this those are the offences but prostitution *per se* not an offence. you cannot punish a women prostitution *per se*. so on one hand we have a law saying that it is not an offence, but at the same time you know as a magistrate as a sessional judge or a judges who sit on appeal, how many of these victims they are brought before the court and put in jail or fined or anything and again put in the same way.. Those things are also happening. What we are supposed to do on this. When a victim of trafficking is brought before a court what could be our response to this?

Participant: we need to keep them under the

Justice Akbar Ali: how many of you think that a women is still punishable under section 8 of the ITP ACT,

Participant: I think you have correctly termed as a victim, they are actually victims not accused ... So if there...

Justice Akbar Ali: at the same time you also know that they are brought before the court as an accused only under section 8 for soliciting, how many of you agree that?

Participant: for that is easily bail able. Offence

Justice Akbar Ali: may be? But the problem is that how many of you are sensitized are aware of the crime that she is only a victim under the act, and she is not the..

Participant: ITP act itself provides some provisions for keeping the victim in a state home, center home

Justice Akbar Ali: I am happy that you are again and again using the word victim.. ... Instead of the word accused and so that the person has to be treated as the victim on one hand sexual exploitation, can we allow this to happen? Did not amount to increasing the human traffickers? will not be allowed... sensitized a sexual exploitation of a weaker section... so we should not say that no no no this people should not be in that trade and they should be educated or they should be given any other reformation or they should be given any other thing? Can you come out n that? is not the duty of the state to see this that in the name of this, this is not an offence. Can it be allowed to continue? Always may be conflict. May be yes you wanted to say something?

Participant: state is responsible to make a prostitute because 90-95% of prostitution is result of poverty if the state gave sufficient facilities for their shelter and job, it can easily avoid this situation, actually it is human rights violation, that is the point, but we are all blaming the prostitutes

Justice Akbar Ali: any other ... why this side is silent today? Yesterday it was raising lot of..... why.. .

Participants: completely...

Justice Akbar Ali: I said na 35% of the people... that is the 385 of the people....the beggar is the violation of law..... beggary is offence.

Participant: in fact they are compelled, to commit the offence.. ... it's a completion, it's not voluntarily,...

Participant: sir1 law is very discriminating an all law, against the well persons only, criminals are always victims, and it's very discriminating

Justice Akbar Ali: law has been settled down on the point that these people has to be treated as a victim and they have to be reformative action has to be given or they have to rehabilitated into the societies, agenda of the state or the agenda of any welfare state, but that is also been going on but at the same time the thing is coming up is there are conflicting interest in this, so there is confusion between decriminalization and delocalization of prostitution, like section 377 is there in, whether LGBT has to be given right, because they claim it as a right under the, may be your personal perception is there, or social perception may be different or religious perceptions may

be different, faith or other things will be different, so this is somewhere it is there that we have already seen the conflict, yes somebody. so apart from that we have, this environmental concern also, which is also a deeper concern, you know the pollution control and environment pollution many of the industries have been closed, remember many of the industries, in Tamil Nadu, the tanneries and the 80,000 workers are been replaced, where is there human rights when right to work is there ? And I have a right to work

Participant: in Karnataka, the big... Plant has been closed by..

Justice Akbar Ali: displacing the course of workers, right to livelihood is denied, right to life is denied and but still.. It's an environmental law, it is pollution control, because it in interest of the society at large, and another area is the tribal land alienation. You know the tribal land all may be Jharkhand or Chhattisgarh may also have, may be from Chhattisgarh or Jharkhand tribal land acquisition or rebel land cannot be alienated where

Participant: permission has been obtained from the sub divisional magistrate for the alienation, the tribal cannot alienate the land without that permission... in Karnataka also there is law, which prevents the land which is granted to the people and cannot be alienated for 12 years.

Justice Akbar Ali: may be idea of law is only to protect the rights should not be exploited or cheated by the other people, but the problem is the owner of land is, not my right to alienate the property . is not my right over my property? this is same thing in Kerala also, I think in 1975, there was debate in forest land, tribal land alienation prevention or protection of the tribal land in 1975 act, is still in the debate, it's always in the courts. Maharashtra also,, they have everywhere this

Justice Akbar Ali: so this again tribal in the forest, you know the tribal, see I am only sometimes I used to wonder where we have encroached upon this country and driven this the origins of this country namely the tribes, to their forests and we are living in the urban and establishing cities, towns and everything and we are living very happily. may be the origins, the tribal, the origins of this country they have been living here, and after we come over here and slowly we have expanded our population and slowly we have been driving them to hills, forests and make them. O you are tribal you have to be there and I am a civilized man I had to be there in the cities and so we depriving them many of their rights. Sometimes it happens I mean it

should be so what is the rights of the tribes, so they are supposed to be in the forests.. what is there in the forests act? you cannot even cut the tree you cannot even cultivate in a forests land. you cannot take anything from the forests. then their whole life is depending on the forest land ,it is conflicting it is common right under the forest law, and they again shelter the conservation and you know the humidity, even supreme court, remove all these encroachments, remove all this slums then, what will happen with these people, who will take care of these people? You know in every city, even in Bhopal or may be any city, you go and see at the platforms I can assure you in every city more than million people living in generations in pavements, have you seen that? they will be having small hut and their fathers would have been there, their forefathers would have been there, they would have been born there and then they would have given birth to their children and still making a part making every day meal and going course of their life, we do it in our bungalows or flats or somewhere. What happens to them if you displace all these people? Even with the promise that you will be giving them some or better advent or better place somewhere outskirts, but they cannot live there because they have to come over to the city only to the livelihood, many work for long hours, many work as small time workers. So what are we going to about that, shelter, conservation, see smart cities what are we going to do? we are going to remove all these garbage right, all these garbage's like are very specific % of, to a place a remote place where there would not be livelihood but we are also talking about their human rights. then we also have speedy disposal of cases and verbal criminal Justice process. under the name of the speedy disposal.... the cases are the fast track courts, the cases are heard by the video conferencing or the magistrates going to the jail and conducting the, are we not denying the fair trial? are we not denying their right to heard in open court

Participant: in 2007as per the directions of honorable Supreme Court any cases which are punishable for less than three years were closed. case

Justice Akbar Ali: see there are many conflicting laws and the rights...somebody? this is just continuation of human rights and other thing... my presentation I want to hear and I want the professor to....or somebody... add anything to it..

Participant: we should here their.... and

Justice Akbar Ali: we are not...any other area. As a judge if a case comes before you between shelter, and law.. what could be your answer will be? Can somebody answer that?

Participant: ...

Justice Akbar Ali: no, I am only imaging that you are only going to the human rights courts and you are going to face such human rights violation.. and are you going to strictly stick on to the rule of law or you going to go beyond and say.. no no no as a human rights violation, I may not allow this to happen,

Participant: but there is as, Justice A.K. Goyal I will tell you he was telling, he went to some state judicial academy and he told magistrates that will you apply constitution? so magistrate said no, we will not apply constitution, constitution will have to be applied by high court and supreme court, we will only see CrPC and other procedural laws, then he said will you not apply for example judgments that are delivered by the supreme court in Husainhara Khatoon case, that handcuffing should not be there, so maybe there is a perception in the minds of district judiciary that constitution is not relevant, and constitution if you see it is very huge text and very comprehensive document, it actually includes so many human rights. we say that and constitution is something by which we take an oath to, so it is definitely applicable. if not directly then through the judgments of the supreme court, nevertheless it is applicable in Our work, so as you said that where are human rights. Human rights are there in the constitution and constitution should be the something that can help us in our reasoning, something that can develop innovative approaches.

Participant: even procedural laws, they are also best in constitutional provisions..

Participant: yes yes! definitely..... no those are different powers 226 and 32 are different powers but normal constitution whole constitution, those are powers of those courts, but nowhere it says that district courts have no powers.authorities of supreme court are binding.. yeah because under 141 even supreme courts judgments are binding law of the land, is equivalent to holding your procedural laws

Participant: supreme courts judgments are equal side

Participant: yes they are on the both side actually will make fun of it, but I think that is actually our plus point, that it is on both side, because it gives you maximum discretion..Values can be prompted that's why we have these things the constitutional values like freedom equality, dignity, equity fairness

Participant: completely, if for 24 hours accused is not produced his constitutional right is also violated, his procedural right is also violated so then courts cannot do anything, district judiciary.

Participant: it is the remedy given to.. it is directing the police to produce the accused, that is the remedy given by the district judiciary,

Participant: no! but cannot you pass picture again the police officer for not producing the

Participant: sir theses writ petition are the expedition.. but constitutional rights are also enforced by the common court of law, these are only the defense, these are the expedition merely lies with the high court and others common, we are also enforcing the human rights, but through the procedures.

Justice Akbar Ali I only want to ask this magistrate or the judges. you just take article 14, equality before law, of course you cannot exercise your writ jurisdiction on equality before law article 14 is of course, but what as a sitting as a magistrate if two persons are coming before you one have and have nots, what is your approach before the both of them? one have and another is a have not or you dealing with the particular case of a, ok one person is coming with a offences under 424, economic offences and other person is coming under 379 or as common offender, then what could be the approach of the magistrate or a judge. will he not apply article or say that I have applied article 14, I keep all these two people equality and equal application of law, equal protection of law, will not come into your mind? so that is what application of the constitution requires

Participant: reasoning may be reasoning,

Justice Akbar Ali: you will have to understand but you will not keep in your mind that I have to treat them equally, you take article 21 if a person is produced before you if has not produced not within 24 hours, will you not set it up immediately?

Participant: completely to detain him beyond 24 hours has committed offence or illegal detention, even in the criminal cases,...

Justice Akbar Ali: you keep this fundamental rights under constitution 14,15,20,21 or 22 in your mind and so that you can apply is not in the manner, what the high court or Supreme Court are applying but the manner you are accepted to it. will you not, as mam was telling after 24 hours you have been produced, what is your remedy?

Participant: suppose we granting bail to an accused, after 24 hours can we release him?

Justice Akbar Ali: no, see the problem is that

Participant: we cannot release we have to deal with the bail procedure.

Justice Akbar Ali: see you are not asking my authority or a judicial pronouncement or a binding precedent to law setting on liberty or not. See I am not on that point, will you not apply the constitution provisions

Participant: we apply under..

Justice Akbar Ali: will you not apply this constitution provisions,

Participant: we apply by doing directing the police

Justice Akbar Ali: see in fact I was searching for one questionnaire on your common questionnaire to judicial magistrate what you will say when a person is brought before you handcuffed? if we circulate the questionnaire, around them, many small small things, accused comes to me and ask for a medical examination, what if you are produced after 24 hours. Yes or no answers... you know to our surprise, many of these magistrates they do not know, what their power under 54, the provisions and the guidelines before the human rights commission or judgments related to that, they cannot be handcuffed, they have to.. Subjected to medical examination and they had to be certain liberties and those are the small- small things that they may not be knowing. When we say that will you apply constitutional provisions or not, not in the context of whether passing an order, in a writ court or a constitutional court, but we are only wanting, to know that whether, keep this constitution guarantees in your mind and pass any order.

Participant: the judge was saying he is free not to, he is produced after 36 hours, how can I set him at liberty, what you do with him is different with the accused but, what will you do with those people who have violated the law? Law which is provided in the CrPC and even constitutional guarantee..

Participant: here we are more particular about the rights of the accused not about the victims, an accused who has committed the murder, produced before the court, perhaps due to some other reasons he has been produced after 24 hours, we are for Justice not only for human rights

Participant: but just by not following the law, you are not helping the victim, accused is produced after 48 hours, how the victim's case is held?

Participant: we are not considering the feelings of victims,

Participant: feelings! no law, I don't think we should do feeling business actually, in legal business, it's a profession, not feeling,

Justice Akbar Ali: see yesterday, I will give you the citation Hon'ble supreme court observed in one of the, you hate the crime but not the criminal, it is judicial, you hate the crime but not the criminal

Participant: victim has other, victim protection, victim compensation those things are there protect those as well, both have to be protected, that is what judge means not influenced by any one or not having emotional attachment to anyone,

Participant:if there is violation of non-production of the accused then, we have to give notice to the IO...it is not that keep liberty against the accused and proceed against the IO, we cannot release the accused, in such a heinous offence.

Participant: yeah yeah ! don't set him at liberty, treat accused in a way as you have to treat in a law, but also see that people don't violate the rights which are granted, because then it only helps their case, completely ...

Participant: if he complains, at the time of production, will record his submission and will keep the liberty of the accused to proceed against the...

Participant: all speaking at once. So you have to know, how you see your work, is it limited or is it..

Justice Akbar Ali: one second! Will you will you agree with this statements,

Participant: I agree but keeping accused above 24 hours, police may manipulate with the records to show the time of arrest as if he had been produced

Justice Akbar Ali: how many of you agree with the statement, an on record they always produce within 24 hours, is it not true... is not true on record, they are always produced within 24 hours.. ok.. ok now, I happen to be magistrate, a remand is coming before me and within 24 hours, there are certain things I have to exercise because the accused person is produced before me within 24 hours, then it is not duty on me saying what has happened to you, do you want to say anything on this, I have been told about that what is the reason for your arrest, how the police followed D.K. Basu's directions, is not your acquisition told about you, is on the arrest or the close relative has been informed about your arrest . it is not the duty of a judge to inquire about all these things from the person, is it only a ritual.... when the accused say that these are not followed, I have detained in the police station for more than three days, I had been tortured, I have not been told what is the offence, or what the arrest is.. what will be the reaction of the judge or a magistrate?

Participant: speaking all at once... we have to enquire into the matter... ..

Justice Akbar Ali see that's why again and again supreme court or high courts have been giving directions to the magistrates, ok a person produced before a magistrate and see that he is not handcuffed and the person produced before you and has asked for the medical treatment, and you have so many directions, so many guidelines have been also given to them, somewhere you can balance, and when you are balancing in such a way, you are also sure that human rights are not violated, so that's the only thing we want to impress upon you.

Participant: accused is innocent, unless been proven guilty, so he has to be treated with some respect, within the limited premises. we make him sit down during trial, and in fact sometimes you have to address them sir also... so that they can feel.. comfortable, an old man we cannot

make him sit down, but then he is also accused of committing some heinous crime then the trial goes on.....but he is still innocent until proved guilty....

Participant: yes of course the principle of the movement the persons is accused is stigma and also we have this feeling... you are accused you must have done something, otherwise why would people accuse you. These are inherited bias also, moment somebody is charged for murder, as typical Indians we are kuch toh kiya hoga, something he must have done otherwise why will he be charged? so we have that very positive bias

Participant: when the trial commences he is presumed to be guilty....all speaking at once...you presume innocence... Violation of human rights,

Justice Akbar Ali: now, every crime. All speaking at once....now, we are talking about the conflict is again it's a crime, crime against woman, right of a particular victim, and immediately we are also talking about the rights of the accused also, because many of the times we have to rely on third party investigator who may not be fair. there is an intervention, it is not you and I, witnessing something, it is something which is brought before us, by a third party investigation officer or agency, which may not be fair that's why this constitution guarantees these types of guidelines and these types of things only to see because why even from Magna Carta to any constitution if you see so many right against the arrested and accused persons why? Globally

Participant: some times are the special hours doesn't allow at the initial stage to take cognizance of the rights given under the constitution as because you think of POCSO where there is complete presumption against the accused and it is the accused who is set up his case and refute the charges.

Justice Akbar Ali: I only want you to keep in mind what is UDHR what is the constitutional guaranteed to any person whether we are keeping that in mind whenever any person is coming before you as an accused as a victim, plaintiff, witness, defendant or whatever it is

Participant: even Justice. Mali math Committee it is emphasized on the rights of victim also

Justice Akbar Ali: yes of course...you know after 200 years you are talking about victims and their compensation not from 1888 when the CrPC or IPC has been enacted we are talking

about these victims and victim compensation only in 21st century and not in 18th century though some provisions were there, ...

Participant: we have victim compensation but what we still need is victim protection proper scheme for that in US and all victims are well protected.

Participant: it is very unfortunate as soon as FIR is being lodged against the any particular crime all the system of the government machinery judges, judicial, academia's all always think about the accused they do not bother about the victims entire system is always talking about, after thinking welfare regarding the accused who has done the crime, this is unfortunate in our system ...

Participant: but why are you getting so emotional with that

Justice Akbar Ali: I do follow brother, again I go back and say again I will repeat and say what I said earlier it is not the thing you and I are the witnesses for a particular crime, then I know that you and I personal knowledge of a particular crime, see why for the last, or 1948 or Un prior to that. everywhere, UDHR is one such declaration is all these accused person will be treated as innocent unless proven guilty that was UDHR declaration why because we are placing a reliance on a party who may not be fair, this is the only criteria we are giving what we called, now you said we are always for the accused and not for victim. it is not that we are always for the accused because they are now in a disadvantaged position that's how we have to look at it and not, every crime is a violation of human rights to a person but because, till it is proved there we have to, little give a leverage to the person that's what the law, government UDHR says anyhow you dwell under.. also police is under severe pressure sometimes.....fair trial.....

Justice Akbar Ali: no, it is the state to prove any offence beyond reasonable doubt is the, every accused person presumed to be innocent is the criminal jurisprudence but we have adopted a criminal jurisprudence saying every accused person is presumed to be innocent until proved beyond reasonable doubt.. why we have taken that unlike any other countries where the accused has to prove that he is innocent person, why we taken this 2 things because as a country when we develop under the foreign rulers and other rulers that we have been watching this process of state prosecuting till 1772 Warren Hastings has so.. ... the prosecution is only by the

victims like we had in Mughal, king's periods and other periods. victim has to prove what the case is then only in 1772 we adopted this system the state prosecuting the accused so we have seen under a foreign invasion or rulers disparity, we have not adopted the French way of criminal jurisprudence, the accused to prove his innocence still we adopted this state to prove the guilt so as long as that remains in law, we adopted that it will go in that manner and cannot deviate on that, that's why I said when an agency is prosecuting let it prove the guilt beyond reasonable doubt that is criminal jurisprudence we have adopted. Thank you.

Dr. Geeta Oberoi: we will be continue after tea break, we are here whole day discussing and debating agreeing and disagreeing so we come back at 10-45 do we agree with that? Ok

SESSION 6

Poverty as an impediment in realization of Human Rights

Dr. Geeta Oberoi: welcome back from your tea break, I would like to introduce speaker for the next two sessions Prof. Dr. Moolchand Sharma, he is destined prof. of law from University of Delhi and he is founder Vice-Chancellor of central university of Haryana, he is widely known among scholars and legal fraternity as taught-activist, institutional builder and teacher who inspires and motivates. he envisaged and guided the building of central university of Haryana as an international institution of higher education of research from 2000 to 2013, he holds a degree in juridical sciences from the University of Northway, Chicago USA he is invited by various universities and educational institutions as senior fellow and scholar and he holds numerous awards to his credits, scholastic approach brought and contribution made by prof. Sharma during his various scientific research and academic associations includes he was vice chairperson of UGC, director of national law school Bhopal, senior research advisor to NHRC, he was an expert legal advisor to law commission of India, national commission for women, he is a national research advisor to FORT foundation India, he was joint registrar of research at Supreme Court of India, on number of task force committees constituted to provide inputs on national policies on complex issues he has proven his deep understanding of interplay amongst final nuances of democracy , rule of law, diversity, development and distributive Justice, currently of course he is full time member of Law commission of India, recently his book on democracy, globalization and distributive Justice was realized by the Hon'ble minister for finance and information and broadcasting Mr. Arun Jaitely as a student of fine even a full-fledged article devoted to a teacher like him will be very less as far as his contribution to legal education is concerned, I still remember he taught me 19 years ago, Austin, Kelsen, Hart and roscoe Pound...chuckles... and all this four philosophers are still my mind he is really a great speaker so I hand over it to you sir, thank you so much.

Prof. M C Sharma: thank you very very much, Prof. Dr. Geeta Oberoi, for being so generous in introducing me, otherwise I was little worried because initially when my another colleague Nitika mentioned about me she said I am vice-chancellor, central university of Haryana that I left 3 years ago to join as member of Law commission of India, no doubt I was founder there and

therefore that correction Geeta has already taken care of but many other wrong statement about me she has made, I am neither that great a teacher nor that great a scholar, but yes I definitely enjoy reading, writing, meeting and talking to wonderful people like you, and particularly allow me before I come to topic, 2 minutes why I say I am more keen to talk to to you people and my keenness you can find out from here that I was in Bhopal, vice-chancellor of NLU here, whatever you see there was in fact a again due to my students mind and colleagues, it was not rare even one amongst 10 and within a year and a half we made it no.3 National map and at the same time this place was also thriving with all activities and people like Menon, Mohan Gopal, Mohan and I have been classmates, they were very keen that I come here but can you believe I never ever came here to deliver any lecture, I did come here whenever CJ came or whenever the dignitaries came to have one to one meeting with them and give my ideas to them but I never ever came on here and now the moment I heard from Dr. Oberoi and from Nitika that they would like me to come my 1st question to them was what is the constituency she said District judges, magistrate, I said yes I am coming and I compromised my every other commitment so much so that I was supposed to be in Hyderabad today evening and now I am going tomorrow morning by taking a very very early flight which my health doesn't allow because I was so keen look, I have been hearing you for one hour and the kind of ideas, astir, questions and kind of experience you people have demonstrated in one hour makes me feel very humble and small, because you people know the integrity and remember you are fulcrum of Justice system, may be something is sitting in bhagwan das road in New Delhi. Maybe there are some 28-29 people over there who are the wisest people, but remember the ball is set rolling by you. They are earning precisely because you are making them earn, and therefore for god's sake this is what I have been telling to my own colleague in academic world that we so called teachers do not have self-esteem, *kya bolte hai? kuch nhi mila yaar isliye master ban gaye, pura career laga dete hai master banne ke baad IAS banne ke liye*, why? because we think we are useless, because we think we are not creative, we don't think that we are up to the level which a respectable person should be and therefore we are low in esteem and because we are low in esteem, we don't know our strength and we don't contribute, what we are in a position to contribute, I really feel very inspired to meet to people and I am here not to give you any certificate because you people have greater experience than mine, ok but there is a colleague of your from fraternity of law, I can only wish, request don't lose your self-esteem because maybe you are less visible than judge of

the Supreme Court, than a NHRC, SHRC while sitting as human rights courts in your districts, you may be less visible, media may not be putting that much attention to you, but remember the real service of the cause of rule of law and human rights if anybody is doing it's you for initiating the ball and therefore I really compliment, my idea precisely was this to come here and make my humble appeal to you that you know, that your self-esteem is very, we will be talking of human dignity today as you know impediment to protection of right, I tell you we have to 1st protect our self-esteem and our dignity that is the whole idea of entire human rights protection, my dignity once I know this is my dignity I can then fight for its protection, if I don't know who is going to fight and who is going to speak and therefore thank you very very much Dr. Geeta for having, given me this opportunity to come, second I know I am speaking little too much but allow me before I come to topic, being my first visit I really want to say something which more than you is addressed to Dr. Geeta Oberoi and more than to Dr. Geeta Oberoi and please do convey without any hesitation and in this very words even to Hon'ble CJI that this place, should be the mecca, madina, Ayodhya and Vatican for the judges and more particularly the judges for the most superior hierarchy namely what is being called today subordinate, I don't call you subordinate ok, they should compulsorily request to spend one month here, I know the problem will be what, units have to be calculated, there work has to be evaluated I hope I able to say what I am trying to say, but that is where the CJ has to be convinced that is what he has to be told, how do you expect them to produce a quality unit, unless they have that kind of skill, knowledge, information and therefore it is crucial that each one of them, in the initial level 3-4 years doesn't mind all these IAs people, Lal Bahdur Shastri academy, I go there almost every second month, now what is happening, the people up to the secretary level, they will come and we are training them and because they know rest and another's who are training them, but because there is something else lying there, which they have to pick and which I have to pick up, the kind of questions they have raised, let me be very frank with you most of their questions remained unanswered, I wish I had an opportunity and I had an opportunity to give my own reflection on what is being raised by him, most of the things he raised remained unanswered, most of the things which she said remained unanswered similarly most of the things which I said remained unanswered because people were not competent to build the bondages, where was the time, where was the skill and where was the need to have that kind of interactions and therefore my second request to you to CJI must necessarily, it's not enough that is Supreme Court judge comes amongst us and gives a

lecture, no, and 3rd you are own book, I don't know how many people... you know today till 3 in the morning.... I remained engaged in reading book which she has authored I had the opportunity to have a vertical glance at the book some 3 or 4 years ago when the book was launched and last night when I came here my special request which I sent to her was I needed that copy and I wanted that copy my larger objective but last night I had some headache which was in my way I started looking at it and it gave me so great encouragement, I kept reading till 3 in the morning got up at 4-49 and again picked up that book and you know in this academy I very strongly believe Geeta that particularly chapter second and third which you can't say because people will say you are patronizing your subject but people like me have to publicly renounce it that chapter 2 and 3 must become a necessary reading right from the Supreme Court to the lower bottom, because when you are talking of professionalization of judicial education and the way you have brought in Krishna Iyer, he has given great caution in that forward itself, because Krishna Iyer had said that too much over professionalization will kill the Justice system, so how much professionalization in what kind professionalization, I think that is very crucial, you may have beautiful building, all kind of facility here but unless that kind of agenda is brought here I think, and you are the most qualified person because having read your book and having seen your work which you have done in Mauritius I am more than convinced that you deserve for deeper, wider more meaningful judiciary, convey my this feeling also, this feeling of minebut my second feeling which I have said that they must necessarily have one month here and similarly all 26 judges there and CJ of high courts should take sabbatical of 10 days from there calendar, come and spend time in introducing with them because most of the question is raised and when they say you know, what can I do I can only talk about this policeman or talk about this accuse and I have nothing else to say meaningful about the victim that mean entire victim logy is missing from the subordinate will of judiciary and who else the judges must come and talk to them and this introduction between criminology and victimology has to be built in the curriculum, agenda, has to be given that kind of skill and training and therefore I very strongly believe that this place has a great role, great potential, there is need to exploit that potential, like what I have told them that they have great contribution to make, they have to realize it, self-esteem with that I will come to my topic, before I come to topic one word, whatever Hon'ble Justice Akbar Ali have said was so impregnated with ideas, wisdom, and vast experience he has gained, I really thank him for giving a really interesting talk and Geeta your interjection as usual

were very very contributory and in fact I was wandering after listening to him, interjections from her and more importantly the questioned you raised, the topic which I have been asked to speak upon, will I be wasting your time? because unlike the topic you have discussed earlier, mine is a very theoretical, conceptual, rhetorical, in one way and in other way it is more of passion, compassion, sensitivity, humanity and humanism and very little....I am not saying law is not important, law remains important, law is important but law is only one important instrument, actually that is one mistake most of us do when we try to consider law as *Aladdin ka chiraj* law cannot find out solutions for everything, law itself resides in society, it does not reside in black from, law grows as the society grows, and decays as the society decay law changes at the social aspiration and need, and law changes as the new conflicts do arise, like you were talking just now of environment, now what has happened new conflict has come development on one side and basic necessity on the other side, Narmada people have to be thrown out in Uttarakhand new hotels have to be constructed even if river bank is disposed and people places are disposed, because economic growth it has to go high, that is what everybody is saying, so there comes a conflict and this conflict cannot be resolved only through law only you can say that natural resources cannot be sold except through the open auction except under certain situation a debt law you can lay, but why have you laid down that law because there were conflicts rights? and therefore according to me law is only one solution law is not the solution and therefore my today's topic is a very difficult topic and please you are free to accuse me, abuse me, hold me guilty for wasting your time because I am not not going to great I will only be talking of certain, how many of you know Hindi? Many of you?

Participant: some of us do not know

Prof. M C Sharma: I will only start with a Hindi couplet which I will translate in English, before I began because my topic is what poverty as an impediments to realization of human rights and we are told that human rights are the rights which are inherent, inalienable they can never be compromised, never be violated, everybody should remain committed to human rights, so much is the importance of human rights, in that scenario I have to talk of poverty as an impediment to this human right and I was worried that what will I talk and when I was listening to you people and when I saw I am irrelevant person then it suddenly struck to me how do I began with and what came to my mind was something I hate, when I was student of 6th or 7th

standard there was a Hindi poem written by a Hindi poet called Bal Naveen Krishna and it goes like this, I am little slow and for my those brothers and sisters who can't follow Hindi, I will tell them in bottom line the English translation, the couplet goes like this Raj Putra *Siddharta chala tha*, you know very well the prince Siddharta who became what? now prince Siddharta, raj putra *Siddhart chala tha rajgarh tayag amirta paane*, he left the riches and all the comfort and why because he wanted to attain divinity, *raj putra siddharta chala tha rajgarh tayag amrit paane*, because he wanted to attain higher values he wanted to attain divinity, he wanted to be having amrit, amirt ok then what happened, *raj putra siddhart chla tha rajgarh tayag amrit paane, aur ussi ke desh nivasi*, you know today if you look to the statistics you will find out that 40% global population in 2015 is either living in extreme poverty or under the threat of extreme poverty, I am not talking of poverty I am talking of extreme poverty which I will explain later but you can make out that it is something more than ordinary poverty and can you believe one out of every 5 persons that is somewhere around 20% is starving, ok now what I am saying is raj putra siddharth will go because he has to attain that divinity because he was the prince, because he has taste everything of life food, clothing, shelter, palace and all kind of thing and *ussii ke desh nivasi*, mean a lot, out of this 40%, *aur ussi ke desh nivasi chale khojne dane dane*, because starving, because extreme poverty, they are only looking for what dana, dana a grain of food, *kaise pae jan apnapan*, he went to find out divinity and I want to find out about myself ok, you are telling me human rights, somebody came from here and said something, you want to tell me that, you have got human rights which is protected, state will protect everyone is under obligation but which human right you are talking of a human and what is happening to me unlike the Prince Siddhaarta, I don't have dana, food grain I am roaming from one place to another place in search of the food, or *ussii ke desh vasi chale khojne dane dane, kon pa saka amar parampad*, do you expect me to have divinity, do you expect me to be a noble person, do you ever expect me to be man of all kind of good virtues, when I don't have food to eat right?, *aur usii ke desh vasi chale kholjne dane dane, kon paa saka amar parampad yun bin muthi bin dano ke, jab ki pade lale prano ke*, I am not able to survive, to sustain and now you are talking about human rights, and therefore entire story, foundation of human rights is 1st insure that people have right to be human then only that you have a subject called human on whom you will invest he human rights and therefore poverty, hunger is the greatest curse and unless you remove poverty, hunger, sheerness, joblessness, sickness and health issues the whole idea of human

rights become illusion, right and therefore poverty is not only impediment to the realization of human rights but poverty is a real challenge which has to be met with those who are concerned with human rights, I think this is the only way I could connect this topic in today's context where we are taking of poverty as impediment of human rights, and what inspired, motivated me was, from this side I am not able to figure out who but disembodied said that, or may be from that side somebody said that you know when we are talking of human rights what human rights we are talking, you said right? and that made me remember the couplet I read long back that prince can go search for divine, the developed world can go and talk about human rights, but what about me I don't mind this entire talk, just now Geeta have told, just come out with the book called globalization, democratization and distributive Justice, I do talk about the importance of economic growth but why? Economic growth for what? economic growth for sake of economic growth has no meaning because access to fruit of economic growth has to be equitable, tested on the touchstone of human rights, unless this happens this entire race for sustained , increased human right itself will become a big hollow cast for poor, eradication of poverty and ultimately for realization of human rights, recall, because poverty can be defined in many ways and poverty if one has to define it is nothing but merely, or it is everything that, it's a very complex thing, it is a complex web of multiple deprivation which are mutually reinforcing each other now what do I mean by that, it's a very technical statement I have made..... think for a second it is complex web of multiple, interrelated deprivations which reinforce each other that is if I don't have income I am poor, I cannot have income, if I don't have education I cannot have education if I am not healthy, I can't be healthy, if I don't have a home, I cannot have a home if I cannot have a job , I cannot have a job unless I have right to ask for the job, and therefore please mark all kind of deprivations are there there is deprivation of income, I am deprived of income because I am deprived of income I am deprived of other capabilities which one need to live a meaningful human life, that I don't have education, health, adequate standard of living and I can't have them unless I have employment, have a job and therefore poverty is a multiple of many kinds of deprivations , income deprivations, it is deprivations of my capabilities and my abilities and above all it also complexes further webbed by social exclusion, because what is happening I am living in a slum colony, because I am living there, please mark the quality of education I am going to have, please mark the quality of health I am going to enjoy, kind of education I will have and forget all that, what happened because of this exclusion of mine right, I don't have

interaction with the larger group of society, I don't have voices to make which could be heard I do not have capabilities of participating and deciding about myself and therefore according to me poverty is the result of multiple kind of deprivations, income, capability deprivation and social exclusion an interesting what happens is if you try to remove one you are still struck up with poverty because two others are looking in your face and therefore it's a very complex game, it is very holistic game right? and it's a very deep struggle which one has to file and remember if Supreme Court, now let's come to law, the rule of law, if Supreme Court giving its judgment on bonded labor or that judgment is yet to come, but having delivered no. interim order about food right, if Supreme Court has played a role in sensitizing poverty to human rights issues I think we have no less important role and that's what I was cajoling to Dr. Geeta Oberoi to convey to Hon'ble judges that they have great role to come here and talk because the entire controversy which came over here that, now I unfortunately language long back I read something language is one of the most powerful tool, humanity is invented to communicate still it is not perfect many things only tears can speak, whether tears are out of job or pain when then that is mystery words cannot. Because I don't have words therefore I will have to call subordinate, though I don't want to call them subordinate, this entire question which came about subordinate judiciary and what role do they have to play so far constitution is concerned again that is question of self-esteem, why subordinate judiciary thinks this way you have so much to depend, rely, read upon and so much to create see when this whole talk of Hussainara Khatoon came this people brought in handcuffed, now there is entire constitutional jurisprudence which Supreme Court will ever say or will refuse to grant you a writ for telling on your orders that I am bound by Khatri, Hussainara Khatoon and therefore this policeman has to remove the fatter otherwise I become as much party to violation of constitutional philosophy rather more than what you are because you may not be conscious but I am how do you expect you don't have a constitutional role when Supreme Court in PUCL cases give 100s of orders talking about how to find BPL or what to do with the food which is rotting and people are still dying of hunger, don't you think you too have as unfortunately subordinate courts, don't you think you have great opportunity at that point of time to deal with administration and varieties of ways including criminal ways and forget that when you sit as human right court and for me it appears that poverty alleviation particularly dealing poverty as an impediment issue in human right if Supreme Court and you have equally important role not in any case going further in formal fashion in my lecture that my 1st right was

that I wanted to establish that poverty is multilayered is complex web and this hampers my right of human of human being itself and therefore poverty is serious impediment in the way of realization of human right in fact Nikita has been very kind she send me some material, I read it very carefully, read- re read I won't share because I need longer time..... more focused approach I need to adopt but I will highlight one thing, there are 3 questions which can be raised poverty causes violation of human rights, yes we have seen just now poverty causes my right to food, liberty, security, health, education everything, so poverty causes violation of human rights also, violation of human rights, now you as judges will be more concerned with second relationship violation of human rights causes poverty because if right to life has been deprived, poverty has been caused if human right of health is deprived and with this, now with this food security act if right to food has been deprived poverty has been caused and therefore poverty causes violation of human rights and human rights cause poverty again reinforcement of each other, you cannot segregate this relationship between poverty and human rights of course we have to understand what is poverty, and human rights. poverty as I have already explained is not a question of income, calories, of course they are important but more important is I should have certain capabilities and also I should be socially included and not excluded but what about human rights, right to health, food , shelter, job, employment this could be considered to be I don't know whether these are constituent of human wellbeing or these are instrument of human, but they remain, so they are important, but equally important from my point of view is another question, can poverty itself be violation of human rights?, see two relationship was easy to understand, that poverty results into violation of human rights, violation of human rights results into poverty but can poverty itself be treated as violation of human rights that's very difficult. and I read lot of literature in this country, abroad, while I was teaching in university of Chicago had opportunity to meet people like Martha Das Nobel laureates worked on economics..... even if supposing we assume that poverty is violation of human right that means you have to eradicate it, it becomes obligation on part of the state to see that poverty doesn't reside because if poverty reside who has violated the human right? if poverty is the violation of human rights, that mean existence of poverty is violation created by whom? I guess state, that means state will be responsible to come out with policy and plans, programs, initiative, remark the funding give the money to ensure that poverty is eliminated and so that as they do not do they remained accused of having violated poverty and as result of which human rights but it is very tall order almost in

communist part of the world even this cannot be expected and therefore we will have to remain contented in this stage only with the proposition that poverty is a great impediment of human rights and violation of human rights is a great source of generation..... poverty is multiple complex of usually reinforcing deprivation of income, capability and social exclusion and if you look to..I know time.. You keep telling me do I have another 2 mins to conclude? And also I am not very use to all these kinds of...laughs..... sorry, where was I? I was talking something, lost my track...I lost but see what is important is when we are talking of human rights and poverty relationship there was a time when people thought that human rights are only civil political rights, you know that was because of an ideology if you look in UDHR came in 1948 post second world war era and emergence of communist part of the world right? and in communist part of the world civil and political rights are not respected and therefore you came with civil and political rights but please mark this is not the end of this story that gave social, cultural and economic rights and after that came 3rd generation that is group rights and collective rights and therefore when you are talking of eradication of poverty or when alleviation of poverty and relationship with human rights though each human right is important because if you don't respect my civil and political rights meaning thereby what that removing poverty is only question of charity, only giving door by the state and therefore we will give you the money, we will take parental approach, you are done, you are only the object you are not the subject you can't make your own decision where do you think poverty pinches, I will... are you getting my point and therefore please mark civil and political rights are equally important because they will give right to participate they will give right to speak, but I again come I cannot participate, speak, decide unless you also see my social, economic and cultural rights to me, give me food, education, health, and also ensure that culturally and socially I am not excluded and therefore to make it clear the relationship of poverty and human rights even poverty has to be taken in extended manner and human rights have to be taken in extended manner that can be an agenda if the law has to play a role and that is why you see, you have got judgments like Francis Holland and that is why you have cases like *Olga Tellis* and that is why now you are having these cases where all kind of interim order regarding food are being given, *Unni Krishnan's case* an please mark it is not easy to mark the role judiciary has played, which you played is a fundamental role, because these interim orders were passed that politicians were forced to make food security act because you came out with Unni Krishnan and therefore politicians were forced to come out with right to

education act, because of various orders of Supreme Court particularly in Bengal khet majdoor where you talk about right to air, now they are talking in terms of health insurance they are talking more in terms of creating rights, it is different part of story, that how much role is being assigned to private sector that remains very different question, but law has a great role judiciary has a great role , you have greater role in ensuring this relationship between humanity and poverty and human right has to take wider senses.....and therefore human rights have to be taken seriously, I am sorry I am not giving chance to speak give me another 2 mins otherwise I will fail in conveying my point and that is no doubt human rights still remains language of vagueness and uncertainty, because the question you should raise, forget about you, all Supreme Court judges are crippling with.....that, while I was teaching in Chicago in 86-87 I was invited by then CJI to advise and help him when they were talking about Union Carbide and Shree Ram food and fertilizers and I continued.... I kept on talking to judges and issues and therefore I know, even they are grappling with this issue that human rights are very vague and uncertain because right needs corresponding duty, which means what the one who violates the duty he has to be held guilty now when you are talking about capabilities, creating capabilities who has the right to say poor has.... who has obligations and even if they, when you say social and economic cultural rights, what do you mean everything can be included in the gambit of social, cultural and economic rights and similarly all kind of actors are involved in violation of human rights not only the state, non-state, business houses, now fundamental rights are available only against state, now what do we do as a judge? and please mark that is what I wanted to tell you, maybe because of moral guilt, I belong to a very difficult category ok, maybe because of moral guilt this rich world, develop world is feeling pressurized and that is why what has happened in recent times in last 10 years, an agreement has been reached in UN sub-commission of human rights, and what is the agreement that within social cultural and economic rights there is a core and the core has to be discharged by the state and if the core is not discharged then state is liable, now I don't have time to explain what is the core but there is document which has been produced by UN sub commission on human rights which has identified for example have identified basic structure and have said nobody can violate similarly they have identified basic core of cultural, civil and economic rights which they think is the core and that core has to be respected and cannot be violated by the state but then can core can be violated by non-state?, and particularly in this globalization period, this issue is there in my book, in privatization period where MUN have

become more powerful than state when I am a world bank can dictate to the state this is the kind of budget you can make, now what happens and therefore again the rich world out of moral guilt have been compelled to come out of another document, and that document is giving guidelines for MUN, business houses and requiring them that you will have to respect this minimum core of rights otherwise you are violator and can be held as much liable as state but then there are certain institutions like IMF, and world bank and WTO which still remain a major culprit, I don't know how many of you, because we every time talk of limitations of subordinate judiciary, one limitation of subordinate judiciary is not to have these kinds of meetings, many times you will think what I am talking is useless, what my parents use to tell me when I was young, areee all the time, *inka zamana kuch aur tha hamara zamana kuch aur hai, inhe kya pta*, now when I sometimes sit I realise, some of the things they said is universally applicable here today and therefore may be what I am talking sounds nonsense but some day.... it is very crucial, important to read what is happening all around to be a lawyer, a judge requires you to know the law but even if you don't know the law you can be a great judge.... you know American Supreme Court judge have no qualification, even non-legal professionals can be a Supreme Court judge in America that's why you need to know about law and you will be surprised....and earlier Kamal Nath and Kapil Sibal when they went to attend WTO meeting what was happening in WTO, it said look you cannot have food stock to feed the poor because the moment you have food stock because you think flood can come, drought can come, emergency can come and you will give food free and cheap to poor people what happens to MNC who are producing food in globalization period you have accepted that all over world trade will be one so you are blocking my farmer though you agree my farmer can come and therefore I will not allow you to have a stock, to continue with subsidy and India had to fight, compromise, 2 years ago the compromise was alright, I accept your every condition give me some concessions give me 2-3 years, so what happened in that.... stop MNREGA stop right to food again government is stuck why? WTO now tell me if social, economic, cultural rights have core content and that is food, that is responsibility of state and non-state player including MNC what about WTO? Is it not violating? Therefore these are the questions and conundrums, paradox, of talking of human rights and relating it to poverty and I think we all need to sensitize ourselves to these rising debates and controversies and elevate it, our own sensitivity.....comes before you in form of victim or accused or poor that has to... I am sorry I became little theoretical and passionate but I can't talk

any practicalities this session, although whatever discussed was very meaningful to me and I wanted to chip in and I thought civility and discipline of democratic manner demanded that, I refrain from interjecting at that point of time. Thank you. Now I think you are going to have 2 session of mine right? Ok don't club what happens is when we will talk of dignity for after tea..for 15-20 mins ok, let them raise questions..

Dr. Geeta Oberoi: we take a 15 mins break, we come back at 12 then start with dignity....

SESSION 7

Protection of dignity as Human Rights

Prof. M C Sharma: I don't know, how was your tea?, but we will come to post tea discussion, let's devote not much because you should have your say otherwise it becomes monologue and it's not a dialogue rather I am not use to human dialogue and you should trilogue, quaterlounge, pantalounge, hexalog and ultimately chaos because unless there is chaos nothing new emerges that is the history of humanity and therefore chaos of ideas is equally important, though in western part of the world they will call it market of ideas because everything is in the language pf marketization, I call it more sensitization of dialogues, ideas..... so we will have half an hour for that, let me devote my 10-15 mins talking of dignity. now again like in my earlier session I find it very difficult how do I begin with because..... life us is very strange, I was born in a small place in Rajasthan and my family, the statement I am making, my wife my daughter-in-law and my son they really hate when I make this statement but I have always enlighten their wrath but never hesitated making this statement, which I now making here I was born in a very, very excluded kind of family born in Rajasthan..... you can imagine from this when I was 9 and half I become the sole earning member of my family, and because of poverty we couldn't even have two meals in Rajasthan, so we landed in MP and there is a small locality in Indore, unfortunately I don't believe in casteism or fortunately I don't believe but I have to quote it that my family is known as Brahmin family and when we came to Indore, we settled in a locality which is known as *Kumhar maholla*, *kumhar* means....you can understand, by those days how excluded, how excommunicated was I from my own background but very interestingly my mother who never knew how to sign, signature, all the time used thumb she every time said I prefer to live in *Kumhar mohalla* because I can protect my dignity here and not dignity living in a rich place where everyone is looking down at me that I am poor that my children don't have clothes to wear, that I am wearing dirty clothes or my sari is torn at 10 places so to her dignity was more important even in her social context, standard of living, many times as a child of 4-5 years I will remain starving, I won't be given food whatever little which was not enough remember, whatever little was at home somebody else in *Kumhar mohalla* who was more in need than my family my mother gave to them and in return we use to get physical punishment if we demanded food, because she said dignity is very important, the person who has come and begged from me is

in greater need and therefore I lose my dignity if I do not give it to him now please mark now I am making some contradictory statement here on one side she wanted to give, because on one side she think if I don't give and if I have given an impression that I am poorer than you, I have lost my dignity and therefore poverty and dignity are so closely connected that it is poverty which stigmatize me, it is poverty which tells me *aree duniya ke tukdo, tukdo pe jee raha*, do you follow Hindi? that you are surviving because others are giving food to you, people will say *kya kutte ki zindagi jee rha hai!* are you getting my point dignity and therefore please mark poverty and dignity are so closely connected and therefore the entire human rights jurisprudence, from emotional statement I come to more, what you call I don't know I don't believe in intellectualism also, any intellectual exercise which is drained out of sensitivity... .. but in any case do you have Kafka trial in you library, even if you don't have take a copy circulate it, they are all in trial and what Kafka wrote in trial, one of my students who wrote KG under me I requested her to write an introductory paragraph of her thesis quoting Kafka, now please mark at intellectual level if I have to say at emotional, sensitive level I have said that dignity to a human being in most of the cases appears to be more important than even the need to food, shelter and clothing, because they think I lose my dignity if people think I don't have food to eat, I am begging now, don't you think many times you say *kya bheekh mang raha hai*, what you have no dignity, no humanity? Right? And therefore dignity personifies dignity, symbolizes what you are human being and therefore being a human being if it requires food clothing shelter, it requires dignity also and dignity means what? Self-respect. self-esteem, self-understanding, if I am deprived of my self-esteem, self-respect I don't enjoy anything and tell me what happens when you have caste system, class system, when in the name of the religion what you do if every time I am being treated as untouchable the food which I cook you will not eat because I'm a Schedule caste, food served as a mid-day meal and if people will come to know it is cooked by people belong to low caste and community they will not even eat ultimately what happens a complex is created in me are you getting my point? that I am useless I am worthless, I am not capable of anything and this is how I fall in my own esteem and this is how I lose my self-respect and this is how I lose my dignity and entire violation of human rights is again a story which is directly connected to human dignity right and that is why if you look to all these text whether UDHR, covenants, all kind of treaties you find a mention of the word and what is that word, that every human being will have right to life, liberty and security of

person and when the word life, liberty and security appears there these questions become fundamental, if I am not allowed to walk in the street because I happen to be Chamar what happens my liberty is gone where is right to freedom of movement where is Maneka Gandhi's passport forget passport in my own country, city, village I am not allowed to touch the pond which is in the locality of the high caste what is that? I use to teach a course in law and poverty way back not now, some 25 years ago and one of the topic I use to teach was scavengers, even today despite of India's independence of more than 6 decades constitutional being enacted in 1960, article 17 untouchability what happens practice of scavenging continues it is only in 1993, 1950-93 43 long years 17 you declare any practice arising out of untouchability is a crime scavenging continues, 1993 the law was introduced despite of that scavenging continues NHRC wrote to all the CM, why don't you do it, this is the law which requires you to do it. state, what was the argument which was given where is the funds, forget funds now new arguments is being invented and what is that? that building toilets doesn't fit into mind set of significant section of rural public and media is, we are talking of conflict and media is full of stories that loan was given for building toilets ok, the land was provided, money was taken applied somewhere else or the toilet was constructed and just 15 days ago, the family destroyed, media has reported, why? because there was no space, and people were feeling very suffocated to use the toilet, are you getting my point now what I'm talking is that it is so crucial, important that provisions like 17, what about child marriage law commission had to come out with such a big report so many seminars including Tamil Nadu seminar took place, Karnataka seminar took place forget about all Allahabad where my good friend, my student Dhanajay was CJ he participated now, mind all these issues child labor, now what do you call Shivakashi, what is this Moradabad, Muzaffarnagar, glass industries children being used for smuggling and trafficking, children being used as a cover in conflicting situations, what are these cases are thus not violation of human rights and more than that violation of dignity and when there is child labor then the whose dignity you are violating, is of the parents, is it of the child and look naturally, *kis kism baap hai? kis kism ki ma hai? bache ko patakhe ki factory mia kaam krne bhej diya?* Now who lost dignity, did I lost? I lost my dignity and child will lose dignity because all children of his age group will treat him untouchable not of caste but to treat him untouchable, *iske saath kya khelna hai? isko kuch ata nhi padhta nhhi hai, school jata nhi*, exclusion now tell me what is happening to entire north east of this country, tell me what is happening , if a poor boy

from northeast in Delhi wants to use his language or wants to live his culture people are treating him as what? alien in a way untouchable, using violence on him that means what? not only you are telling him you are worthless to live here, right you are not allowing and therefore there is heavy slot on dignity and that has direct relationship with human rights, and being poor, if I am poor again because I don't have dignity, poverty has been caused and because I am poor I lose my dignity as a human being, you know as, if you read Bhagwati judgment J. Bhagwati in one of the cases, Karamveer Singh or something where he has talked about bounded labor, where he has talked dignity and have said that dignity is probably the most fundamental right, the language he used I will try to reproduce, getting aged, the bottom line of what he says is that right to life is, from earlier cases beginning from Kartar Singh, Francis Holland and he says right to life doesn't simply mean right to biologically living, it also includes living with dignity and further elaborates and all that necessarily goes along with it like food, clothing, shelter goes further, freedom to read, express on different forums and different style, and therefore don't make fun of my poor CJ Thakur has confronted with very serious situation, that a number of jokes are cut against Sikh community which are lowering down their dignity, currently the petition is pending and J. Thakur is finding it difficult you know because other side is saying Kushwant himself has come up with a book and entire book is a satire may be in lighted tone but there is a growth which says it is a violation of my dignity and therefore if a north east child says you are violating my dignity because I want to express myself in my own ways I want to wear the kind of dress I want to wear, right you can't tell to a woman that you walk in the street in only this kind of style and not this kind of style, and you go to school in that kind of uniform and not that kind of uniform, now these are the questions of dignity and Bhagwati goes beyond and beautiful quote he says , let me recall, what he says that the loss of dignity is nothing but merely crossing a human soul, please understand , once I lose my dignity, self-esteem, self-confidence, self-respect goes beyond and says it corrodes human soul, goes beyond and says cause sapping of human soul in mind by robbing, *chus leta hai, jab meri dignity jati hai mere se chus leta hai, chura leta hai, aur kya chura leta hai*, my sensitivity, belief in higher values of life, you are talking about aesthetics science, mannerism, fine language if my dignity is gone I am completely robbed off the desire to believe in higher values of life and sensitivity, and then you expect me that I will not commit the crime, what a tragedy, don't you think, when a woman is raped , physical assault, violence, if physical Violence is important in

Bhagwati's paradigm and the paradigm where dignity means freedom to live in peace, health and hope, I am rapped either any hope left for me? is there any psychological health left for me is there any peace in my mind..... and therefore child marriage, child labor, rape, violence, caste discrimination is all signs of taking away dignity and dignity is as crucial as life, security and your own jurisprudence is full if Francis Holland is taking of liberty and liberty does not mean liberty of movement but liberty to protect your dignity and coming from there up to Nirbhaya. yes I am I think I will take care of time and I will conclude here and before that I will take you back to the 1st session because something was in mind which I wanted to share with you on dignity I have too much more to talk because if you look at human rights jurisprudence there is something they are talking off that human rights believe in intrinsic, please mark, intrinsic moral worth which every human being has but Dr. Geeta that is the biggest mockery, because entire western jurisprudence is talking off that every human bring has equal intrinsic human worth, it may have but it does not work that way because when you say intrinsic ,oral worth means what, I should be treated as a moral agent and who is amoral agent, who can think rationally, reasonably and can take moral decision regarding himself now tell me that bounded labor can he exercise his rationality, can he take decisions about himself, otherwise he would not have become bounded, America way back some 100 years ago, I am not talking of ordinary court, American supreme court Hon'ble judge said in the morning too much influence of Americans , we have also exercised experienced there came a judgment called Dread v. Cott and judgment is as grateful as the name, anyone know about the judgment? that a black guy who was a slave, civil war, therefore white people started running from south to north and those white people who were living in south and were having black as their slaves, they took their valuables, they took slaves also with them but then few thought of selling the slaves because how to carry these slaves to north, because we are going to settle there so it is better yard sale in America it is very common yard sale, thing which you don't require you put in your yard, and you puts yards there 2 dollar each anybody passing thereby can pick up and put 2 dollar so they had yard sale of black slaves, now one of the black, let me tell you sometimes knowledge is so romantic that it is greater than romance, now see how the judgment comes out, the American goes to American Supreme Court and what he says my lord I am black, I am a slave, I am bonded, what do you mean by slave and bonded.....that is the meaning of slave, this is my pen, my slave bonded to me, wherever I go this pen goes with me, so he said don't give me

status of human but that much humanity that I am bonded to him and if he is going my loyalty demands I should go with him, he should not sell, not that he was talking of dignity, challenging bound ages, slavery rather he was professing slavery, you know what the Supreme Court said you are a slave and being a slave even this that you are bonded to him or not cannot be decided by you, you are like a commodity, which can be sold, purchased so are you talking of dignity, intrinsic moral worth are you talking of rationality and please mark this is judgment coming from none else than Supreme Court of America saying slaves are like commodities which could be sold and could be purchased which has no senses, no emotions, no sensibility, no biology they can be just sold and purchased that is why they came out with human rights, slavery and servitude is to be abolished that's why they say 22 that forced labor is to go that's why child labor is to go and again it's a huge battle, and why I said all this, I was telling you, you as special courts are facing huge crisis these, you are sitting as presiding officer of human rights courts and you are given status of special court now what do you mean by special court why it is special, urgency, present need, special procedures, otherwise why you are a special court it is a special kind of a crime, it is distant kind of crime, it is a crime which require fast investigation, fast conclusion and therefore new methods and new techniques and therefore this judge who is a special court's judge require more time more energy, training, skill, guidance, more leadership but to the contrary what is happening I was telling to Dr. Geeta last night each one of you is aware of this Nirbhaya, if occupy wall street was there, occupy Ray Sinha was here, even the president house was allowed in the history.....we have seen rape is not only physical violence, now what happens because of media and public opinion even the president house was....ok, it became a huge story, it became such big public, so a special court naturally circumstances were special, crime was nasty, entire nation got involved so special crime court and so just now I said special means what, special skills, training, more time, now a judge very bright judge was picked up he was made special court judge, I personally met and spoke with him, forgive me I am not so important statics are available, history is great parameter, despite of that great urgency and despite being entire nation been engaged, exercised special court have been constituted the trial took about an year 11 month which is no special, but still it was considered to be a fast track and very interestingly you know what, though he was called a special court judge, fast track court, he was supposed to be little liberal with technicalities, he was supposed to devote his entire time no.no, this unit system your promotion, and your other responsibility, so the poor judge you

know everyday use to sit in his regular court finish the agenda by 3 in the afternoon will travel from Rohini to Dwarika and held his special court there now tell me are you causing a torture to him or not and then, section 30 of human rights protection act is talking of human rights court and how many of you is discharged from holding your regular court, what happens to your unit, promotion, even if you compromise or system compromise, please allow me Hon'ble J. Akbar ail and prof. Geeta pardon me for saying so because I have been advisor of NHRC so, you are still going to face 2 major crisis one is you can never ever be visible as SHRC or NHRC people will know very little about you that there is some human rights courts also and even if they know, they will prefer to knock the doors somewhere else partly because subordinate judiciary in itself is a state and unfortunately the consumer of Justice do not give much respect and media on the other hand only highlight what happened in NHRC, SHRC and even if supposing all these difficulty is taken care of the system still treats despite of this long talk today, despite of one week program here, system still feels human right litigation and human rights jurisprudence is not a main stream and corollary, incidental, fashion, passion it is not doing hard law therefore when your own turn for promotion comes, own seniors will say what may be good, may be sensitive but not hard and therefore promotions for whom? now you are coming up with special commercial courts, and marketization and therefore which court is more important? Commercial courts, or human rights court therefore whose promotion? Dr. Geeta don't invite me next time....if I am here you are heading for a difficult time because judicial and legal leadership of this country requires to be sensitized more than simply creating an institution of human rights courts is not enough what is importance is its place in the system needs to be recalled. Recognized, respected and dignified. Dignity violation of human rights, violating. I am.....

Dr. Geeta Oberoi: questions will be raised from you and sir will answer.

Prof. M C Sharma: questions reflections, your own views, sentiments.

Participant: sir, we have heard about child right, poverty and other provisions, I have a faced a problem few months ago, being chairperson of legal services authority at district level.

Prof. M C Sharma: sorry I am unable to..

Participant: you are unable to listen? All people speaking together...

Prof. M C Sharma: I heard initially you said poverty and all

Participant: we have listened about poverty, child right and its relation. my view is the poor consider law as its as enemy and not as friend, now I quote an example being chairman of district level of legal service authority, 3 months back there children were rescued they were less than 14 years age, were rescued and brought before CWC and then they were to restored to their parents, 2 of them were physically challenged persons they said ki, these 2 children are source of our income, we cannot keep them because of our poverty, now the proposition was 3 years back 3 children was also rescued from some other place and now the proposition is that, where they will be rehabilitated because the parents are saying if they keep the children home their source of income is curtailed, and they cannot be restored to their parents because their rights are infringed now this is a peculiar situation where we have to act upon.

Prof. M C Sharma: I tell you, the question you have raised is a fundamental debate and I was avoiding using some terminology, entire human rights struggle is full of conundrums, contradictions and paradoxes and it becomes very difficult to make a judgment which paradox is superior because both will appear to be violated, now the question will come which enjoys more credibility, the question which he has raised is on global level itself, and what child labor..... now many poor people like what you are saying are raising this question, alright my child I will not send but then what happens the family loses income, if I was getting x and still I was unable to send him to school, if I have x-5 do you think I will dream of sending of him to school or he will lose his health or effectively he was getting 2 time meal or one time meal even that will go and therefore are you eradicating poverty or you are ad equating poverty this is one side, what the other side says this amount to perpetuation of poverty because what is happening, I am making poverty chronic poverty, which will have inheritance, like ambani's will fight for inheritance of wealth, Anil Ambani and Mukesh Ambani, what they inherit? they inherit wealth, so there is fight, so what this child will inherit because, child labor, weak health, no education, social excluded, less income and therefore when he becomes father, what a child will become when he dies as a father what his son will inherit and therefore the other side is no child labor, it has to be abolished, no doubt that is where the question will come of human rights that we are talking off, that's very important the question arises, if fulfillment of human rights or enabling enjoyment of human rights is obligation of the state and please mark after have

ratified or becoming the to ECCPR, UDHR and having fundamental rights, judicial verdict state cannot absolve itself from obligation of respecting human rights but agreed that human rights is such crucial fair, that in one way they cannot be realized and therefore you have to go in a phase manner but, how much will power do have to commit resources for issues dealing with human rights, children, how much political commitment you have to ensure that people have home, after considering right to education you are not able to provide schools and therefore it is not question of individual alone, state itself is violating duty and what is that your policies, programs, must be designed and you are under obligation and duty to come out with policies and programs which respect the human rights of child, prostitute, sex worker, marginalized minority and because of action or inaction on your part do not do it, you remain convicted of the charge of violations of human rights 1. 2. Corruption, bureaucratization of these programs is as much offences. 3. priorities and mind that is where it is Supreme Court and for us to talk but fixing these kind of problems state will require judicial creativity and please mark that is why writ of mandamus, PUCL, right to food till today Supreme Court has not given final verdict. you know why? why 9-10 years? and the petition is pending, the petitioner was asking right to food, depending upon Francis Mulle and Supreme Court kept on passing interim orders and not giving final order or judgment that right to food is part of fundamental right or not why? because they keeping hold on the bureaucracy is better rather than telling it as part of fundamental right and you legislate and execution is not legislation, it is full of gaps and flaws, and corruption and therefore it is better they keep passing interim orders, issue mandamus, and keeping on monitoring, these kind of techniques are need to be evolved and ultimately please mark that is forced the state to come out with food security act, that force state out with NREGA, in fact I was the chairman of the committee which..... and I know what acted as a pressure was the Supreme Court and directions, please mark, Bhagwati gave its bonded labor legislation, you know Swami Agnivesh, what you are saying same charge came and you know after 2 years someone approached the court and they on affidavit gave to J. Bhagwati hat look you have issued and order that from Haryana, from mines of Aravali these bonded labor will be freed sir, they were freed they again become bonded labor, because they thought they were getting the food, again they have no option of going back, Bhagwati got very disturbed and therefore he come out with another order that no, issue a mandamus directed the state for 6 months give them allowance and during that 6 months give them skill and training so that they

can earn their livelihood and till today there are studies after studies which are saying that most of the bonded labor was freed have again become bonded labor or worst kind of criminals or they lead a very worthless life and therefore this is a conundrum, I agree this is why call it conundrum and pains of doing human rights because you have to weigh two sides one talking of posterity, one is talking of current. you know mid-day meal why it came? it came only for this but what do you find implementation going on MNREGA was banned and that is why you are converting them into right and right based approach is important but right based approach will also create this problem, I agree with you nothing to disagree, but that is the dilemma, conflict that is why ILO it say that child labor per se has to go away, even the created a space it is Indian state which is now fully cooperative and like the economic level also there are serious issues.....most of the western lobby which talked about abolition, they went to the extent that they stop exporting rugs and carpets from India hitting Indian export and worst they told to china stop child labor if you don't sanctions, you know why, rebook it is one example, like this there were many MNC which was owned by Americans, located in America, marketing center as America all over world they supply, but you know the manufacturing took place, initially it started in America and entire manufacturing now is taking place in china =, you know why? because of cheap labor, child labor, so that's why who was getting hit, they were not concerned about child labor, poverty more concerned about their own economy and therefore they said stop child labor the moment you do that the cost of production goes high, in competition the then the then American companies will survive and therefore these are all serious issues which I don't know.....and this kind of mental journey should continue, I don't know about you but trust and believe lived in a different world when I meet you people and when I talk to you, such a deep nuisance *koi bhakti isse badi nhi ho skti koi meditation isse bada nahi ho....my barking..I keep on barking and I attempt to hesitate, I have undergone 6 surgeries in 7 months, I don't eat, sleep.....*

Dr. Geeta Oberoi: is there any other question.

Participant: when paramilitary forces have some excess, human rights violations made by the paramilitary forces but when insurgence killing common people nobody raise the question human rights of common people who are being killed or the families who have suffered from killings. That question is not raised and I think there is a paradox in both the things

Prof. M C Sharma: I am glad you self said that there is a paradox and it is a very serious paradox and recently this debate has become sharper, not because you and I are concerned because 9/11 happened, again things are travelling while no doubt it is true that paramilitary forces many times if not usually enters into use of excessive force causing serious damage to human rights therefore they should not be absolved because every human life is important, this cannot be denied, but at the same time 2 variables should be given significant consideration one, the circumstances in which the paramilitary forces, those circumstances make a huge pressure on them compounded difficulties and therefore they taking chance of violating human rights though distasteful, not to be condoned but it is to be seen with different glasses life of innocent who have lost the life there life has to be equally valued, that is why when paramilitary forces accused of use of extra force there is resignation, trial, prosecution has to be more deep sensitive, wider because you have to understand these dimensions, because you can't absolve them but at the same time can't hold them guilty without going in details of the circumstances, now what happened 9/11. before 9/11 terrorism was not an issue for America when India raised voice of terrorism America just heard now suddenly the entire US, Europe talking of global fight against terror earlier it was not global, your yard not my yard, because they had to face 9/11 that is why terrorism has to become a fundamental signature to UN and that is why they have come out with the laws which are more depressing than earlier TADA of yours that is why British parliament has passed a legislation which is more depressing than any of the laws that's why EU has come out and that is why all these international visits by different dignitaries I am not talking of only one Modi, I am talking of all, who are coming to India or travelling to different part of the world, they are all talking of global fight against.....one of the social economic cultures of civil rights and collective right, they give you right of self-determination, these are all very serious issues I am not pleading for self-determination I do not belong to this JNU controversy, but at the same time I wish to say that there is deep conundrum, paradox and that is which can never be resolved to the perfection and there is nothing unusual, because life itself cannot be laid with perfection and you as a judge are more to if and when, as and when provided to subject to that is why you know how to strike a balance, okay, balance need to be there entire human right jurisprudence is balance, synthesis of conflict of interest with this friction a great jurist Roscoe Pound when he was asked what is this lawyering, what is this law, court. he said in simple sentence, I can tell that there are

interest and no body's interest can be satisfied 100% and even if you want to satisfy resources are not there, to satisfy each ones interest, interest will come in conflict and therefore you need the law, court, lawyer and that's why human rights because how to synthesis, how to harmonies but synthesis and harmonization is not simple even treaties when you enter in treaty, they are successful only because one side gives this much, other side gives this much and therefore synthesis of treaties is job of law which it cannot achieve without ensuring that while striking a conflict of interest or making a treaty out of there, there must be least waste and less friction, it should not happen that because majority says, maximum satisfaction and therefore majority interest may prevail, no you must see friction is less. therefore mine doing human rights is much more difficult..... that's why in 19 I will give you one but 2 3 4, give your life and liberty right..... use of 21 and use as a question does it give you right to life or power to state to take away right because when you read Holfield talks about right, duty, power, liability, I raise this question again 21..... fundamental right, human right, human right within human right, right to life nobody can take away right to life what is the language except in accordance with procedure established by law meaning thereby what, is life absolute or can be taken away not by murder, by violence, legally my life can be taken away state has power, are you getting my point and therefore really again a paradox and conundrum is 21, guaranteeing life and grinding procedure to state to take away life and again you play a great role as a judge, I concede you have power to take away but not arbitrary, not unfair, not unjust..... so this trouble continues, battle of ideas continues.

Prof. Geeta Oberoi: sir thank you so much, it was really nice to hear you, with is because sir is going so we have a big round of applause so I think its ok the question you want to finish.

Clapping...

Prof. M C Sharma: thank you, I really enjoyed..... Thank you.

Ms. Nitika Jain: we will take one hour lunch and will be back by 2 o'clock

SESSION 8

Functioning of Human Rights Courts and their role vis a vis Human Rights Commission Under 1993 Act

Justice Akbar Ali: again the same problem like yesterday, after taking lunch, you feel like taking a rest and Bhopal has become hot also today, I don't know, see how do you feel about Prof. Mool Chand Sharma 2 sessions, really it was very amazing, I like everybody felt the same and many of you express their... such an age and when he said he, so humble about his background and I don't know how many of us would see the same humbleness and you know that regarded as one of the legal luminary of this country and having served and pouring, literally amazing to have such law teachers among us. any how we have to deal with our realities, next week you have to go and preside over your courts, you have to discharge your duty, as he was also telling our promotions, our future is before us and I said that you have to place a dice in such a manner, not bitten by any snakes, coming to the last session I will not be available after this, I am leaving so coming to this last session about functioning of the human right courts, the moment I start with that we know that we don't function, anyhow I think I will connect it with yesterday where we left about what to do with future, we have already asked Nitika to prepare a paper on that, you are also given many suggestions and somewhere we have to say, even prof. was saying that it's only the NHRC or SHRC will be on the visibility, and we will not, and the visibility may be that, I was telling that, why don't we go and make an awareness to the people that we are also available and still we are having a dilemma, what type of cases that can come before us what type of procedure we have to follow, what type of thing we have to do, if you look at the human rights commission or both national and state level, I have not been to commission because we know that commission works within the parameters of the act and it has its own procedures and everything and has its own powers but if you look at those functions are assigned to them under the act, you know if you look at the act you already have powers under the act and it also has section 17, 18, 20 and other sections how to conduct an inquiry, how to conduct an investigation, and what are the powers, it is an autonomous thing and is not answerable to anything and it takes suo motto inquiries, even if there is a media report of human rights violation, the commission takes it suo motto thing and that many, if you go through the website of NHRC it has its own area where is suo motto action is so far taken, it turns to many

things, they have taken many initiative on this violation of human rights and passed many orders which are respected by the government and respondents and it has its own inquiries and of course what are the complaints which comes the commission are also notified and what are the procedure it is also there, it has stated that the complaint may be in any language, from any corner of the country you can write a complaint of violation human rights to the commission, and that what it says and the kinds of complaints which are not entertained by the, it has a critique that what are the, once you say no, you receive complaints like we go to, somebody was telling as member secretary of legal services authority, here you see many complaints, even if the aadhaar card is not issued that we receive a complaint, even if the family court is not issued we receive a complaint, even if you go to a legal aid camp that is so many legal and non-legal complaints are also being received like that they receive many complaints, but what all the complaints they can entertain, they have restrictions and kinds of issues in which the complaints are received, because its yesterday... the other day I was telling about mostly on the excesses either police excesses or uniform service excesses or para-military excesses, or those type of excesses that was the main complaint they receive and it has its own working condition, now coming back to comparing to the commissions, they are working and coming back to the human rights courts where we are very restricted, we do not even have the procedure, what we can do about it? that also we have to deliberate on that, yesterday as a follow up that was asked, we can do that. whether we can receive such a complaint, taking clue from the NHRC and taking clue from whether we can receive such a complaints and that has to be considered, very object of human rights courts is also, if you look at the present complaint that are dealt by the HRC which are overburdened and take long time in disposing the cases, because either there is national commission sitting in the capital and that commission is again station and capital of the state and what happens if any district, they have to go long way to approach and they are already overburdened, you know commission members are there and they sit and investigate and they do, whether it is enough, whether commission work alone is enough, if you look at the doctrine of speedy trial, violation of human rights than the human rights courts are better instrument in achieving this motive, maybe that's where if it is at the doorstep like somebody was telling, maybe Prof. was telling it is at the doorstep whether we can do better job on human rights violation, that is one object maybe because of the creation of human rights courts in all the districts, it is far better to make a joint effort to deal with the problems related to human rights,

that is one idea because if you have one, they are acting in their own sphere, as a human rights court we don't have nothing to do then, because as a judge if we don't even are exposed anywhere except our social phase of legal services, I don't think we are coming in contact with the any of the common man or anything we are within our sphere and we have only one door to open, that is procedure way of coming to us, so you know that is one thing that maybe working along with the commission, may bring in some sort of comprehensive way that how to deal with this problem, that another thing is that section 36 says there is a limitation for commission, I do not know, whether there is going to be limitation for commission, the act is very silent about any limitation about courts, human rights courts may be the cognizance of the limitation may be in the CrPC,... yes, so that whether we have a any limitation the act is very silent about it. again between the commission and human rights courts, no statutory duty is provided against the direction, order or report issued by human rights commission, except the state has to honor that if a commission makes a recommendation to the state, state only has to honor that recommendation or the direction, otherwise there is no statutory obligation on the state, but orders, on the other way if human rights court passes an order it is judicial order may be there lies a little difference that we have to understand, that also, moreover if any order is passed , I don't know any commission order is being challenged anywhere , I don't think so, but our orders can be under the scrutinisation of the higher forums under 482, 397 or anything that can be modeled again based on these things...they will never, it's only recommendatory, any commission's findings, reports we are seeing from the day of appointment of any inquiry commission act, under the commission of inquiry act any commission's report is only a recommendation, it doesn't have a core of implementation unless state wants to implement that. so, based on this problems or areas still we feel that human rights court has to be there and coming back to, there is a case of *Rasikulla v Govt. of Goa* through chief secretary, 2004 106 Bombay LR 626 bench Maharashtra High Court, they, the case come up before the court and filed the respect to complaint cases in the court of special judge not in the.. violation of human rights by the respondent named accused therein, by virtue of notification, because that is the notification making the court as a special court, concurrence of this high court at Bombay in excess of the power confirmed by so and so so and so, and south goa by government of goa has appointed a particular judge as a human rights court under complaint has given to him that on basis of preliminary assumption the learned special judge considered 3 point arising for his

determination of 4 complaint cases pending in each file, see very encouraging point is as nearly as 2001 court has been notified, judge has been appointed and he has also taken the complaint, he has also inquired into the matter that is where he is encouraging and where we see we don't need, receive any complaints at all, the issues before the judge who has found this issues were, whether the comp/pros instituted by..... are maintainable, whether the special prosecutor appointed by the government can conduct the cases where the complaint is filed by private complainants, whether a special public prosecutor appointed by the government can define the respondents who are functionaries of a state missionary, see very relevant issues because we are also thinking of the same issues earlier in this matter, if you look at the bench gave a judgment, I am only took out some of the points which has been, actually this..... in your book the article is here in page 91 or somewhere, only from that because from the reading material I am also projecting this, see the court has come to certain observations as given certain observations, saying section 3, 12, 13, 14, 17, you know that section 3, 12 13, 14, 17 are all procedural aspects and other things in the human rights act, clearly indicate that the powers, duties and functions of the commission under the human rights act do not overlap with the functions of human rights act, see they want to know, whether it has to go before the commission or to the court. functioning of these 2 powers doesn't overlap with each other, the provisions of the human rights act, do not mandate that the prosecution cannot be logged until and unless first the complaint has been 1st inquired into or investigated by commission, so again it says it is not necessary it has to be 1st given to the commission or investigated or inquired by the commission then come to the courts, the provisions of the act certainly empowers the commission to recommend to the government the prosecution the hearing officers but that does not mean that the prosecution can only be the logged if the commission recommends the institution of prosecution, in fact section 12 B permits the commission to intervene any proceedings in violation of human rights, no doubt with the permission of the court again it goes into section 12 also and say differentiates by this act 2 different forum is created, that is very important, one forum namely the commission to inquire and investigate into the complaints, involved in violation of human rights and to suggest either remedial measures or the prosecution of the violators, the second forum namely the human rights court to try the complaints involving violation of human rights, so maybe this is more important it differentiate what are the functions of the human rights commission and more particularly it empowers or gives some ideas about what is human rights courts also, so it says

there are 2 forums are created one namely the commission to inquire and investigate into the complaints of violation of human rights and to suggest either remedial measures or the prosecution of the violator, the second forum namely the human rights courts to try the complaints involving violation of human rights now, I am only taking this to private complaints ... offences arising of.. of course that follows. see it says straight away it gives the direct jurisdiction of the session's court or special court to try such offences coming out of the violation of human rights court because that's why we are being created, maybe the division bench interpretation of section 30 by, as Prof. Ramesh was telling maybe the act, the interpretation has to come from the judicial authority or judicial pronouncement, so my idea is, my thinking is that why not we take this, when we have 2 forums one deals with one thing and another deals with this, so we will also point out such judgments also in our paper..

Participant: that means they can go simultaneous

Justice Akbar Ali: yeah, that can go simultaneously, if the complaint comes, so trial of an offence by the human rights court is different from the inquiry and investigation by the commission, I am not saying this, this is the division bench of the Bombay high court. see 2 judges of the Bombay high court interprets section 30 and comes out with an observation, trial of the offence by the human rights court is different from the inquiry and investigation by the commission so we are the special court, are empowered to conduct a trial on the offences, violation, offences arising out of the violation of human rights, filing of complaint cases is not something unknown to the procedure of the court of criminal procedure, private complaint cases can be filed for offences exclusively tried by court of session hence the human rights court has to try the cases as per law and is not called upon by the CrPC or human rights act to hold an inquiry that is the finding of the division bench, of course, so it's not single judge, its division judge finding of the high court, saying filing of complaint cases not something unknown to the procedure in the CrPC if there is a procedure, 200 of course it says magistrate but procedure is there, private complain cases can be filed for case exclusively tribal by court of sessions also, it means that it can be filed by the magistrate also where he can commit to the sessions court because it is tribal by a sessions court, the human rights court has to try the cases as per law and is not called upon by the court of criminal procedure or the human rights act to hold an inquiry so you need not to worry about the CrPC or take any procedure law from that, all in the human

rights act but you hold your own procedural law, to try a case, that's how it gives an idea I am not sure whether how the higher forum are going to take up this matter, the role of human rights commission is more recommendatory in nature while the role of court, that the human rights act is to try the offenders and punish them according to law, so it gives a direct differentiation our role is to punish the violators, so there are 2 different forum created under the same statute which is one is there another is there and it gives the interpretation rather which we were looking for, gives an interpretation and so that human rights court can also try, so I am only again, going back to this nomenclature or going back to this recommendation, interpretation, or going back to this what is the human rights court, and again I only wish anybody, yesterday that we were talking about some of the recommendations so that human rights courts can be a better equipped so that can be procedure, we can file a paper or something to that thing, did anybody have any idea after seeing this judgment also, can anybody come up with solution how to go about it.. yes sir!

Participant: we can see that the functions of the commission and courts are different, separate, they have own sphere of operation, suppose, and we also discussed that the both the proceedings can be, can go simultaneously, what happens when a proceeding is being logged in the human rights court and subsequently or during the pendency of the proceedings or may be after the trial the human rights commission recommends for prosecution again. What will happen on that?

Justice Akbar Ali: I am sorry, I was dis.. Sorry.. again please

Participant: we discussed that commission and court can hold simultaneous area of operation, they have here own area of operation, and what will happen when after the trial has ended suppose it has ended I acquittal but after the trial or during the trial the commission again recommends for prosecution what will happen then?

Justice Akbar Ali: I will add one more situation also, one finds it not guilty and another finds it guilty and this forum founds not guilty then there will be conflict of decision, judgments... (Speaking together).. that is..

Justice Akbar Ali: see we will, see according to the judgment it says you can before another forum which is recommendatory in nature and we can award a compensation or recommend for

a prosecution that is one and simultaneously if the complainant comes before the human rights court invoking whatever the thing we want to know, offence, creating an offence or something. and we are also trying, 2 situations may arise one is saying no there is no violation of human rights, so no recommendatory thing and can it be binding on a criminal court or..... see the problem id I don't think that..

Participant: just like the departmental proceeding being initiated continued after the acquittal of accused by the criminal court, standard of proof is different.

Justice Akbar Ali: standard of proof is different, it's not binding, you can have your own procedure and if you holding guilty that is because of the evidence values before you, and you access the evidentiary value and you come to a conclusion. so one answer is it's not impediment, there will not be any confusion.

Participants: it has already been recommended for prosecution

Justice Akbar Ali: see even if the recommendation is sleeping that is the problem, (laughs) see the problem is..

Participant: this the conundrum the professor was talking about.

Justice Akbar Ali: that is what, see because that's why they themselves dare to call in a public meeting that we are tiger papers, sorry, paper tigers. chuckles... honorable member of the commission has declared that it is a, all the recommendations are not there, so I think that will not be an impediment and there cannot be a double jeopardy because they are not punishing any person they are just compensations and other things are given and that cannot be...yeah he is appointed as per section 30 of the act....no the question before the court was, the objection taken was see you cannot now inquire into unless the commission makes an inquiry recommends under section 18 A II for a prosecution that was the question before the bench, the question before the bench was I just read that portion, the provisions of the human rights acts, do not mandate the prosecution cannot be logged unless and until the complaint has been 1st inquired into or investigated by the commission. that was the objection raised, it was not observation, that was objection raised before court, unless the commission recommends for a prosecution, you cannot

before go to the human rights court that was the objection but the bench says there is a simultaneous, you can hold simultaneous and that is recommendatory this is trial of an offence that's what it says....so I think we can also refer this judgment in our paper, and say that this is how the division bench has held, so that the human rights commission can take complaints and if that wants to forward that to magistrate to ask to proceed under 200 and later commit it then, that can be done, or if it is had to be done as warrant trial cases, court themselves they can take it as a on their file and try it as an offence, because if it is going to be a lesser offence, so not involved in the sessions cases or something like that, I do not know but any how our recommendations, deliberations, there should be a mechanism or there should be a clear guidelines by way of judicial pronouncements or anything by the Supreme Court so that human rights courts can be function, otherwise it will be in paper, or we will be the presiding officers of special court. Any other suggestions? Because I think many of you, they have given many of the suggestions.. Because this session is also overlapping the yesterday's follow up.. Functioning of the human rights court and commission. any other thing that you want to discuss?.....that is one thing, anything you want to add....yes a brother from Punjab/Haryana... chuckles. Anything?

Participant: from section 13 and 14 it appears that the duty of the commission is twofold, as per section 13 the commission can hold an inquiry and after that he can pass an order in the recommendatory nature or the commission found that a detail investigation is necessary, he can file an order an investigation under section 14, if an investigation is held under section 14 the result is that, the concerned investigation team that the officers has to file a final report before a competent court, because, the commission may for the purpose of conducting any investigation pertaining to the inquiry, utilizes the services of the any officer or investigation agency of the central government or state government, that means the police has to conduct an investigation, suppose a police conduct an investigation there must be a final report to be filed before the proper court it can be inferred from section 37 also, section 37 reads... investigation team..

Justice Akbar Ali: no, it answers 14 (3), 14(4), class 4...the officer or agency whose services are replaced in sub section one shall investigate into any matter into pertaining to the inquiry and submit a report thereon to the commission within in such period as maybe specified by the commission on his behalf, it is filing a report..

Participant: it is not an investigation of provided under 156,

Justice Akbar Ali: it's not under 173 of CrPC, so it cannot be under 173 it's only under this act, only under section 14(4) it cannot take 173 of the CrPC

Participant: but the act provides some distinction between inquiry and investigation, that may be on the peripheral that inquiry means do not require deep investigation and investigation means some more graver matches the detailed investigation, that may be the difference between section 13 and 14, anyhow it is not the inquiry, investigation under 156.157 and report is not under 173

Justice Akbar Ali: yeah its not under 173, so that's why after filing of the report it goes on say that what is the order or report commission can file or pass any recommendation or something or it goes to 18 A II to say, it may initiate proceedings for prosecutions and such a suitable action as the commission may deem fit against the concerned person.

Participant: only for the purpose of forming an opinion by the commission.

Justice Akbar Ali: hmmm... the division bench comes and says that it need not to be the initiation should need not always come from the commission but the court themselves can take the case that's what the division bench now says, it should be may two sources, only after this investigation report and everything under 14 and 18 the commission can also forward or if the complains comes to you directly then for that only we are only discussing what is the procedure to be formed, what are the offences to be described, what is the punishment could be there and those things that has to come either as judicial pronouncements or as amendment or as rule or something like that, unless...well we still feel little handicapped because the provisions are not there or clear, in spite of division bench directions we can take it to consideration, yes it can happen as it has happened in bench and division bench has approved the procedure and complaint has been taken on the file and human rights courts has definitely has tried the offence to that level we can say that why not we that's the only question. That's what we are insisting, but A II is there but this division bench says apart from A II also you can take own your own that's what the division bench is saying...

Participant: because in commission they are the expert, we cannot presume them to be an expert in investigation into the offences related to the human rights, violation of human rights, that's why more... all speaking together..... if a private complaint comes to a magistrate he has only option to refer it to the police, but they are not the expert, but here investigation will be by expert those who are the experts in human rights, more reliable..

Justice Akbar Ali: more reliable and specific and focused and more over now the state commission, national commission have their own set of investigating team with an IG and police officers and everybody....it is also provided under the act,

Participant: even if complains comes to a magistrate can't it be referred to the commission for inquiry? There is no bar, it can be referred to inquiry for ensure inquiry, instead of sending it to the police, it can be referred to those experts.

Justice Akbar Ali: that's also.... all speaking together.... yes, yes, (laughs).. that's why we wanted to say better make a joined efforts to deal with the problems relating to this, maybe we will also recommend to the academy that, let the commission also come let the presiding officer of the human rights court also come so that they could sit together and sort out their problems also so that easily we can tell them 14 is in your favor, you can exercise 18 A II empowers you to forward you to give report to the human rights courts, you can exercise and so far they have not done that's the problem, they can ask for joint sitting of the commission as well as the...laughs... yes sir? one second, brother one second, one second.

Participant: if the complaint is filed in the special court under the human rights act and it is not specified whether in which will be the process either warrant case or it will be session case or summons case but as it is a session court, as session judge has given power under this act, will it be a session's case and tried as sessions case and if such complaint is entertained as session's case or warrant case under scheme of CrPC it becomes a state case the title of the case would be state versus defendants or accused whoever it may be so the problem is if it is sessions case because of it is court of session, section 225 of the CrPC provides that it will be public prosecutor who will prosecute the case, then the complaint will be defended by the public prosecutor, now considering that the case is against the state government machinery or its officials. doing

something in official capacity and violating the human rights and the respondent or the accused will be also state then the problem will be who will be defending on behalf of the state..

Justice Akbar Ali: see that is why. Whether the special prosecutor appointed by the government can defend the respondents who are functions of the state machinery, that is the problem, another issue is if you look at it, you are talking about compliance, any procedure in the given CPC or CrPC there will be a provision to file an application, there is a provision to file a complaint, revision or something, when you look at it, it says in 30 there will be a court, under what provision I file a complaint? Should there be a provision or we just file a complaint? (laughs) then there rules will be that they should come up with some procedure rules or something and again as he rightly says that what if the offences made out in the that particular complaint are not tribal by the sessions court, but still we are the special court we have to try, either a session's offence or an offence which can be tried by a magistrate or whatever it is. Yes sir? ... hmm.. yeah it is about 175, 178, 179, 180, and 220, alone it speaks about. IPC offences 175... omission to produce a document, 177 furnishing the police with false information, refusing to oath, refusing to answer, refuse to sign a statement....that is only that those are the such offences..

Anyhow today's deliberation but I only take it that we have to file a paper and definitely we are going to and after all your recommendations and deliberations we will also say that we need more clarification and guidance by way of amendments or by way of judicial pronouncements and defining what is offence and what are all the offences and defining what is punishment, and the procedure to be followed....laughs... we will see let it be decided by the Supreme Court, any way we are going to forward it to the Supreme Court.

Participant: commission comes to a conclusion that some offence has been committed will it guide the trial court?

Justice Akbar Ali: it can only, see 18 A II says take action to initiate prosecution, see it can.....

Participant: so when the finding is different, it will not hamper the prosecution

Justice Akbar Ali: suppose the commission after taking the investigation report, and also finds its own inquiry and ultimately says some offence has been committed by such and such person so we decide to forward this report along with investigation report to the human rights court, for further proceedings then we have to take it on file issue summons and call people and ask the special prosecutor to conduct a trial and we have to come up with that so that we can go. again still we will be having the same problem of taking cognizance...domestic violence act, something like that....yeah, instead of an FIR we can give DIR, now we are giving FIR we are giving DIR we are giving CIR now we have to come up with something like HIR or something....that is why any how we will talk it out, and come out with something may be, you also go back and think about it, because human rights at least in since one of the member secretary of the state legal services authority here, and you can make a legal awareness that there are human rights court as well as prof. was saying that we are less visible and not in the arena, may be... yes sir?

Participant: sir as you said that legal service authority should come forward for the awareness of the human rights act but at present, as a member secretary or all judges, we are also in dilemma, regarding the entire act.

Participants: chuckles.. How can we sensitize....

Participant: how can we sensitize...

Participant: so whether the SHRC can be asked? Through the NHRC to approach each and every district to sensitize.

Justice Akbar Ali: that's right.

Participant: through the legal service commission.

Justice Akbar Ali: see we will write to the state as well as the national human rights commission also these are the problems either you invoke 18 A II or you make an awareness that it is not only the human rights commission is available it's also the courts are also available. right? let them say in there website, they have very big website and they are not

coming up, you have rightly pointed out that we can write to the HRC also and say in your website you can point that human right courts are also available and you can recommend that and you can forward that or you can forward the report for initiation or you can file a complaint, if the complaint comes we are not going to reject it as it is, whether there is a procedure or not procedure as special court proceeding officers, suppose tomorrow a complaints comes to you, we are not going to reject it because we are also going to take up the matter and we are only going to find out what is the way to take up and file depends upon the nature of the complaint, what are offences made of, like brother bench did, actually he has dismissed the application as not maintainable that's why it came to the bench and bench said no, no dismissal is....nah, before the special court. yeah?...if it is under 18 A II....yeah...laughs... see if you go through the website of Human rights commission, they have everything, all the orders on net, they have suo-moto cases, their procedure, Frequently asked questions and how to approach, where to approach, the entire thing but we will be asking only to add one more some information's about the human rights courts.....I was telling about there is a website for the NHRC it contains all the information except human rights courts.....I think that it's high time that we can also tell them...

Participant: sir there is another issue, like these offences are committed by the public servant, human right violations generally committed by the public servants, issue of sanction whether this recommendation for this commission can be considered as a sanction or in case of a private complaint, do we direct it to be investigated by the police, then sanction will come, then who? How it had to be solved?

Justice Akbar Ali: sanction, another point to be noted on then a complaint it is against the public servant, whether 197 has to be.... chuckles.... whether 197 sanction is necessary.

Participant: here sir section 197 of CrPC will come into play.

Justice Akbar Ali: yeah that will come into play....see there are 2 views on that, what does 197 says you know? Very well in course of his discharge of the...

Participant: 197,

Justice Akbar Ali: 197 goes with the discharge of the official functions, so courts have held that if something is done out of that, 197 sanction is not necessary, whether we can vacate, take it violation of human rights is in course of his discharge of official duties or not..... it is again very debatable point but....laughs.. Whether 187 will try.... anyhow thanks for bearing with me for 2 days and I really enjoyed being with you...chuckles.. I have learned many things from you, it is always a learning process, they are all experienced judges, I only wish all of you peaceful and progressive career without any snake bite.....laughs... so you can go up in your ladder and reach the pinnacle because ultimately that what this judicial officers want, if it is a civil judge junior division he wants to go the next step, and if he is a senior division go to the district judge or if he has still some days or younger high court or something like that, I also, I was with you, and I am exhilarated now I have again with you.

Participant: sir I wanted to ask you, one question.

Justice Akbar Ali: yes sir.

Participant: whether it is a case, in a wrong whether it is a civil wrong or criminal wrong there is an element of human rights violation no? Even in the case where a suit for money on a promissory note, he borrows money execute his demands, promissory note, she does not repay it. Even then there is violation of human rights no?

Justice Akbar Ali: see that's why prof. said see even the Supreme Court judges are wandering about what exactly the human rights are violated because it is so expandable, like you said suppose somebody takes money from somebody, he is not repaying that is violation of human rights... laugh.. it is all debatable but we will go within the law which is now before us..... Laughs.. so what is the next program? so you are all free to go to the library and computer skill training whatever it is. Thank you very much

Ms. Nitika Jain: Thank you very much sir, thank you on behalf of NJA. the tea is served if anybody would like to have tea, it is there in cafeteria, and tomorrow we will start by 9.30. Thank you.

SESSION 9

Human Rights protection through Part-IV of the Constitution

Ms. Nitika Jain: very good morning to all, good morning sir, we have Justice Sarin with us today, we will start with our 1st session that is human rights protection through part IV of the constitution.

Justice Manmohan Sarin: Good morning friends, I had the privilege of meeting some of you at least in the sessions at the NJA at one or the other, right? And my perception of these courts is of, that's to my mind that is no mark, this really ought to be in essence a dialogue, a dialogue in which we share your experiences as well. Over the last 5-10 years. what I have experienced here at least here is that if a speaker comes with presentations and make those presentations to you, of course you listen to him what he has to tell you but then it's a lecture you have, you absorb some of it, part of it goes to your notes and least of it gets implemented the effective way of going about in my opinion is been when we draw you out and share your experiences, what you narrate to us, what you tell and what you discuss in between is something which leaves a lasting impression and you see all of you comes from different parts of the country in our case as we talk of diversity, in the nation in fact it is so if you see the legal methodology which is followed even we have the same law but from state to state how it is implemented it varies, and this is part of some local practices and others so what is the best thing to develop is the best practices, and keeping the stone in mind what I would request you starting from here each one of you introduces himself and do 5-5 line introduction so that we know and then we start. You can sit down and speak no problem.

Participant: myself Dinesh, I am from Maharashtra posted as ad-hoc district judge..... I have practiced for around 8 year then I got into judiciary in 1999, I served as judicial magistrate 1st class for about 9 years then after I was promoted as senior division then last year I was promoted as ad-hoc district judge.

Justice Manmohan Sarin: what's your name I didn't get it in the 1st instance?

Participant: Kotlikar

Justice Manmohan Sarin: Kotliar you are as no. 5 AR very good, ad-hoc district judge Bombay.

Participant: Somnath district judge Jalpaiguri, Kolkata high court

Justice Manmohan Sarin: Jalpaiguri, this is west Bengal? Right.

Participant: Kolkata high court

Justice Manmohan Sarin: they are likely to get J. Indrani Banerjee right? she was here in couple of sessions earlier with us.....Jasbir Singh ji.....I didn't get your name please a little louder.

Participant: Ashok Kumar Sahu

Justice Manmohan Sarin: Ashok Kumar Sahu

Participant: *Service mai lower judiciary mai, 2005 mein mai promote hua higher judiciary mai and last july se mai district judge ke roop mai jaspur mai kaam kr raha hu sir.*

Justice Manmohan Sarin: who is the CJ these days in Chhattisgarh?

Participant: *abhi sir*, Sinha sahab, Naveen Sinha sahab.

Justice Manmohan Sarin: Naveen Sinha right right. he's been here also we have met him couple of times. right

Participant: I am Mrs. Meenakshi Gondole, principal district judge at Surajpur, Chhattisgarh high court.

Justice Manmohan Sarin: I see, yes.

Participant: I am Muhammad Ajmal.

Justice Manmohan Sarin: just a minute, tell me Mrs. Gondale have you ever had a chance to deal with, you are a, this is a special designated court for human rights or not?

Participant: in our state all district judges are designated as human rights court, but..

Justice Manmohan Sarin: there would hardly be any matter... I am not known of any matter as yet

Participant: only one case I have yet.

Participant: only one case of human rights

Justice Manmohan Sarin: one case? ok. Yes?

Participant: Mohammad Ajmal, principal district judge, Raigarh in Orissa.

Justice Manmohan Sarin: right. How far is Raigarh from Cuttack or other places?

Participant: it's about 400 km from Cuttack.

Justice Manmohan Sarin: well connected?

Participant: yes well connected.

Justice Manmohan Sarin: yes please?

Participant: I am Vikram K Chinnara, from Orissa

Justice Manmohan Sarin: from?

Participant: Orissa, I am district and session judge Naigarh, I am also having power deal with human rights cases, I have been posted 2 years back.

Justice Manmohan Sarin: but no case has come since then?

Participant: no cases.

Participant: myself Rajeev Dubey, district and session judge, Bhopal from MP high court

Justice Manmohan Sarin: so you are the host here?

Participant: sir, myself Anil Verma

Justice Manmohan Sarin: Anil Verma

Participant: district and session judge at Sagar, MP, and MP high court. I am in judicial services, since 1987.

Participant: my lord

Justice Manmohan Sarin: yes mam?

Participant: my name is M. R Suneetha and I am representing the AP high court my lord and I am direct recruited in the year 2013 and posted as 1st additional district judge in Nalgonda district of Telangana state sir. and we are having POCSO cases, electricity, NDPS apart from them human right..

Justice Manmohan Sarin: what are you having?

Participant: POCSO act cases, electricity and NDPS my lord and also human rights is also designated court but so far no cases instituted

Justice Manmohan Sarin: we will discuss that, I think you have been discussing that already for some time

Participant: yes, yes, yes, yes my lord

Justice Manmohan Sarin: right.

Participant: Sir, I am Haripal, 1st additional district judge, Kerala

Justice Manmohan Sarin: so you have me to charge also.

Participant: yes sir.

Participant: good morning sir, I am John Eden, I am now working as special Judge Vigilance cases that are the cases arising out of prevention of corruption act

Justice Manmohan Sarin: one second your designation is inquiry commissioner

Participant: yes sir, that is also there.

Justice Manmohan Sarin: so you are specially designated judge for all inquiry or what?

Participant: no actually we are not allotted any.....

Justice Manmohan Sarin: pardon?

Participant: because vigilance are now existing in Kerala for conducting departmental inquiries and hence we are only allotted cases under PCA only.

Justice Manmohan Sarin: so you have PCA cases, no I was just wandering what is the purpose of, what is the rationale behind designating a court as inquiring commissioner.

Participant: because formerly there were no vigilance tribunal there.

Justice Manmohan Sarin: pardon

Participant: vigilance tribunals were not constituted formerly in Kerala

Justice Manmohan Sarin: actually acoustics here are bad, while you are speaking, I can see to your diction is clear but when you see the sight we can't hear you. Any way we will try to make the best of it. but if you find me ... please tell me or you can't follow me tell me.

Participant: myself Vipin Bihari I am from Jharkhand, posted as principal and district session judge khuti.

Justice Manmohan Sarin: I am taking one effective measure, like you have it in cricket field I can't see all of you till those get dropped. Those of you who play cricket should know it, akhir ka bhi..... yes?

Participant: sir, myself Vipin Bihari I am from Jharkhand, posted as principal and district session judge at khuti. there is no special court functioning as human right, violation of human rights commission.

Justice Manmohan Sarin: we have J. Vijendra Singh as your CJ.

Participant: yes sir

Justice Manmohan Sarin: he was with me in J&K I remember it that's why.

Participant: good morning my lord, myself Malkhan Singh posted as additional district judge, district courts Allahabad, basically I am from Karnal, Haryana. I was practicing as an advocate in.....

Justice Manmohan Sarin: thank you

Participant: I am Shahi Moli Tiwari from UP, I joined this service in 1986 after 9 years I was appointed as a ACGM then again CGM now I am doing HJS form 2001 to till now, I am in charge district judge at Chitrakut.

Justice Manmohan Sarin: very good. So you must be one of the senior's district judges?

Participant: Pardon?

Justice Manmohan Sarin: you must be one of the senior district judges? in Up hierarchy?

Participant: yeah.

Participant: sir I am Anant Bhandari, special court CED cases Bhilwada.....

Justice Manmohan Sarin: thank you.

Participant: good morning my lord I am R. M Sareen principle district judge Jamnagar Gujarat.

Justice Manmohan Sarin: hmm

Participant: good morning sir, I am Reeta Tejpal special, district judge special court EC act, though its abnormal now we are not having any EC act cases in our court and my dealing with MECD cases and along with that I have additional charge of bomb blast cases in Jaipur, I am in the service since 1996 I joined as judicial magistrate.

Justice Manmohan Sarin: good

Participant: good morning your lordship, I am Shahbano, posted as add. District and session judge in Dehradun, I am from Uttarakhand I joined services in 2003, got my 1st promotion in 2009 and has been promoted as add. District judge in 2015.

Participant: good morning my lord, Ravi from Tamil Nadu principal district judge, we have given power to try the human rights cases my lord.

Participant: I am R. Sliver Kumar district and session judge Kanchipuram, from Tamil Nadu all courts are notified as human rights court apart from that we are dealing with PA act against.....

Participant: good morning my lord, I am Jitender Laxmi Chandra Gandhi, I am posted at sangam nagar as district judge II under the Bombay high court. Thank you

Participant: good morning sir, I am Premdistrict and session judge Kullu Himachal Pradesh

Participant: good morning my lord, I am Akram Chaudhary from J&K.

Participant: good morning my lord, I am K. Bhudhe principal district judge Harveri in Karnataka state.

Participant: good morning my lord, I am Vadley Vankun from lung Lia Mizoram Guwahati high court and we are designated as human rights special court and I am also dealing with POCSO as special court

Justice Manmohan Sarin: Mizoram ok.....you know there were 2 participants listed in the list of participants I don't remember hearing their names today that is Mr. Chandrasekhar and Sanjay Sharma, do you meet them yesterday or day before, or they didn't come?

they have not come ok.... as I see you have gone in the 1st session you have cases dealt by under human rights court, now I really don't know what you discussed in this. Did you have the opportunity to discuss any of the cases which are dealt by human rights court? So some of this I think Nikita when you plan it out there is a misnomer there because there are very few cases which have come up before the court under the human rights act. So what did you discussed in the 1st session? Can anyone tell me that? so it should have been the subject should have been the absence of human rights cases rather the cases under the human rights act. ok then, interpretation of section 30 of human rights act, in this I think you must have discussed the judgment of J. Thakur which was the last one saying that you know it's mandatory may should be read as shall and therefore it is mandatory and directions given for constitution of human rights court. Now rights of women against sexual harassment at workplace is well understood right. Role of human rights court under the 1993 act I wonder also here what? This is something which has yet to function or what they have done, so would somebody enlighten me what are role of human rights court under 1993. Yes? This is your session 4, not so far you must have remembered what you talked about. and listen please feel free, don't hesitate on what you are saying, we all are in a learning process that's the way I approach it, so feel free whatever comes to your mind I have no inhibitions. yes? I think possibly what you would have discussed is what should be the role of human rights courts, or how could the court function.....4 session 4

Participant: hello, in the last session it has been decided that as there is no specific definition of the human rights as there is no punishment provided in the act, it is necessary to be amended and proposal have been given by the officials present here and in fact human rights court have not been safely established in India, in some state district and session judges have been given special power to act as human rights but it is unfortunate to say that this day no case has been registered in so called human rights court.

Justice Manmohan Sarin: anyone else, would like to say something on this? yes?

Participant: the agency is created, formed to detect human rights violations as in other cases, in cases of domestic violence, an officer is posted in very area to take note of domestic violence

cases, like that unless the agency is created in the field level to detect the human rights violation and bring cases to the court, otherwise the court will not be functional.

Justice Manmohan Sarin: some point yes. Anyone else?

Participant: my lord another point that was discussed here was that since section 30 says offences arising out of human rights violation, how the court who is dealing with human rights cases will take out the offences, since there is an overlapping see for any offence there violation of human rights is bound to be happen definitely there will be a violation of human rights, so how the magistrate court or other court which is dealing with that offence will be working differently or how the special court will be working differently from the ordinary court, that was also a point of discussion we had but we didn't reached to any specific conclusion and what should be exactly, how the definition should be evolved and what offences should be included which can be exclusively taken by special courts dealing with human rights violation.

Justice Manmohan Sarin: all right, I think if I am not accused of hijacking a session which is already over I will tell you what my views are, you see one of the greatest problems we face in our country is and if you go through large no of legislations which are existing in statutes in both case the moment there is some ferrero or something we rush into legislation and very often such of these legislations are the result of nicer reactions where without complete planning and thinking you have enacted a statute, now let's look at human rights act, barring the definition of human rights violation, you see the definition is given in 2(d) and the judge was very right it says human rights means right related to life, liberty, equality of individual guaranteed by constitution or embodied in the international covenants or enforceable by courts in India, it is a very wide definition, let's analyses it there, rights related to life, liberty, equality and dignity so in the entire bunch of fundamentals rights plus rights under part IV, you perhaps will realize why I am taking you through this, because ultimately we are going to part IV, so international covenants and enforceable courts of law, so the what has been accepted by the UN general assembly accepted by India is also becoming human rights in terms of legislation, so now if you say violation of human rights, she is very right anything would be alleged as violation of human rights apart from the problem that you get of what they called taking cognizance, the act the principal judge doesn't have, the statue does not give him power to take cognizance, as long as the power is not

given to the session judge to take cognizance, it has to be a committal proceeding by the magistrate. then the statute provides there, then you amend the statute, again we are coming back to it, if the present statute doesn't provide that where does it provide, show me? therefore, when I started with telling you my friend we end up legislating fast without fully framing what are the consequences, what is the objective, what is the ill that you're trying to cure. in this case for instance now the cognizance problem is there magistrate must take cognizance or the law must be amended to provide that you take cognizance, now you go a step further supposing you took cognizance also, tomorrow in the act the punishment part has to be under the penal code or other offence statutes, the human right act does not contain any penal provision or does it? it does not provide, so therefore for imposing any punishment you have to go to the IPC, now within IPC where do you have punishment given for these offences, do you have? any one recalling in the IPC punishment given for these offences, so I mean I have no hesitation in saying for these reasons it's a non-starter, you see that's why I asked all of you have anyone of you has a single case no. so would this house be right in saying as a conclusion that this act as far as the principle judges and the district judges are concerned is a nonstarter. does anyone have a different view? Yes please? we are all agreed on this? Ok so madam you can make a note of this... yes?

Participant: day before yesterday we made suggestions. it was mentioned that offences, punishment has to be described.

Justice Manmohan Sarin: it's not easy you see the second part, let's go one by one. Macaulay will turn in his grave because if you look at it, look at the IPC, each of the offences has stood the test of time, offences carefully drafted here you have unknown animal, any violation of human dignity, right to life with dignity it gets included how will circumscribe and define what is violation of dignity and will you make it penal? Today perception may vary, supposing let's take an illustration.. ...no, no perception may vary kindly look at it in this way we are house here 30-40 of them you ask yourself a question, in the perception of some, let's put it this way if a suspect is lapped by the police right? I have no hesitation in saying that there may be some who says that ok no 3rd degree method, you are ought not to be slapped but there will be equally good no of people who will say look be practical in life, this thief of this criminal will not speak till he is slapped by the police right? When it comes to the 1st one he will say slapping him was violation

of his human dignity because until guilt is been established he is presumed to be innocent he should not have been slapped right? your perception on the other hand, no no there is no violation of dignity in this, he is involved in something like that so if as lap is done nothing is wrong, so I am mentioning this example is how do you precisely define these offences, difficulty in defining these offences and circumscribing them, to my mind the answer have to be in all such offences possibly unless they are very grave, you have to do away with imprisonment and confine to fines or sanctions that is one possible thinking one can do. You can confine it to fine and sanctions but anyway this is not our jobs as judges, this is the job of legislature and I think they are well paid to do it, all we are pointing out is that you have not done your job. take the other side, another aspect which comes to my mind, I don't know whether you have discussed this, there is a SHRC and NHRC to be constituted, neither the NHRC nor the SHRC have the power to try any of the accused, what is the power under the act make an inquiry and secondly, make a recommendation, and you know what happens to recommendations as a Lokayukta I have seen it for 5 years how you have to fight to get your recommendation through. hanji??
Recommend prosecution

Participant: launch prosecution also provided under section 18

Justice Manmohan Sarin: han to initiate prosecution, but do they have prosecution machinery and prosecute for what?

Participant: in some state they have..

Justice Manmohan Sarin: no.no.. prosecute for offences which are within the penal code what will you do for rest of it, its only recommendations. You see there are 2 distinct aspects one is you can put it within the penal code and other is all the violations of part IV which do not fall within it. now one thinking I will tell you the thinking of the members of the state or national commission is, you know NHRC is head by the former CJI there is a judge of the Supreme Court and former CJ and other members what the feel is look if at all you at the national level at least, you give these powers to us or at state level give the state human commission these powers let them do it or amendment an act where within the state commission rather than burdening, that's another fresh thinking rather than burdening the district, judges and others you within the state

commission have an officer who deals with this, district judge posted there he will deal with it, what do you think of this suggestion?

Participant: that would be little bit more effective

Justice Manmohan Sarin: no he has the burden, here is specialized body made by a CJ and Justice of high court has been with minimum of 7 years of experience as judge and you take it if he would be in the services, he would have had it as 18 years as district judge so this is a body to put pressure under them, create 2 district judges with them.

Participant: in UP, district baliya is far away from Saharan puran about 800 kms. If one court is designated as a human rights court in Lucknow, every person, witnesses will travel and that's why this legislation wants every district to has..

Justice Manmohan Sarin: Justice at door steps. Right that is the concept. But tell me..why not? then you see in that way, take the Lokayukta in Karnataka, there is a special judge posted there who deals only with the lokayukta cases..

Participant: but that is not under Lokayukta my lord..

Justice Manmohan Sarin: yes he is under the other one but he does only lokayukta cases. Yes. But let's address the question raised by our friend. he says and its a valid point also I must concede it one of the factors if we consider and pursue the proposal of SHRC being manned by it the baliya will have lot of trouble, but that's the problem you have in UP otherwise even after Uttarakhand and this large, even for other offences also he has to travel

Participant: SHRC is in Lucknow there are 2 officers posted there but every efforts is futile.

Justice Manmohan Sarin: every?

Participant: efforts are futile, none, no functioning is there.

Justice Manmohan Sarin: see you see that's a different issue, non-functioning or lack of effective functioning of a body can be of variety of reasons for instance the primary reason for

the state commission not succeeding for that matter even the NHRC is not making marks is to my mind is the apathy of the executive of being selective in acceptance and non-acceptance of the recommendations, when a recommendation comes it goes to whom? To the executives and supposing, who are normally the excess are against police authorities who are the violators, generally these peoples.

Participants: all speaking together... it's the state actually violate the rights.

Justice Manmohan Sarin: even go beyond that, take on a larger issue, the moment who are in charge, whenever there is human rights violations , if you tell the area which is troubled the army people will tell you look you want to have law and order maintained, you want us to remove this terrorist, some of this will have to happen, if you want to put our hands please don't ask us to maintain peace and tranquility, we cannot do it that is the message which goes to the executive head so, executive head what does he do, he says go slow, so the recommendation will come they will start evaluating the recommendation and by the time they get through with it it is already cold.

Participant: executive is slightly biased.....

Justice Manmohan Sarin: you see it's the same thing let me put it in this way, when a lokayukta makes a recommendation, I think gentlemen we are not able to get your attention right in front of me, *sahab yeh bataiye*, if a lokayukta makes a recommendation then what happens? it is a recommendation about either the government having failed to act in accordance with poverty or otherwise it goes to the government only for comments and evaluation, now what else do you expect either you have statesmen who will be able to distance themselves and say look wrong is a wrong let it be corrected.

Participant: sir I have a point that section 30 of the act does it define specific offence of human rights violation, my means to say is that offences would be the those that are provided under the statute only a special procedure has been provided because these offences has been committed by public functionary and there is..

Justice Manmohan Sarin: no, you see we discussed the 1st part, for purpose of providing speedy trial of offences arising out...

Participant: offences arising out of..like IPC offence remaining the same only speedy trial.

Justice Manmohan Sarin: no, no it doesn't sorry, sorry, I defer from you right here, kindly hold on, providing speedy trial of offences arising out of violation of human rights....just hold on, you are saying violation of human rights is to be tried under the IPC, but that offence has to be there in IPC.

Participant: say for example there is custodial death, now the offence it is committed by public servant ok the prosecution of human rights has been launched now that offence will be tried under IPC but it will be violation of human rights.

Justice Manmohan Sarin: you see there is no difficulty gentlemen as far as those offences are concerned the difficulty arises when you come to violation of human rights which are covered by part IV, which may or may not be penal offences at all.

Participant: it's very difficult..

Justice Manmohan Sarin: I think it's time we go to our subject, your question has lead me on to come to this, let's see this, let's come back to our subject what was it today? section 9 human rights protection through part IV of the constitution. the definition as all of you have seen it is section 2(d) of human rights act which I read to you a little while ago, I am not going to repeat it human rights means the rights relating to life liberty, equality and dignity of individuals guaranteed to the, by the constitution that answers your questions, all rights which are guaranteed by the constitution if violations need not be a penal offence, and not only this embodied in the international covenants, whatever UN declaration, French declaration, whatever they provide to make human life worth living or human dignity is worthwhile, now see turn to the constitution starting from article 36, (long pause) now 36 to 51 contains the DPSP, now I think all of you please turn over to article 31, you see when the constituent assembly debates were going on, one of the things which they were ceased off was look we have enacted this part IV where we have given directive principles for a just social order

this must be invaded if possible, while another viewpoint was look given the constraints the state has how can you guarantee livelihood to everyone? you can't guarantee livelihood to everyone, decent wage to everyone, medical aid to everyone, right so therefore it is not possible to have these enforceable or justifiable and that is what my friends lead to article 37, please read it, the provisions in this part shall not be enforceable by any court but the principles there which are laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws. so what is the mandate of section 37, whenever you legislate or make laws the DPSP will have imprint in that, that should be the guiding force behind these, so you come back to just, social and economic order, Justice, social Justice and all those.

Now if you see what are the fundamental rights intended to, fundamentals rights basically you stated simply are meant to give you and protect you against excess from the state, it is a democratic rule negating..... and therefore fundamental rights are made justifiable, now the directive principles are social and economic freedom by appropriate state actions, these are of several importance, you go to 38 it is promoting welfare, putting welfare Justice, social, economic and political to prevent all institutions minimize inequalities in income, these are directive principles, read 39 come to 39 now, this is important, you people have constitution with you? just quickly go from a to f. adequate means of livelihood, ownership and control of material resources of the community, operation of economic system not to result in concentration of wealth, that they is equal pay for equal work, health and strength of workers, men and women, children..... so what has happened is, just let's pause here for a moment, as you were saying my friend, all these are the directive principles in Part IV if any of these is violated it's a human rights violation.

Participant: like child labor is restricted..

Justice Manmohan Sarin: pardon?

Participant: say for example import of, restriction of child labor is imported from DPSP, now statute has been created and offence has been defined now if it is violated by a public servant then..

Justice Manmohan Sarin: sir we are both saying the same thing, except what I am pointing out and perhaps I am not able to put it across you is this, where ever a statute or penal statute has come into being for instance provision of child labor right? there is an offence under the statute so there is no difficulty but what I am trying to emphasize and which perhaps you are get appreciated, that's why I was reading to you article 39 it leave the whole canvas open. we have not even our penal statutes will not even cover one fringe of it, you just see from here start from the beginning, that was the point I was making so therefore if you are saying either you codify the offences or if it is not feasible then,...

Participant: the offence is already been provided by different statutes.

Justice Manmohan Sarin: if you are saying all violations of these then possibly one of thing which we thought off, it's just thinking of the hat I mean we are not deliberating upon it, could be there is no imprisonment provided for these, these are made provide you know provide financial sanctions for it. Right?

for instance let us take the recent example, you had in Delhi the, this, shri shri art of living festival now the question is strictly speaking if it is degradation of the environment I violate the DPSP, it's a human rights violation, now which offence will you try him under, nothing? so what has happened is NOT taking cognizance of the fact, not falling under ...this one ...they said you are jeopardizing the environment all though that will become justifiable whether he did it or not, they slapped a fine so in a way it's a very wide ambit that's what I am telling you ok? now the important point here is....

Participant: excuse me sir,

Justice Manmohan Sarin: yes sir?

Participant: as per the definition of human rights act section 2(d), it is related to life, liberty, equality and dignity of individual guaranteed by the constitution as per part III of constitution article 14, 15, 16 equality defined, 17 untouchability 21 life and liberty.

Justice Manmohan Sarin: *aree baba dignity ka kya karenge aap?*

Participant: dignity, untouchability my lord.

Justice Manmohan Sarin: please my friend hold on.

Participant: my point my lord is whether this act is in consonance with a provisions of article 32(3)?

Justice Manmohan Sarin: fine nobody is doubting that.

Participant: whether the powers given to the district court to enforce the fundamental rights of an individual?

Justice Manmohan Sarin: if it is a violation of human rights, now you are asking 2 different questions, if it is we were discussing way, the widespread part of 38 there is no restricted part we do not know where it ends, now tell me, I am taking you to another aspect, how the right to life article 21 if you see the plethora of judgments on it, you see what happens is this, I don't know those of you who have practiced earlier may have had the occasion to deal with some writs or otherwise, and deal with the part IV of the constitution, but if you are otherwise in your services, you start with the daily routines and the offences under the statutes the district judges do not get exposure to constitutional remedies. am I right on that? that is the hard reality of life except those who are readers, who want to read and read a lot it is a different issue, generally what happens is if you trace the history of right to liberty article 21, now under article 21 liberty, right to travel has come, Maneka Gandhi's case, right to have a passport has come, so all these have been expanded and that's why the next part of my, talk to you was see how when I read to you 27 and read to you that part IV is not made justifiable, rather it says no court shall grant any relief with respect to part IV right? but if you now see the Supreme Court over a series of judgment over a series of judgment over past few years have, what they have done is, they have brought these article 4 rights as essential to fundamental rights complimenting each other and therefore treated these as violation of fundamental rights, and granted reliefs now, illustrations, DPSP says, I will just come to you.....you see in the formative years DPSP were equivalent as human rights, supplement the fundamental rights in achieving a welfare state, greater imperatives, importance of Keshvanand Bharti, you have all heard of this case. yes. fundamental rights as the end of endeavor for which the DPSP provides guidelines, I want you to turn to your material,

young man if you want to have a conversation have with us, I want to be enlightened on that also otherwise pay attention, please turn to page 87 of your case material, course material provided to you...you have it at the end of the page, I am just pointing out to you that some good portions which you can read, if any distinction between the fundamental rights and DPSP on the basis of the difference between ends or means were really to be attempted it would be more proper in my opinion to view Fr as ends of the endeavors of the Indian people for which the DPSP provides the guidelines, another case they have defined it that look the DPSP are the path given on which we have to tread, now come to page 88 and mark the citation, I am just pointing out what you have to read, you can leave the rest, see this Minerva Mill citation read this portion and what you don't follow you are free to ask me.. Indian constitution is founded on the bedrock of the balance between part III and IV to give absolute primacy to one over the other is to disturb the harmony of the constitution, this harmony and balance between fundamental rights and DPSP is an essential feature of the basic structure of the constitution, the goal set out in Part IV have to be achieved without abrogation of the means provided by part III, it is in this sense that part III and IV together constitutes, the core of this constitution and combine to form its conscience. Anything which destroys the balance between the 2 will also effect to destroy the essential element of the basic structure of our constitution, now pause here for some time. over the last 25 years what has happened is, violations, the requirements of the DPSP has been treated as violation of fundamental rights, to put it bluntly and that is why these DPSP is, although if you start with 37 it says that DPSP per say is not enforceable right? the question arises how they are being enforced, yes would anybody attempt an answer. I have provided an answer to you already..... not only enacting the law there is simple, what has happened is the fundamental rights are expanded, the meaning of fundamental rights under right to liberty, livelihood that has expanded

Participant: so for definition of human rights...

Justice Manmohan Sarin: please, we are coming back to, please hold on, we will come back to it. Right now we are on subject of part III and part IV of the constitution that is the sessions subject, so I will answer your question, we will come back to it. so what I am trying to tell you is what is happening, now the decent wage structure, equal pay for equal work is a DPSP, now could the court have been directed? how have you achieved it, I am giving you a very simple

example, you will bring that under article 14, discrimination so therefore, see the next case here Ghreh Kalyan work union page 88 down below, you have young man this material? see that at 88 in this case the apex court while dealing with 38, equal pay for equal work, held that, equal pay for equal work is not expressly declared by the constitution as a fundamental rights but in view of the DPSP as contained in this, equal pay for equal work has assumed the status of fundamental rights in several jurisprudence having regard to the mandate of equality under art. 14 and 17 so what has happened is you are incorporating 39(d) as part of article 14 and 17 this is the basic thing which we must all understand. is there any doubt? so this is where you have this paradigm shift where the DPSP are incorporated as fundamental rights and thus enforceable. now take another case every day we come across, you would have seen writ petitions come before us, we have decided many cases, medical aid, hospital is not admitting, HIV patients right? Blood transfusion there cost is very heavy, right? the aid of the state is very simple, we do not have these resources, we cannot provide medical aid to the rest of the people we can't provide social security scheme, I mean after all let me put it if you go abroad under population in countries, medical facilities are excellent, let me tell you, what happens in a hospital if you go there is welfare visitor, if you ring up he say when you want to come, ok come tomorrow, he will note down your history and fix your appointment and then medicines even to foreigner or anyone else medicines would be free, this is as far as general hospitals go, but we don't have the resources, here if you will find you go to the premier institute like all India medical institute, you will have lines in the veranda people lying down, if you, patients after patients, now if you want to provide them the state doesn't have the resources, the answer is we don't have the funds we don't have the facilities, but nevertheless the court under article 227 says it is right to life and right to life and dignity, you are bound to provide it so, therefore give treatment, individual cases such orders are passed then again, similarly take the cases here you will have from pages 92-94 are the various cases given, page 92 is absorptions of daily workers, now you know for years together you have situations where people are employed on daily basis many companies, private sector even public sectors even courts, you keep temporary people, ad-hoc and they go on for years and years, if you are asked why they are not been confirmed, he has right, 8-10 years have gone on the answer is there are no sanction post we don't have the means and as far as these people are concerned they get the minimum wage, so continued with that so what did the court do, as a part of DPSP, you are bound to promote the welfare of labor, the courts have gone ahead

in treating it as fundamental rights asking the state to frame a scheme, revise a scheme where these people can be absolved based on their security so these are examples of DPSP now here also there is a lot out of which as far as human rights are concerned or violations comes also been incorporated as part of fundamental rights. that you will find numerous cases in prison reforms, custodial deaths, those are the cases where lots of people are coming through jail reforms in particular, and take the case of environmental cases, preservation of existing forest care cases, you have proper legal protection in child rape cases, part III violations are enforceable, now the DPSP will respond to international covenants on economic, social and cultural rights that is the ICSEER, if you see the definition in 2(d) it is not there that is in our statute but those also.

Now another instance of this was by someone mentioned the other day, you had.... why don't we legislate the laws, that's what happened also, if you look at article 31(c) of the constitution, 42nd amendment what happened was to give effect, they said 31(c) provided that, you know you had abolition of zamindari, the ceiling of land holdings so there those laws can't be challenged as violation of fundamental rights to hold property under 31 so they said look any of these, 31(c) insulated from judicial challenge all laws which gives effect to 39(b) to 39(c) of the part IV that is for welfare legislation are incorporated so these are... interestingly the last is article 51 that is the DPSP requiring state to foster respect for international law, also you may read from your case material, I am just pointing out which is worthwhile for you, read page 101, 108, 109, 110 and 124, I am not going to take you through all, because I think we are over shooting our time, because we, this young lady also wants to tell you something but one or two cases I will mention, you see just and humane conditions of work, you have legislations for maternity leave, DPSP is giving a living wage to have a decent life, now there is a legislation the point that you said my friend, you have NREGA these are the once under.. ok now *Bandhan Mukti Morcha*, you read at page 109..... now what had happened is *Bandhan Mukti Morcha v UOI* you know these were the mines in Haryana that swami Ganesh has started action there, what has happened is if the grandfather is employed in the mine he took loan from mine owner, that continued for generation so the interest themselves was so much on the loan and the loan itself for generations barring mere sustenance the grandfather's loan would not be paid by grandson, they will continue so it was virtual forced labor they had to continue working because they had this loan yet to be

repaid so that was filed and they said look these are bounded labor, so the Supreme Court came down heavy on that and this is what they said, you have this court before you, you have it in the middle the right to live with human dignity enshrined in article 21 derives its life from DPSP from particularly clauses e and f of article 39, 41 and 42 and the least therefore they must include protection of health and strength of workers, men and women, and of the tender age of children having a lot opportunities and facilities for children to develop in a health manner, and conditions of freedom and dignity, educational facilities, these are minimum requirements which must exist in order to enable a person to live with human dignity and no state has a right to take any action which will deprive a person of enjoyment of these essentials, the legislations are already dictated by the state providing the basics and requirements to work men and investing the right to live with basic human dignity with concrete reality and concerns, the state can certainly be obliged to get it, to ensure observance of such legislation for election on the part of the state and securing implementation own, if you read this carefully, these are the violations of human dignity and labor, if you are laborer you are allowed to live with dignity, decent fair, that is under DPSP, enforcement under the Fundamental rights basically this was the theme of our session, how the rights under part IV which give you the human rights at glare, you living with human dignity are getting enforced through part III. yes young lady would you like to say something.

Ms. Nitika Jain: sir, has very elaborately explained the DPSP, so I made a presentation of 11 slides that would briefly give an overview of the DPSPs.

Justice Manmohan Sarin: I must tell you Nikita is the young girl who has compiled this course material for you and she has worked on it, she done her masters in law and she is research associate here?

Ms. Nitika Jain: Law associate

Justice Manmohan Sarin: law associate here.

Ms. Nitika Jain: so sir has already explained I will just give a brief overview if it is repetitive please excuse me for that, so the 1st question is what is meant by DPSP, so these DPSP are basically a set or guidelines and they help in fundamental governance of the country, these principles reflect a unique mixture of humanitarian , socialist precepts Gandhian idealism,

democratic socialism though they are non-justiciable but the constitutions in various fundamental rights the Supreme Court as well as the High Court have made them justiciable through various judgments, then from where these DPSP have come, India is a party to UDHR, ICCPR and ICESCR, so if we see the corresponding rights, the right to work to just and favorable conditions of work has been given under UDHR and article 23 and under Indian constitution it is provided under article 41, right to equal pay for equal work has been provided under article 3 of UDHR and it has been provided under article 39(d), right to education, so these corresponding rights are there, right to education, just and favorable remuneration, rest in leisure, proper social orders, so these rights has been taken from UDHR ICESCR and as former fundamental rights and DPSP, they have been guaranteed under constitution of India, so the preamble of our constitution says Justice social, economic and political, have been guaranteed by these DPSP under Part IV of the constitution, so these DPSP aims to establish a welfare state and many of these provisions like I said corresponds the international law, the DPSP have through important constitutional amendments have become the benchmark to insulate, enacted to achieve social objectives as enumerated in some of the DPSP, in this case Chandra Bhawan v. State of Mysore the court have used DPSP to upheld the constitutional validity of the statutes that apparently impose restriction of fundamental rights as long as they have stated to achieve the objective of DPSP.

Justice Manmohan Sarin: give the page I will look into the course material.

Ms. Nitika Jain: ok sir,.....so the case was basically the state government issued under section 5 of the minimum wages act a notification was issued whereby the minimum wages for different classes of employees were fixed, so this notification was challenged and the court stated that article 43 dealing with living wages and conditions of work has been relied upon to sustain reasonableness of restrictions imposed by the minimum wages act, the courts have actually sometimes use to uphold the constitutional validity of these statutes like the minimum wages act and thereby reach the objectives of DPSP.

Justice Manmohan Sarin: I think, I the point sinking in? the challenge to the legislation is ought to be defended on the basis of DPSP even if fundamental rights are violated say for

example, you pick a particular minimum wage which an industry says it is unable to give now, it is defended under the DPSP

Ms. Nitika Jain: so these DPSP seen as aid to interpret the constitution and more specifically to provide the basis in extent of the content of fundamental rights sir as rightly mentioned the *Kesavananda bharti case v. state of Kerala* this is famously known as fundamental rights case it was held in this case that fundamental rights in themselves have no fixed content most of them are empty vessels into which each generation must pour its content in the lights of experience.

Justice Manmohan Sarin: I pause here, you know this question of empty vessel and pouring the content of its generations reflects the changing values of society, so what they are saying is look fundamental rights are there with the dynamics of society changing, requirements changing, what, how the fundamental rights have to be understood is the....you will pour into the empty vessel varying from time to time.

Ms. Nitika Jain: restrictions, abridgements, curtailments and even abrogation's of these rights in circumstances not visualized by the constitution makers might become necessary, they claim to supremacy or priority is liable to be born at particular stages of the history of the nation in moral claims, embodied in part IV of the constitution so the majority opinion stated in this case is what is fundamental in governance of a country cannot be less significant in the life of individual so we see like fundamental rights even these are fundamental for the governance of the country even they are very significant so the expanded interpretation of right to life lead the court to the areas where there was need for social Justice, areas where there was direct interaction between law and poverty as in the cases of bonded labor, child labor, crime and poverty and in cases of under trial in the jail, reading this several concomitants rights has given rise to overcome the difficulty of justifiability of these rights, of these economic and social rights which were earlier stated as non-justiciable has given an expanded view under the fundamental rights. human rights which are protected through DPSP they can be classified 3 groups that is social and economic Justice, idea of social security and Indian polity, so these rights which are enumerated under section 36-51 they can be clubbed under these 3 heads..

Justice Manmohan Sarin: articles..

Ms. Nitika Jain: these articles can be clubbed under these three heads of the groups. just concluding by presentation, that the definition of human rights as we all have seen under section 2(d) of protection of human rights act that provides for rights related to life liberty equality and dignity of individual guaranteed by the constitution or embodied in international covenants which are enforceable by the courts of India so specially says which are enforceable by the courts of India, so we see that it is very evident that the courts have major role to play in these rights, being the district judiciary it renders an active role in dispense of Justice they have a massive duty to protect the constitutional rights of the citizens barring few limitations, district judiciary is in charge of all matters, applications and interpretations of constitutional provisions like article 14, 19 and 21 also being the expanded view the DPSP are implemented through the fundamental rights. Thank you.

Justice Manmohan Sarin: why are you letting this girl get away with the last sentence huh? Please ask her how the district judicial magistrates are in charge of all matters including application and interpretation of constitutional provisions like 14 19 and 21. I think it is ritual observance I don't think any one of really in the actual practice you get situations where you interpret 14, 19 andyou see what has happened is I have tried to correct it this has gone from right Dr. Menon's time this was his thinking that you know the district judiciary must get even the fundamental rights interpretation, but I said sir that will happen only when you give article 226 there, unless you amend the constitution, you know this is mere occasion where you will you may get an occasion to deal with a case which has it but not direct interpretations of 14 19 and 21. So it is not Nitika's fault she is following the tradition of NJA... but no then all of us who have been from the judiciary and have the practical experience must tell them.....now we are running short of this session.... What is the consensus would you like to have a tea break now and then continue? I think it has been very heavy, is it heavy? Acha, I hope you enjoyed the session, partly dialogue, now I will let you into a secret which I must share with you. I was only to preside over the session I was not the speaker... so I think....thank you.

Ms. Nitika Jain: we will take 15 mins tea break and we will be back by 11.20.

SESSION 10

Human Rights of Fair and Impartial Investigation

Justice Manmohan Sarin: fully refreshed, huh? and ready for the onslaught of another verbal dialogue exchange for another half an hour we will reduce the length of the session so that all are within time, and because I firmly believe this particular session a lot has to come from you than me, the subject is titled human rights of fair and impartial investigation, it proceeds on the basis that if the investigation is fair and impartial or rather the converse if the investigation is not fair or is impartial it would be violation of human rights I think on that there can't be a disagreement, any, everyone is entitled to a fair trial a fair investigation, partial investigation, violation of it would also be violation of his rights because as you know all are experienced judges one of the most or rather the starting point of a trial before you is how the investigation has been done, if the investigation is not fair it can result in conclusions which are not intended both ways, next question I would like to modify and ask you, you know we have police force, conventional police force if you go back to J. Mullahs definition given way back in 54 he said the most organized band of.... is known as Indian police force, of course the Supreme Court did expanded those explanations.... we have traveled far from that definitions, there have been police reforms, still even the prime agency not as far back as 2 years back, Supreme Court has in 2G matter had the occasion to say the CBI is a cage parrot who speaks from his master's voice, these are reflective of the agency not being independent, objective, so, when the investigating agency is credentials a question mark is sort to be raised what I want you to ponder over is, and each one of you will have answer to this I am sure what can the judiciary do while exercising its functions to ensure that the investigation is fair and impartial of course you people all of you have crossed the stage the rail person, the reports which comes to the magistrate under section 156 or 154? 156, 173 would be the final report no, but you know the daily report which comes to as to what has been filed, you know the 156 or 157, 157 it comes to the magistrate, so at that time he had an important role now I would like to know from your experiences and your thinking what the judiciary can do? To make this investigation fair and impartial or we are helpless the, it has to be reform in the police itself? we have our judicial job to do we can't do our nothing about it except correcting that, that is one part

I will speak for 5 mins then we will get your views because I think that is what is essential in this case.

now, as you all know the police is raised by the state under the Indian Police act, 1861 the act is that old it is not yet changed curiously CBI is formed by the government of India under the Delhi special police establishment act 1946 now I have never understood this...chuckles... local Delhi police, special police establishment act 1946 and under it a resolution was passed which constituted the CBI, it inquires into cases assigned by the central government having concurrent jurisdiction on union territory, for cases in the if it's a state case as you all know CBI can only come and inquire when state government gives its consent or the court transfers it now very often the court, you know a spare is made I don't know whether it is made also before the session judges but in the High Court it is made sir transferred this case to crime branch, investigation is not proper, transferred the case to CBI, do you get that at session level also? you don't have the power to transfer, ok as far as the High Court is concerned the guiding principle is, you see these should be in rare and exceptional cases that you should transfer it, there are 2 reasons for it you can't over crowd the CBI and you should give those cases where really the investigation is required, it is not that any influential person comes and he says so and so has been murdered the case must be transferred, that is the law, Supreme Court has said repeatedly court transfers has to be in rare and exceptional cases and not on the drop of a hat it is a jurisdiction to be sparingly and cautiously exercised it can be done in cases of public importance or of national and international..... now 2G scam now interesting thing it is said it is done in the case of public importance, now what happens matters which receive a lot of attention in media become matter of public importance now they need not really be but they become and then there is an outcry to transfer it, for instance if you all know the Sunanda Tharoor's matter or what you call death, unnatural death, now there is a call for investigation by CBI in that case, no strictly speaking there may not be warranted but because of the media outcry political ramifications involved the court may transfer it, but then in some cases I am saying it from a different point of view, hopefully in years to come in the next couple of years some of you will be adopting the high court benches and my wishes to all of you for the best and that's the time you will be exercising such jurisdictions you see there are certain specialized agencies for works like for instance take customs, cybercrime, the enforcement directorate which

implement the feminine and others, now these people are experts in their respective areas so when cases of there are concerned you know there is no need to straight away transfer these, these are expert bodies let them give your input to you, next part apart from the police and others one part which requires correction and where also input from you will come is the are the public prosecutors, each one of you would have experienced that if you have a good public prosecutor who us above board, whose integrity is beyond question and he is well prepared it makes world of difference to the trial, on one side whenever there is a well to do accused you know people from the poor strata who can't afford it at times you will have lawyers who are more competent, but if it is a well to do person he will hire the best and if it is a public prosecutor who got saved, is not very effective or doesn't do his job then your task is very difficult right so one aspect which needs to be done is public prosecutor training and their emoluments have to be raised in Delhi I think for instance the Delhi government has virtually doubled or tripled their emoluments that the fee to be paid to the public prosecutors so that good lawyers can tick up and I think in Delhi at least we had most of the states the public prosecutors there appointment at least in the High Court is done with the approval of court, the government recommends and the court approves what is the position in your states..... Pardon? Court has nothing to do?

Participant: in Tamil Nadu as soon as the new political party takes charge all will resign and new will come....

Justice Manmohan Sarin: where is this?

Participant: Orissa...

Justice Manmohan Sarin: that's good no at least, maybe my question was unfair when I said in the High Court it is in the High Court that the court approves the prosecutors... at least in Delhi, we do that we use to do that...no, no that is different in the High Court who are the public prosecutors standing counsel and all the High Court approves the name, the government recommends and the court approves... ok so that is good way to ensure competence, right?

the another point on which I would like to have your views is you know we have this adversarial system as of now, in civil litigation in criminal also to the extend here the role of the

judge is primarily adjudicative for instance if somebody is not leading evidence the general refrain of a judge is too bad, you should have the evidence if you don't do it, it is not my job to be proactive and seek evidence or even to give suggestions because at times you might too accused of biased or in the other sense if you are letting the accused person might end up saying here is a convicting judge you know the prosecutor is not coming forward and he is giving time and he is again asking the witness bring that witness right and secondly the victim hardly has a say so the 2 questions which I raise here are, you see as far as civil litigation goes prudentially there is a change now the thinking is a judge is not a mute spectator of the proceedings before him let the plaintiff and defendant say he is a proactive one and to what extend this should be extended to criminal trails, because here is the liberty of the individual is involved, so at times if you are proactive can result in a conviction which he otherwise would have got through or would have got the benefit of doubt so at the same time I think the balanced course is which would appear to me and these are not empty words the approach ought to be quest for truth and Justice that is the guiding principle of the judge if he feels that this prosecutor for reasons is not bringing best evidence then you don't sit back I think you will be failing in your duty if you don't correct that, I would like to hear from you what each one of you has to say in that, then in the course material that you have, the young lady has given you a detailed list of the procedure under 154, 155, how the investigation has to be done, how does it began with lodging of a FIR now FIR is a fundamental information it is not a substantial piece of evidence but in a relevant circumstance produced by the investigating agency, FIR cannot be used under section 154 but not as a, can be used under section 154 but not as a substantial piece of evidence I am not going into details because all of you deal with this every day and you know it, right it would be repeating it, now investigation beings on information received under section 154 CrPC one if the IO suspects the commission of offence then he had to proceed to spot for further investigation and take measures for discovery and arrest of the offender, 5 steps are approved by the Supreme Court proceeding to the stop spot, ascertainment of facts and circumstances of the case, discovery and arrest of suspected offender, collection of evidence dating to the commission of the offence which may consist of examining various person, search of places, now one of the things which very often comes up is, is the IO or the police officer when he receives the complaint which alleges commission of a cognizable offence is he required to register it straight away or he has a right to do preliminary inquiry, and then say

look let me 1st see whether there is any basis for the allegation then I will register it, what is your view this has been the subject matter of number of decisions..

So you are saying once a complaint or a FIR which alleges commission of a cognizable offence is received he is bound to register it or he can still have the discretion to say let me make a PRE inquiry... I think there is a divided house? Yes?

Participant: I have a point sir..

Justice Manmohan Sarin: you have all points we will hear all points.. One by one. So let's hear 1st those who feel he has no option but to register it. Who are those who feel he has no option but to register it? Raise your hands.. no, no the allegation is disclosing cognizable offence. What is the other view? Right you are. Please explain to everyone or you want me to do that? That judgment is for specified cases to general cases.

Participant: ...medical negligence, certain...

Justice Manmohan Sarin: one by one, otherwise we will not have a discussion, one by one yes, let's put it this way of course in Lalita Kumari when they discussed class of cases that is merely illustrative it is not that only in those cases you have to do it, it is illustrative of such cases but whenever you read a judgment you have to see what is the ratio there, the ratio is in certain circumstances is the IO conferred with any discretion?... so can I put an end to this discussion by telling you what I consider the ratio? normal the rule is register the case, however if for some reason he feels they may not be any basis for this allegations either of some his own knowledge or his knowledge of the area or persons and he wants to do a pre then the pre the Supreme Court in Lalita Kumari has said pre is not for to check the veracity of those allegations but only to assess the existence of those. That means yes somebody has alleged this and these are the factors which have been alleged like for instance a murder took place so the pre can be whether the murder took place or not but not who has been murdered right? so the pre is only confined to the basics there but not to the veracity of the allegations because the moment he is convinced of the offence why I am distinguishing or partitioning this is this in the veracity part would be his investigation, who is responsible accused has committed or not what is the evidence against the accused at this stage what are the circumstances, those circumstances he

need not go into pre once the factum of the offence by the pre is established he is bound to register, this is what I understand of the judgment... so just one minute, let me complete it. while doing that they say there are certain classes of cases where because of necessity in matrimonial allegations, there were allegations he is trying to burn me, the wife would say that he tried to assault me, poison me, strangle me you know 3 months later experience has shown when they settle they are hunky dory again so those are the cases where he may not initially register the FIR but go into it, these are the cases you will see, commercial offences now very often what happens is in commercial offences people lodge even if there are debts are to be paid, you know you make it a case of cheating and very often I tell you, in Delhi we experience it very often somewhere in Bihar or somewhere in MP in district a case of cheating will be logged now this poor fellow has never been to that town they will have a witness there and from there the warrants has been issued so you know those are the kind of cases where commercial cases are converted to cheating so these are those kinds of cases which are referred to. yes? after I have said you are free to express your views, this is what I understood of the judgment. same I have told you the same thing, for your benefit our friend has tilled it out please read page 137, for your reference we don't have the time right now, but you can go into that.

Participant: sir, in case of preliminary inquiry is been taken by a police officer there could be chances of mischief committed by a police officer, destruction of evidence could be there, how to explain delay in such case, how to explain the delay, if these are the parameters, these are the issues raised by a complainant. These are the major issues.

Justice Manmohan Sarin: pardon I didn't get you question.

Participant: my question was, my question is sir, in case of pre inquiry embarked upon by investigating officer without jurisdiction of the case the issues which would be likely to be raised during trial would be delay, some time there would be a chance of committing mischief by the officer....

Justice Manmohan Sarin: you see it goes.....sorry perhaps you have not seen the input of 137 page there in Lalita Kumari's, there he is not to go into the veracity of the allegations,

preliminary inquiry is confined to the basics has he murder taken place.. Therefore... it doesn't visualize delay.

Participant: sir it's a collection of evidence.

Justice Manmohan Sarin: *arree bhai nahi*, it's not collection of evidence

Participant: evidence start from the registration of the case, there is no scope for preliminary inquiry.

Justice Manmohan Sarin: let me answer this way, the pre is not something which is envisaged as by the IO that he is conducting a preliminary inquiry for months together or days together, that is not the objective, there is scope for that, the moment he, as a matter of fact as you read further they have gone in Lalita Kumari to say those officers who have found not guilty of registering the FIR they have to be proceeded against. so it is not that in the garb of pre what you are anticipating is, here is a Police officer who may be corrupt somebody set some rights and starts with the pre and will not register the FIR, what is contemplated is 24 hrs., 48 hrs. or so that kind of pre inquiry

Participant: whether this kind of absolute discretion can be assigned to investigating officer or it should be under the supervision of magistrate.

Justice Manmohan Sarin: I will tell you why, it will ultimately be under the supervision of the court because the court has power to give directions which goes without saying,

Participant: suppose there is a complaint...

Justice Manmohan Sarin: one second....here what happens is see the risk that he is taking, if he has not registered the case he is subjected to disciplinary action it is his own future he is staking therefore what is visualized is the IO must be convinced that there is genuinely a case which require us to be seen whether offence has taken place or not.

Participant: sir I am speaking for my, when I was CJM I referred a complaint under 156 CrPC then IO sat on 2 days for that complaint that some action was also taken there could likelihood of some mischief even on magistrate's order he sits over that and said...

Justice Manmohan Sarin: my friend, if there is no mischief than we would have not been debating here this subject, what have we called is the investigation by the police is always fair and impartial? Then? every day we are encountering mischief, every day on this subject without meaning words you have the situation to see the hard reality which you cannot do public protest of is complaints are lodged in civil matters to treat it as a criminal one everything has a price, this much price you pay he will have a recovery made for you, he will have a FIR registered for you, eviction case that is done, the all are aware of it, aren't we that is why when we 1st talked of, what is the role of judiciary in ensuring fair and impartial investigation, now I think I have covered up most of it, I want hear from each one of you as to your experience and tell us what according to you should be done to ensure fair and impartial investigation. one by one or is there anything else you have in mind?

Unless you find that it is going astray then you do get a right to direct certain things, you do get.

Participant: no sir in my view magistrate cannot give directions to the investigating officer to carry out the investigation in a particular manner

Justice Manmohan Sarin: no, no that you may not but you will ask certain questions, when you ask probing questions they have to be answered and that is where that is the role you can play....no, no you answer, one is the role of judiciary the other part is what according to you otherwise be done to see that the apart from police reforms, how it can be fair and.... right...that's a good point. Yes?

Participant: sir, judiciary has limited but important role.

Participant: the magistrate if...

Justice Manmohan Sarin: little louder *bhai, Punjab de sher ta jor di bolde aa.*

Participant: right sir, right if magistrate is of the view that IO is not properly investigating the matter then he can change the IO some other officer may be appointed investigating officer if he is having some personal interest or is not doing his duty properly.

Justice Manmohan Sarin: that is generally done by your writing to the DCP or concerned system commissioner that investigation is not proper do it, how many of you have done it at the magisterial level?... that's why I said what you do is you bring the laxity in investigation to the attention of the police commissioner and leave it at that, and that is his job to change it.

Participant: it can be raised in the police magistrate meeting we have every month.

Justice Manmohan Sarin: that is a forum available, which is the state where are you from where you have this meeting?

Participant: Orissa sir, in fact we have 2 meetings

Justice Manmohan Sarin: CJM conduct those meetings?

Participant: CJM and superintendent of police and other senior officers meeting along with the collector present.

Justice Manmohan Sarin: one by one... we have so much wealth of experience coming from each one of you let's have it... Pardon? *yaar mic do na inko...*

Participant: Fast investigation

Justice Manmohan Sarin: you see there is a very thin line, you don't have to interfere in investigation.... but when you talks in terms of monitoring the investigation if you lose the distinction between interfering of or giving directions somebody challenge it the next day and you will get a reprimand from the High Court so you have flaws in the investigation, that is function that we do very often in the High Court and that also again we are very conscious that we do not give specific directions that investigate in this manner, because that is then regarded as investigation interference in investigation which even the High Court cannot do, so what we

do is we ask them searching questions and once this is through I will give you an illustration and tell you how it helps.

Participant: sir sometime sir, medical officer did not interested to examination and they delay as referred to other expert that time sir some evidence disappears.

Justice Manmohan Sarin: there you can pull them up, that medical officer should examine, I mean for instance very often...

Participant: technically...

Justice Manmohan Sarin: you see, take accidents cases where the man is drunk in my experience in 7 out of 10 the report as a result of money being the changing hands the report is of clean breath test, now at that point of time you are well entitled to ask them, look you had the breath test done because that is where the doctor has also shared the booty and shared the report, you ask them where is the rear and report you see he was drunk those signs would be available in next 34. 36 hours at that, so ask them that, so that is where you have to be pointing out... yes?

Participant: sir the role of judge is initiated after challan is filed in court, judge cannot interfere in investigation but in meeting we can direct the police officials..

Justice Manmohan Sarin: you see you are, when these gentlemen are talking about this, they are wearing 2 hats, now you are talking you're wearing the cap only of the district judge, and then talking from that point of view but when you are talking in terms of area magistrate he gets the reports under 156, and after that, and in that context that they are talking of correcting the flaws in the investigation. you are right when in the sessions court challan is filed or committal comes you take it... but we are asking you is not while discharge of your duties but as per your experience how judiciary can play a role in making the investigation fair.

Participant: sir we can direct them in meeting that how can rectify the investigation

Justice Manmohan Sarin: that is, we will put it in the head coordination between the magistrate and police.

Participant: the police officers, doctors, we call them in meeting then direct them that is to rectify the investigation process.

Justice Manmohan Sarin: that is the informal mechanism the extrajudicial, to put it in that way. yes? Administrative rally.. so one thought that is emerging is the answer lies in administrative cooperation, yes?

Participant: as my brother said 167 should be scrupulously followed if that is followed lot of problem will be solved.

Justice Manmohan Sarin: right.

Participant: my lord even though there is a restriction that magistrate cannot interfere in the investigation still magistrate has a very important role during the investigation what experience says in dacoity cases which the FIR is registered with description of the person involved in the dacoity, police use to prefer not to hold TI parade which is a link particularly in a dacoity case, piece of evidence which is very vital and without which identity of the accused cannot be established in the court, so in such cases police is required to be instructed by the magistrate that you have skipped over the stage of...

Justice Manmohan Sarin: no the identification is mostly done I mean there would be rare cases....

Participant: they use to leave it, skip over it, in many cases...so importance of interference, judicial interference is very important

Justice Manmohan Sarin: what is your experience?... you see what you have, let me put it on that there is no diversion of opinion, difference of opinion between us, what can be done is, these are the areas where TIP is not done when you have monthly meeting bring it up that these TIP is not done, nothing prevents you from there, whether it is effective or not is a different issue....therefore while you cannot give the directions to hold the identification parade right? but at the same time what is being said is when you have the monthly meeting you raise it up, yes next quickly..

Participant: magistrate cannot control the investigation, hampering it..

Justice Manmohan Sarin: that is understandable

Participant: but in such cases when we found it some area where investigation is necessary we can ask for further investigation for such point

Justice Manmohan Sarin: you can ask questions... what has happened on that.

Participant: sir my suggestion sir, a special report produced at certain time... but.. not put up.

Justice Manmohan Sarin: you know this is a problem which a forensic science laboratory science are facing all over the country, you know and

Participant: *ratio mai set up karna chahiye sir uthna.*

Justice Manmohan Sarin: *bhai uska yeh hai*, let me tell you we have one in Delhi

Participant: sometimes merit effect...

Justice Manmohan Sarin: we need to establish large number of them, at times the thinking is gone behind that look what is happening is the credibility comes in our country only when it is a state institution if it is a forensic science laboratory affiliated with government institution then it is given credibility, otherwise in other countries you have foreign laboratories and other...

Participant: ...scientific, evidence rehta hai sir.

Justice Manmohan Sarin: you know I was addressing once, about 6 months back these... and I had a great opportunity to learn there you know it's amazing and there is a very good book I will recommend, I will give the name little later where they have taken out a glossary of cases which have been only decided on basis of... right and how in the absence of other evidence this evidence has been held to be conclusive, it's a very good book its about 130 pages, I will give you the reference, the preempted to me I found it very interesting reading anyway fasil has a role. next? And we need to you are right, we need to have more of these...

Participant: sir, after...police file report under 173 of CrPC

Justice Manmohan Sarin: you know the acoustics here are little bad so you will have to be loud.

Participant: sir, after completion of investigation police files final report under 173 CrPC and requesting to allow... proceedings if state thinks police has not investigated the matter properly, police can direct police to make further investigation and...

Justice Manmohan Sarin: you have a right to direct further investigation, right. yes that is a provision that you take note of... 173(8), yes madam?

Participant: sir, laws are such that we can..

Justice Manmohan Sarin: you know this is, you know right now the AC has been switched off this is the power of women empowerment you have to be properly heard.

Participant: sir, no doubt we cannot interfere in the investigation agency or we cannot direct the public prosecutor to proceed with the trial in a prospective manner, when a judgment of acquittal is passed by the court with the reason only that there is some lacuna in part of investigation and if the judgment comes like, prosecution has failed to prove his case, basing on the said judgment the concerned IO should be made accountable for the way he has investigated the case which lead to the acquittal and that accountability should be made through the SP or concerned higher official so, that the same thing is not repeated once again and they will be careful in the next investigation process.

Justice Manmohan Sarin: you see there are... there are wildest may bring to book aren't IO who for ulterior motives have produced faulty investigation or prosecution on that, but remembered something that's why I raised that issue to some extent judiciary will also have to take the blame for it because as when the case is being presented to you, when I talk to you about the adjudicative approach simply and not a participative one, if you toward the jurisprudential development in participative judges it is your duty also at that very stage as they said under 173(8) why didn't not order further investigation, if you were seeing at that time that important

links of evidence were missing so when we talk of action being taken against police people tell me why should the judiciary also not be accountable if you are allowing simply to go that way, so these are thoughts which we need to look at while you are right that action could be taken, especially when it is, when the record is large with it, negligence of the IO or it shows clearly that this fellow, this is a bunched up case, those are the cases which you can recommend.

Participant: sir, sitting as a magistrate, one gets the FIR under 157 CrPC, and then under 167 he receives remand and then 173 he receives charge sheet, in between these 3, nothing happens before a magistrate it really doesn't take hold of rest of the case daily because that is not forward, because that is also not necessary.

Justice Manmohan Sarin: on the practical side if you ask me there is so much of work that he doesn't apply his mind to merits of the investigation or what is done, till he is finally going to try to commit that's also the part of the truth, is it not?

Participant: and then when it comes to looking at the charge sheet and case diary he has to apply so much of his judicial mind whether it appears to a prima facie offence or not, he was not really to scrutinize

... therefore now the mental agony

Justice Manmohan Sarin: tell me what we need to have a re think that at the stage of 173(8) application, we ought to be paying some attention,

Participant: yes my lord.

Justice Manmohan Sarin: you know what has happened is, over a period of time we have got use to a certain method of working may be what we need to have re think is at that stage 173(8) the magistrate has a look so that can be a good change....

Participant: I have 2 small interdicts to what has now been deliberated my lord, one is so far is TIP is concerned ultimately their lordships has said it is up to the satisfaction of investigating officer to find out that this is the man whom I suspect has committed that offence and if he feels that it requires further authentication from the victim who can really identify him only in such

cases TIP need be, and it is the exclusive opinion of the IO, to go for a particular aspect of investigation or not, my point is not that it is the complete law on the subject, but interposing a judicial mind into that asking that see, my lord we have some judgments of High Court where section 304 IPC TIP is made mandatory, now these pronouncements has been harmonized in the context....

Justice Manmohan Sarin: in 304 they have made it mandatory

Participant: yes my lord, of course that is not been really complied for a long time and directions was given to DGP also my lord by the High Court now interposing a judicial mind into a police investigation, finding that you ought to have conducted TIP and all that, is there an investigation to decisions, my lord where we can really interfere like in the cases of NDPS where statutory violations are really made, one could really interject.

Justice Manmohan Sarin: judge when he is suggesting that draw the attention that the TIP has not been done the idea is not that you are taking the role of an investigator or IO or the judge is taking over the investigation, that is definitely not arguable, obviously the presumption for that is where he is making that recommendation or where they are asking it in a meeting is or bringing it to the attention of higher police officers are those cases where TIP would have helped right?

Participant: yes my lord,

Justice Manmohan Sarin: in those case if you pointed out you really not taken over becoming an investigator, you are like that person who is an objective is judicial mind who is pointing out possible error for them to relook.

Participant: the last one my lord, coming to further investigation the Supreme Court of India held judge has no power under 173(8) his power is only under section 156(3) my lord that is one aspect I would like to point

Justice Manmohan Sarin: what is that come again? Which is that decision

Participant: on hand I don't really possess it, I have read it and I have....

Justice Manmohan Sarin: you mean that 173(8) there is no power,

Participant: 173(8) is only..... under the what provision of law the judge has his power to order for further investigation, is it under 173(8) or 156(3) CrPC the lordship has said positively that 173(8) is only the exclusive decision of the police either to investigate further or not to, it is not the domain of the judge, he has domain under 156(3) when and where he finds further investigation is required... I cannot really immediately furnish the audience with the citation but that is a reported judgment I will send you.... I am talking about further investigation....there is nothing like suo moto power of criminal court now it has one has to really draw a power from a profession, inherit power is vested with criminal court....

Justice Manmohan Sarin: this is if you read the bare section it is the IO submitting the further report after collecting evidence..

Participant: yes my lord that power is there that is not with the....

Justice Manmohan Sarin: exercised by the magistrate

Participant: only thing lordships have said that if the trial has commenced

Justice Manmohan Sarin: 156(3), you have the power there..

Participant: yes my lord...

Justice Manmohan Sarin: you use 156(3) then...there is no stage at which this can be issued

Participant: only 156(3) lordships have said power of judicial magistrate is only under 156(3)

Justice Manmohan Sarin: so what we are finding is under 173(8) it is the further inquiry and further report by the police officer now it may be pursuant to a direction under 156(3)? That's the way, the scheme is that, please look at it

Participant: magistrate can direct under 156

Justice Manmohan Sarin: Bhai one by one

Participant: ... question arises of 156

Justice Manmohan Sarin: you see if there is a direction under 156(3) by the magistrate for further investigation and or investigation to be done, in that case when the police officer gives report under 173(8) or in doesn't follow, I am wanting to know from you.

Participant: in my view sir, if a report under 173 is submitted by the investigating officer in that case there will be no role of...

Justice Manmohan Sarin: no, no that's not the question, I am asking is 156(3) you..

Participant: that will not come into picture..

Justice Manmohan Sarin: what I'm trying to tell you is 156(3) you pass a magistrate on finding a case of faulty investigation give certain directions and orders further investigation as he deems fit 156(3) is what?

Participant: 156(3) will come in picture if the victim or the compliant approaches the police and police doesn't record it thereafter he goes...

Justice Manmohan Sarin: no, no it can be exercised otherwise also not only in case of private complaint. is it only with respect to private complaint where any officer in charge of police station may with or without order ... is it cognizable offence have jurisdiction where is private complaint in 156?where do you get a private complaint... please have a heart 156 is for cognizable offences...why not the other?... I don't find where is the factor that you can't exercise it in the other, where does it say?...

Participant: excuse me? under 15...

Justice Manmohan Sarin: I think we have been sidetracked, let's go back as I see it 156(3) empowers the magistrate under as under section 190 and may order such order like investigation as above so let's see 190. What does 190 provide?

Participant: when complaint is filed before the court with the...

Justice Manmohan Sarin: take a mike... you have a mike here?

Participant: and ... sir when complaint is filed by a private person that I have gone to the police and it has not registered by case, so this very complaint can be sent under 156(3) for registering the case and investigation thereon and that is why there is only this stage where 156 is invoked

Justice Manmohan Sarin: where do you get this fact? it may be happening so in practice but where is the restriction?

Participant: it is regarding private complaint

Justice Manmohan Sarin: any case, any cognizable offence.

Participant: it is of cognizance of the offence by the police..

Justice Manmohan Sarin: I think let's go back to the 1st subject please I think this discussion can be resolved later, now we are going back to the subject now, otherwise we will be running out on the other session

Participant: there cannot be any..

Justice Manmohan Sarin: Priya tells me I am already encroaching her session

Participant: sir there cannot be any dispute on the proposition that investigation is the exclusive domain of the police, we can rarely interfere in the matter but there are instances where court is compelled to that is when the court on the administrative side want it. at least on some cases one case I can cite Shakari Vasu case the court is empowered to monitor the investigation that is only in rare cases only I can't give the citation...

Justice Manmohan Sarin: you see monitoring still they do not give the power to the magistrate this is under 482 with the High Court

Participant: no, High Court can empower a magistrate to monitor..

Justice Manmohan Sarin: High Court barely does it, show me a case where the High Court has delegated the power to magistrate to monitor the investigation.

Participant: in our state that has been happened

Justice Manmohan Sarin: you must be having a very indulgent High Court judge.. right next please? Now may I request you please be brief and kindly focus on the original question we asked give one or two concrete steps which can make the investigation fair and impartial and role of judiciary in it rest of the provisions we can debate over lunch

Participant: that is in our state that is in Kerala there is an administrative committee know as monitoring committee consisting of principal district judge, CJM, district collector and supersede and public prosecutor of the district

Justice Manmohan Sarin: so this comes under head coordination

Participant: that meeting will be convened once in 2 months and appropriate actions can be proposed by concerned officers.

Justice Manmohan Sarin: thank you...yes?

Participant: sir this also happens in Jharkhand in 2 months we have meeting in which all gathers and have discussion of the problem and whenever the case fails because of faulty investigation then that particular case is also discussed..

Justice Manmohan Sarin: now one question that I have from your experience, do you think these monitoring committees are an eyewash or they are effective?

Participant: generally it is not eyewash sir, the SP takes the steps...

Justice Manmohan Sarin: yes thank you...thank you..

Participant: most of the times it's just an eyewash if the SP he wants to entangle a police officer for his purposes then only that statement what has been brought to his notice during meeting of

coordination committee or whatever he says then only it is taken care of otherwise most of the time they don't take any action against the police officer.

Justice Manmohan Sarin: you see let me put it that way, without question whenever you have this interaction between magistrate or the DSP or SHO some of these case it comes to our knowledge also the SHO has either fallen foul of the magistrate like for instance on the administrative side we receive complaints about this magistrate these were his requirements he wants me to oblige on these this otherwise he passes order unnecessarily he is wanting my presence all the time, where they have fallen through what you are talking about those cases arise there the head of the dept. whether it's a DC or district judge he has to become statesman and decide which is the, is he is judicial officer he has to correct him and if the other party is in the wrong he has to correct him. so I think it is worth a trial you know because these places and most of the places it's working effectively in some cases because of the personal enmity between them at times they may be cases where one person is targeted but let me put it this way for a general good if it is curing any ill otherwise in one case it is not successful it doesn't matter you go ahead with this right.

Participant: sir, as per 159 of the CrPC

Justice Manmohan Sarin: Bhai, no section... there are no section at this time, vaise bataye because it will take another 15 min to debate on that, what is the point that you are making?

Participant: point is magistrate can at the time of investigation can use section 91 of the CrPC it is very effective section

Justice Manmohan Sarin: 91 is generally if I recall rightly for production of things or something

Participant: no it for investigation in trial purposes, if a Cd is produced before to the magistrate...

Justice Manmohan Sarin: use of section 91 chaliye ... Thank you

Participant: in case of minutes of the monitoring committee of the district judge is not implemented in the next meeting the report shall be sent to the chief secretary and DGP of concerned state through registrar of High Court

Justice Manmohan Sarin: you see this has reminded me of my lawyer days of 95, you see I remember there was an auditor of the general who was not returning the car and company property and we filed a complaint before a magistrate saying under companies act there is an offence if the man doesn't return the company assets.. 630 A and we moved an application under section 91 and this is how I tell you if an advocate is persuasive you can convince the magistrate, you know we argued it before him 91 I said sir, you can produce a document, direct investigation which is required we are worried that he may have taken away the car and have taken it away so it is any document or thing the word used is thing we said the thing can be car so he ordered the production of car, so I am sure we generally don't do... but I tell you the direct result of this on an anecdote I am narrating to you the matter was settled in 2 days in the court.. Because when he brought the car he went to 482 to the High Court there the compromise was arisen.. yes? So when you said 91 I was reminded of that case

Participant: direction can be given by the magistrate to the IO under 156(3)..

Justice Manmohan Sarin: that's what we have said

Participant: it empowers the magistrate for any information from any medium even complaint any witnesses which has not been heard by IO approaches even magistrate...

Justice Manmohan Sarin: so you are saying power under 156(3) is all purpose...utilize 156(3) challenge

Participant: sir, I have 2 points to make, 1st is whenever a closure report that is fundamental rights is filed before the magistrate, he should not take it as a face value he should inquire from complaint and should see behind whether proper investigation is conducted or not

Justice Manmohan Sarin: are you suggesting that they are taken on face value, I am sure when you get a closure report you go over it or you simply file it?

Participant: this is one method for fair investigation.

Justice Manmohan Sarin: scrutiny of, careful scrutiny of closure report

Participant: second point your lordship whenever accused is produced after arrest, whenever is produced we can check whether the complaints of section 41 a, b, c, d has been compiled or not, we can ask the person arrested whether his family members has been informed or not....

Justice Manmohan Sarin: please tell me that you really believe Supreme Court directions or 41 is really implemented?

Participant: this is only a point...

Justice Manmohan Sarin: to my knowledge they have remained in book

Participant: it is one of the method..

Participant: it is implemented sir..

Justice Manmohan Sarin: are they actually in implementation

Participant: in Jharkhand sir it is implemented

Justice Manmohan Sarin: you know you are following the Supreme Court judgment where you fill up the Performa and immediately a member of family is called who signs it and respective member of colony is called who attest it

Participant: yes sir

Justice Manmohan Sarin: very good which is the state?

Participant: Jharkhand sir.., it is being complied with sir..

Justice Manmohan Sarin: so I think you should withdraw this question of under developed states from Jharkhand, Chhattisgarh you are far more developed in many ways.. yes?

Participant: sir each and every steps has been covered nothing more to add in Gujarat also same position is there we are monitoring the investigation by conducting the meeting with the SP and all and mainly the magistrate has been authorized to scrutinize the challan and if lacuna is found he orders...

Justice Manmohan Sarin: I think the basics we are coming on is there is a difference of opinion on the use of 156(3), while some of us believe that 156(3) can be used in all situations irrespective of private complain or not and at all stages while where is another opinion says no it is of restrictive application... yes?

Participant: your lordship it's true that we cannot direct the IO how to conduct the investigation but since I belong to Uttarakhand... when I was CJM what we use to do, discuss the things in monitoring cell meetings we started giving training to IOs..

Justice Manmohan Sarin: that is part of all states,, I think in every judicial academy there is a course done..

Participant: we have started this practice at our station only...there were effective results.

Justice Manmohan Sarin: ok...judicial academies ... good

Participant: magistrate...can educate the IOs who are lacking

Justice Manmohan Sarin: you can there is an old saying you can show water to horse but you cannot make him drink right? so unless there is basic change in the character in the police officer itself which I think should come and is coming through education, you see now in Delhi and nearby places, earlier times there were use to be 8th class pass now you are having either 12th pass or graduates who are joining as Sipahis so level of education makes a difference, they understand what is happening although it is not guaranteed that they will not fall for the usual extortion, you know one of the biggest excess police commit is extortion, the moment the complaint comes that is the beginning of extortion.

Participant: ... even at the time of remand they can ask for CDs before passing remand if materials are not placed before the court before passing remand if the materials are not placed they can release the accused on bail there itself.

Justice Manmohan Sarin: you will be helping Priya in next session, no under trials should be kept judicial custody remand without application of...

Participant: apart from that at the time of filing charge sheet, failed to produce the materials gathered actually so as to facilitate the accuse.... chemical report, forensic report, fingerprint etc, but at the time of filing charge sheet they deliberately omit to file the materials before the court, the magistrate can look into it and whether they are relying upon the reports gathered at the time of investigation, in such a way the magistrate can gather...

Justice Manmohan Sarin: what are the solution you are suggesting, you have pointed out the lacuna... at the time of filing of the charge sheet..

Participant: the court has to ensure the material gathered by the IO is placed properly referred in the charge sheet or not so...

Justice Manmohan Sarin: so you are saying at the time charge sheet is filed or you are framing charge or asking the 313 statement at that time you do the scrutiny

Participant: no my lord at time of filing charge sheet...

Justice Manmohan Sarin: no who will check that?

Participant: magistrate has to check it.

Justice Manmohan Sarin: magistrate to check at the time of filing charge sheet that all relevant material filed have been relied upon.

Participant: lordship investigating agency is an autonomous body.... it does not means only police there are other agencies also which are dealing with different offences.. why not the cooperation and guidance because many times we found that panchnama are not prepared in food

cases, in drug and cosmetics act when they seize the article they don't prepare panchnama and say that as per the direction of higher official and section 29 they are putting that and saying that panchnama is not necessary. When we are talking about coordination then why not cooperation and guidance

Justice Manmohan Sarin: which is this department which says panchnama not necessary?

Participant: sir food department, sometime drug and cosmetic act

Justice Manmohan Sarin: under the food and adulteration act also

Participant: under essential commodity act...

Justice Manmohan Sarin: panchnama is not corroded, this can definitely be taken up in your meetings... right

Participant: sir I want to submit 2 points, 1st point is magistrate is empowered under 167 he is, there is constant monitoring he has to record reason, see case diaries what is the progress in the case suppose there is a judgment of D K Basu on the table on the 1st day, things instructing the police officer you have to comply..

Justice Manmohan Sarin: these are the 7 points

Participant: these are the 7 points none of them is being complied by them then the fair investigation by them and it starts from there you will see the magistrate is very tough he knows the law then that constant monitoring will start with every 15 days that is 1st point where magistrate is empowered to take all these provisions human rights violation everything that is... and second point is there are 2 components of Justice one is victim and accused, accused right from the arrest we are providing him legal aid but complaint is ignored, suppose every investigation has to be taken place in his presence providing him a legal aid counsel so that a fair trial is ensured... if it can be provided that is a step may be securing a fair investigation otherwise police people what they do only record his statement rest is done,... like what they want to do.. These 2 points.

Justice Manmohan Sarin: have you noted them?... you see the only difficulty you have will be this, your suggestion are welcome they are ideal but I don't know what are the situation in other state but in metros the magistrate is so burdened that he rarely raises his head, what you are suggesting idealistically he can do it purely as practical measure or it remains an idealistic solution, that's what we have to look at you know it is ideal to do it... nobody is questioning that....they understand it... I mean you don't have to educate them on D K Basu you have to ask them whether they have done it or not. but where were you posted?

Participant: Hamirpur, Himachal

Justice Manmohan Sarin: Bhai you are living in dev bhoomi, dev bhoomi hardly has crime, come to Bihar and other places where the magistrate has a list of 76.... *nahi nahi vo apki baat thik hai* but what we need to do is also therefore we will need to suggest a solution to them, this will be a perfect solution for Himachal no doubt about it...but whether it can be practically done by others or not that is to be seen.... there you are and if he is says he is spending time he will be talking about..... chalye next. Good suggestion, thank you this shows as I was telling you in the beginning India is a diverse nation we need to evolve solutions which are as applicable in local areas as fitting it, this will be good in Himachal in Mizoram perhaps another place it can work out very well, ideal.

Participant: my lord brother from Himachal has...

Justice Manmohan Sarin: you also from Himachal??

Participant: no I am from J&K

Justice Manmohan Sarin: so hilly range

Participant: to me magistrate has all powers to investigate a fair investigation by residing to all these matters providing he has time, but I fail to understand the committees referred by some from other states, we don't have such committees and what is there legal sanctity

Justice Manmohan Sarin: you see on a lighter vein the committee in J&K is from across the border so that's why you don't have committees there... yes?

Participant: my lord if we go through the process of 156 192 the investigation in cognizable offence is the exclusive domain of the IO, we cannot interfere in the investigation by suggesting a particular mode of investigation...

Justice Manmohan Sarin: that's right you are repeating what we all said, but 156(3)..

Participant: we have to see whether the direction of D K Basu case has been complied with the IO we can see to the supervision to that extent only...

Justice Manmohan Sarin: nobody is saying that the magistrate is to become a investigating officer that is no one's case here, magistrate remains a magistrate investigation is not his job that we all know, but the question is when you find investigation going hay by or essential question not been asked..

Participant: nothing can be done, *kuch nahi kar sakte*

Justice Manmohan Sarin: whether at that time raise question which law permits you to raise and ask those questions or raise up in the meetings, that is what we are discussing, next? we are clear on that..

Participant: being the last in line I think it is the risk of what has been said..

Justice Manmohan Sarin: no, no be original

Participant: but I will return to some of the points like under 167 the magistrate has to do his duty 173 at the time of submission final report has to be thoroughly scrutinized which is possible in states like Mizoram and in Himachal and one point I want to raise is, again the monthly meetings which we have which is very effective in Mizoram as we passed the orders and at the next meeting we see whether it is followed or not and we ask explanation from SP of the police as to why it is not followed and one point which I like to add during the investigation some of the magistrates are asked to record the confession of accuse now many a times the investigation the magistrates are little bit careless at the time of recording the confessional statements which is very important at the time of trial stage so, in cases where confessional statements are recorded

may be magistrates are need to be reminded that statutory provisions on 164 should be followed, it gives weight on the trial of the case.

Participant: my lord being in Mizoram I am repeating what my friend has said

Justice Manmohan Sarin: you can say... very simple... that is the easiest thing we judges also find as far as writing a judgment..

Participant: as far as my experience is concerned, I interfere on the....submitted the final report as time prescribed by 167 then if the accused is under judicial custody bail is granted... charge sheet then what my friend has just said under Guwahati jurisdiction everyone... there is superintendent of police in my chamber that is really fruitful we have this discussion about investigation and then the next time I inquire what steps has been taken... so it is fruitful and they are also eager to attend the meeting.

Justice Manmohan Sarin: Thank you.

Participant: I would like to add a point my lord, it is regarding committee meeting, there are 2 kind of meeting there are informal meeting of police and judges to see that witness are not.... what I want to say that there is already a direction by the Supreme Court in *Prakash Singh Badal v. UOI* case to amend the police act and to separate the law and order and investigation separately and also have committee at district level to... if that is being done then things will solve to some extent because investigation a police agency will be particularly be in charge of investigation alone and they will not be burdened with any other job and there would be complaints handling mechanism at the district level under this new amended act because the state has to.. so that I want to remind *Prakash Singh Badal v. UOI*, Supreme court direction to amend the police act... some of the states have done it...

Justice Manmohan Sarin: you know Thank you once again, Thank you.. you know this just adds to the number of cases where the recommendations of the Supreme Court remains unimplemented I meaning starting from setting up human rights court and commission itself has not been completed as yet, but one thing a silver lining which seems to emerge from today is that at least I was earlier a little skeptical, but I am now reconciled to think it's a good thing that from

the reports of all of you that these committees are working that means all is not lost there is still hope to redeem it you know when there are people even in police at the higher levels there are people who are willing to the right thing because this appears to be the consensus which is coming now one thing which was alarming which was said by you I don't think there should be cases where magistrate while recording the confession under 164 can falter in a statutory duty to tell the accused how it is going to be used against him that he is under no coercion or pressure to make the statement these are fundamental to basic to judicial officer, so when you said that it happens, they are careless, I am little worried that this phenomenon happens elsewhere also.

Participant: no, no....

Justice Manmohan Sarin: you have a standard form elsewhere also? to be put to the accused telling him about 164, so I think why don't you pick up this form and ensure

Participant: my lord we have the form, but when we question the accused later sometimes I have a feeling that it is just letters whether he is actually understand..

Justice Manmohan Sarin: you mean that he is not told, he will be shown, have you read it? Then just sign it. Well then the magistrates are not doing his duty or is not going by his judicial conscience

Ladies and gentlemen thank you, I think we had a very interactive session in which the model which I have adopted has to my reckoning be successful in which you people all have contributed and have given us an insight which we cannot have from books or study material. Thank you.

SESSION 11

Overcrowding of prisons: Human Rights of Prisoner in Danger

Justice Manmohan Sarin: let me introduce Priya Hingorani to you, she is an advocate, very committed advocate whatever she does she does it with a great zeal and she has been associated Priya it has been quite some time over 8 years and 10 years I have had known your mother well, right and interactions with her so she has done a lot of good work in mediation and other areas apart from, and she is been involved in number of activities women rights and others and so you are a very active person speaking on a subject which is dear to our heart that is overcrowding of prisons.

Adv. Priya Hingorani: thank you sir, thank you for the kind introduction I would just add to that by saying that my parents Mrs. Kapila Hingorani and N.H Hingorani started public interest litigation in India with *Hussainara Khatoon case* which all of you must, must have read, more aware of it than the others would be, whether by a letter an article which is published in the Indian express by Rustam ji, which says that there are under trial prisoners languishing in jails for longer than the sentence would have been, pregnant women are kept in jail because there is no place to send them, women witnesses because they have no shelter homes to send them to so they are available for next date of hearing in court those are the kind, that is the article which came in 1000 and 1000s of prisoners, under trials were languishing in jail across the country, they filed the first PIL in 1979 and the Supreme Court J. Krishna Iyer and later J. Bhagwati released 40,000 prisoners by one order across the country and that's how the whole concept it started, a new jurisprudence started and the concept of speedy trial and right to legal aid fundamental rights all these issues were dealt with, since then we had a plethora of cases whether it was the Khatri case of the Bhagalpur blinding where 44 prisoners were blinded by the police in Bhagalpur jail, to teach them a lesson by pouring hot acid in their eyes and poking them with iron rods and when the doctor asked them can you still see, yes doctor sahab I can see a little bit, oh you can still see? so they poked the iron rods further into the eyes, as a result 12 of them died at the spot, the rest were brought to the Supreme Court and the Supreme Court could not see them because of the oozing wounds and eyes but unfortunately in our country we don't have the concept of rehabilitation and till date they have not been rehabilitated despite the fact the

Supreme Court had ordered that, they are just been given mere amount of 750 rs. Per month for their daily subsistence, so many of them lost their lives many of them are begging in streets of Delhi and Bihar, so that's what the sad state is. so those were the cases which I proudly say I belong to the family, parents who started that, and we me my brother and my sister we have followed the legal profession we are all three of us are in the legal profession and taking this forward 100 cases were filed by them, our office pro-bono and unfortunately in the last 2 years we have lost both our parents, and we have set up a foundation in their memory which is carrying forward the work in criminal Justice system particularly for the under-trial prisoners, the right of victims and accused. so that's my legal background of course I am practicing in Supreme Court, I have been the office bearer of the Supreme Court, secretary and the vice-president and I am very happy to be here and I was thoroughly enjoying J. Manmohan Sarin's session with all of you, I think we could have continued with that it was very, very interesting and learning process for me as well. I just want to ask all of you how many of you have actually visited the prisons? All?but you have visited as judicial officers, have you ever gone incognito? you couldn't, because believe me if you go to the jail and I have done a study on Tihar jail so, I can share my experiences and it's a different kind of world, it is completely a different kind of world in the jails, of course the judicial side is the magistrates the CMMs the session judges have to take forward in a proper manner to ensure that fair and just trial is conducted but how many of the judges actually look at the human rights of the under-trials or the prisons or the convicts believe me practically very few, very very few we see it in the courts there are small-small issues that come up in courts vis-a-vis there rights the judicial offices, particularly Delhi, Punjab and Haryana I can speak of they don't want to even entertain those applications if you are represented by a good lawyer yes, the applications are heard but even a legal aid lawyer comes before the court he is not given proper hearing, I am saying with my experience of Delhi, Punjab and Haryana, I am sharing that with you that we have lot of issues when we talk of basic concerns, human right concerns of the accused on a daily basis which they are facing in jails, the jails..

Justice Manmohan Sarin: can I interject?

Adv. Priya Hingorani: yes

Justice Manmohan Sarin:..... as she has told you she takes PIL and naturally the cases she deals with all the time are those of victims, of those who are the sufferers so her perception of necessity has to be of those persons who have been denied access to Justice or who have faced these problems, so when she says this is happening her perception is based on the cases she is getting but while on the other hand your perception is that look if there are some cases where it is not been done there are also other cases where it is being done. so that part is perceptual difference you must appreciate and I think give Priya a patient hearing because what she is telling you is the other side of the coin

Adv. Priya Hingorani: I am, thank you sir for clearing that, I will just share few examples with you which are actually happening, I have just finished with a case of a 67 years old man who got been granted bail by in 2 cases of 138 cases, the MM says 50,000 rs. Surety bond to be filled, the other court says 1 lakh rs. he is a poor , he is 67 year old we moved application before the court release him on personal bond, the judge says no, sure he will be able to cuff up 25,000 at least or 10,000. it has been 6 and half months he is not been able to get released because the judges are not willing to listen.

Justice Manmohan Sarin: I have a question, you said this is 138 case, taking it from judiciary's point of view if it is a case where he has received a check of 2 lakh of rs. and not issued a check of 2 lakhs and considerations you see the are not paying it up, the judge starts thinking here is man who is beneficiary of 2 lakhs, why the hell he should not deposit this money, this could be the thinking

Adv. Priya Hingorani: yeah true, but the complainant himself in this case is supporting him saying please release him, I know I can get my money back, but I am telling you Patiala house the MM has said no.....who, which is, the judge is not willing to listen what do you do with a judge like that? we are just waiting for her transfer, what do you do it's been 6 and half months he has not been released....these are examples which I am sharing with you, the law is there personal bond is there, Supreme Court judgments are there, when you talk of implementation where the implementation by judicial officer is? There is another case, hello ma'am can you hear me? can I just...because I want all you to respond but of course let me finish in 10 mins and then, there is another case under the economic wing EOW case the 5 of them have been arrested, one

person the main accused he is been in the jail for last 6 and a half years total imprisonment if convicted is 7 years, the court is not willing to release, him he told the judge in the last date of hearing says what will happen? You will have to release me on 7th of august, I will finish 7 years no one will keep me in jails, and the judge says I feel very bad for you, why don't you plead guilty, he said why should I plead guilty? charge sheet for vis-a-vis 2 has been filed to are under arrest, one is on bail, six and half years he is in jail, 438, no court is willing to, neither the High Court nor the Supreme Court has accepted or even decided his petition under 438 criminal procedure, the MM is not giving after 7 years is it fair? I mean is that his right, human rights are not being violated that he is 6 and half years in jail, had he would been convicted his total, even after admission, the problem is under-trials don't get remissions, ferrules or any kind of remissions to for which they can talk of or apply for, it's either bail or you just suffer in the jails, he has no money, his family is ruined, his one daughter has committed suicide, his wife has left him, he has no money even in the jail for pay his daily expenses, he sometimes washes the clothes of some of these big people, who are brought into jail, the politicians or one other people and they probably get him a paratha or glass of milk or he is just dependent on jail food, he had a heart bypass surgery when he finished two and half years in jail that he was not given mail even at that time, I mean these are harsh cases which I am sharing with you because you feel so frustrated as lawyers when you come up with these cases in courts and the judges are not willing to listen, I am not saying all judges are like that, but these are cases, other case is of, the biggest, I mean the misuse of, fair amount of misuse is under the rape law, the new amendment of the rape law, relationships with consensus, the women goes and files a case of rape, I have just got an anticipatory bail for a person the person lives in Guwahati, the women has been in a consensual relationship with her boss who was in the media she also makes an allegation against the guy in Guwahati saying that he on the phone use to make remarks, sexual remarks and he said let's go to Kashmir for a holiday and all, so both of them booked under 376 504 and all the other sections, so where, I mean is that not misuse? the minute 376 comes the judges minds blank, oh 376 rape case they don't go into the merits or into the facts, whether it is actual a consensual relationship, being misused by the lady because she could not get her way, yes there are harsh cases where the man promises marriage and he doesn't promise is that 376? Should it not come under 422 cheating or any other section? it is I am telling you in my experience, it is you go to Tihar jail madam and I have been there for the last year and a half I have come

across 22 boys inside because of this 376, they are good families, I have counted them 22 boys.....I have counted them 22 boys inside from different strata of family....it is I am telling you I can give you the list of 22 names, it is so.

Justice Manmohan Sarin: I think Priya sorry to interrupt, I think it will do well if you come back to the subject of overcrowding of prison

Adv. Priya Hingorani: I will do that but I am just..

Justice Manmohan Sarin: ...into this, let me say one thing for all of you the last example which Ms. Hingorani gave about 22 persons being found in tihar jail arrested in complaints of enticing a women and rapping her, madam things are not that bad, I can tell you the last in 2007-2008, and these are all reported judgments the bench presided by me and Manju Goel we gave a number of judgments on what we described as child marriages right, where the women or girl was in the age group of 16-18 we quashed the charges of rape and released these boys and most of the cases they were you know, brought back and you know council look the couple, convinced the parents also let them live together and where there was not possible the girls wants to go back she was allowed to go back with charges quashed so it is not that the judiciary is insensitive.

Adv. Priya Hingorani: no, no, no, no sir

Justice Manmohan Sarin: and therefore let me tell you, within the court our bench came to known as the valentine bench, you know was giving relief to couples who are running away. right. so that being a part in such cases I would say while you have point that there are cases which render your heart, which pain your heart there may be no one can deny it but at the same time let me tell you in Delhi if the MM is rejecting it you go to the session judge and Delhi is one state where the bail is taken up the next day and it is taken up the next day in the high court itself, tell me if I am wrong, you file a bail application in the high court, it is listed in our high court on the second day so I can't foresee a situation where just injustice will prevail when it is reviewed in three level. So I think..

Adv. Priya Hingorani: Delhi is unusual, Delhi is one of..

Justice Manmohan Sarin: therefore, as I told you, what Ms. Hingorani is relating to you are there may be few cases in which it happens, what she is relating to you are actual cases.

Participant: it may be few cases, but general opinion is not that...

Adv. Priya Hingorani: see there is always, these are always perception, and judicial side perception is very different, litigants..

Justice Manmohan Sarin: let me give you, you my perception as a lawyer also, I was lawyer for 18 years.

Adv. Priya Hingorani: I know sir, I am not disagreeing with you, but what I am saying is...

Participant: lordship has given a very clear picture, you have options...

Adv. Priya Hingorani: obviously, naturally everybody has options...

Justice Manmohan Sarin: let me put it, it is not an option where from a district somewhere in a minute area of the state he has to travel to the capital of the high court and then make it, here he is making across..

Participant: it is true....all speaking together..

Adv. Priya Hingorani: yes...yes..

Justice Manmohan Sarin: so let us proceed further, you know may be there are cases which are there, you know after all she is relating from her experience.

Adv. Priya Hingorani: not releasing...ok

Ok let's then now, so these are the few cases which I did wanted to point where I, we have felt that the judges really need to have a different approach or you know have to think about it, but coming back to the subject of overcrowding the jails. I am not going to go into the data, everybody knows so and so much of percentage in this state, that state, what are the reasons, the reason is the courts again that a litigant, a lawyer perceptions, the courts don't think in every

matter we feel, that in every matter the courts need not necessarily have to send them to jail, there is Supreme Court had said that jail is an exception, bail is the rule so, we feel when we are on this side, we feel when we go to the court, see there are different categories of cases.....yes sir, I am saying in different categories, now in India as far as matrimonial cases are concerned, of course there have been Supreme Court guidelines, so there is some kind of a system in place, as far as matrimonial cases are concerned, heinous crimes there is no question of not sending them, taking them into custody and seeing what is to be done but the biggest cases where we feel, where the judges could have a different approach are on economic offences, 138 offences negotiable instrument, offences where if the judges feel, because in India we don't have a correctional system, we don't have system where they can be put in a correctional home, it's everything is mixed up in the jails, if you go to the jails you see the convicted the harden prisoners are on a daily basis interacting with the 1st timers, people with pity offences, people with matrimonial matters or economic offences, so there is no demarcation in the jails, the conditions in the jails, they say tihar jail is one of the 5 star jails, Arthur jail in Bombay is one of the other 5 star jails, but the conditions in the jails in smallest states in this district is pitiable, rough, there is no question of any kind of convicts or under-trial has in the prisons.....it's not only question of eating well.

Participant: how is judiciary responsible for all these things?

J. Manmohan Sarin: may I suggest something? Excuse me...

Adv. Priya Hingorani: I think....

Justice Manmohan Sarin: point of order please.

Adv. Priya Hingorani: it's one v. 30....

Justice Manmohan Sarin: Priya one word, may I suggest something? Let Ms. Hingorani make her presentation and we, you reserve your comments make a note of it, and she must have the benefit of interpretatively heard.....

Adv. Priya Hingorani: sir believe me I am very use to it, from being from Supreme Court...

Justice Manmohan Sarin: no the Supreme Court interpretatively hear, they hear you and throw the file...

Adv. Priya Hingorani: no they argue for us...

Justice Manmohan Sarin: no they don't argue.... no the idea is we are short of time, therefore let you be heard peacefully, then questions will come later.

Adv. Priya Hingorani: yeah, I know, yeah...

Justice Manmohan Sarin: let's do it this way please hear her patiently note down what you have objection on, one of you from each side can speak on that, I will permit that and after that I will make my comments. ok . This is a fair position to go? Otherwise your lunch is hampered.

Adv. Priya Hingorani: ok, so when we talk of human rights of an accused the position in the jails, I can share with you what is happening in tihar jail, so please hear me out, the under-trials are not supposed to be working, it is the convicted persons who are supposed to be working in the jails, it's the contrary, it's the reverse the wardens are the ones who are the blue eyed people of the Superintendents, who are in charge of the barracks and the under trials are made to work in all the jails, I was there about three weeks ago and there was a doctor who has, because of a 498-A case against him, very very well qualified doctor, and during the course of the mulakat he came to tell the Superintendent we usually have the legal mulakat in the superintendent's room and he was weeping profusely very very well qualified doctor, asked him what happened he said because he has questioned the warden as to why he couldn't go to the library to read, he wanted to go and read in the library, they said no you cannot go because I say so, give me 500 rs. and I will allow you to go to the library, and he refused to give the money or listen to him and they made him clean 12 toilets of the 2 barracks which were in the filthy condition so he come to the, during his course of the mulakat this is what has happened with me, and he wept and said I want to commit suicide, I can't take this condition, you take my assistance I am in here for whatever reason as long as I am in jail, you take my assistance, let me help you in OPD, in the medical facilities , looking after the patients here I am so qualified but the Superintendent told me in front of me, no no, we don't need your services, you go and do what you have been told to do, if you been asked to clean the toilet for a week, go and clean the toilets, that's when I told the

superintendent sabha that I think there is really, you know if he is so qualified you can really use him as it is you don't have good doctors in the OPD why don't you use his services he said let him put an application we will send it to DG if the DG allows it then we will think of it, so this is just one example of the conditions, and why is there overcrowding, it is not because of anything but the judicial system, because of course the administration is there, they don't have enough no of jails, they don't have proper facilities, not enough police persons, we were doing a case for the tihar police staff where they don't have proper pay commission, recommendations for their what you say their wages and salaries or accommodations, they have their own share of problems but, the overcrowding the political will or the states are not building enough jails or able to fulfill the responsibility is a different aspect which we cannot discuss or decide on that so as far as the judicial officers are concerned we really need to, and since you are all senior judicial officers we really need to think or evolve a way where we do not have, speedy trial is one aspect, each court is overburdened we are not the once who going to appoint judges, that is a big issue and J. Thakur has taken up and many CJ have taken it up that we want more judges, more appointments, more courts because all the courts are overburdened with the case....he said 21,000 court in his case alone, it is a nightmare those are the issues which are in our domain in our discussion but as far as we are concerned, how can we not over crowd, should we not think of giving bail to those, in those cases, where it is possible to give a bail, don't you think we should pull up the IOs when they file complaints, which are being on the basis of, specially particularly in 498 A cases where they do not conduct an inquiry and on the basis of just a statement of the lady, they roping everybody and get the FIR registered against the parents, brother-in-law, sister-in-law who is in US and all and they are not able to you know, to the proper investigation or even come to the situation where they will not register complaint against each other, who are not directly involved with the currents of the incidents, which is alleged by the accused, by the victim so those are issues which I think we can discuss and as I said we don't have the time, I will leave all of you to share your thoughts on that. Thank you.

Justice Manmohan Sarin: yes?...mike, mike, mike?

Participant: my mike is on, mam said judiciary is one of the main reasons why the jails are overcrowded, to that I would say that while talking of overcrowding we can't lost sight of the fact that jails, more jails are required so that there is less overcrowding plus as we've seen off

late heinous crimes in are more in number in so in heinous crimes people have to be sent into jail, they have to be detained they can't be, at least at our level they can't be released on bail, like in murder, 395 even economic offences as well as NDPS and such acts, offences, that's one thing second thing is not that, in most of POCSO cases I would say in our cases when the victims is above 16 mostly they are released on bail within in a space of 2-3 weeks, not more than that.

Justice Manmohan Sarin: I would agree...

Adv. Priya Hingorani: that is juvenile Justice, under the juvenile Justice act,

Participant: no, no

Justice Manmohan Sarin: no, no

Adv. Priya Hingorani: POCSO act

Justice Manmohan Sarin: victim is 16 to 18 years..... Accuse may be over na, he is not juvenile.

Participant: and plus...regarding other cases... in fact I have 3 jails in my district 2 of them are under-crowded and one is about 110 person population.

Justice Manmohan Sarin: anyone else?

Participant: if you see the percentage in comparison to the cases in our file it is very negligible, if we have 10, 100 cases in our file we have 10 UTPs

Adv. Priya Hingorani: I don't agree, even the Supreme Court says overcrowding of jails, I don't know how...

Justice Manmohan Sarin: one by one on the mike address the madam.

Participant: Punishment in the form of imprisonment only, now crime rate is high so therefore there are so many accused who are convicted and sent

Justice Manmohan Sarin: no you see....

Participant: my lord

Adv. Priya Hingorani: no, no in matters where the...

Justice Manmohan Sarin: what you need to answer is this, after all let's what she is saying there is substance in it, the Supreme Court has come down number of times, in numerous judgments, you will have it in your case material also if you turn from pages 157 onwards, you will find it there as far as under trials are concerned overcrowding of prisoners at the under trial stage, where ever they can be bailed out in accordance with law as we understand that must be done so therefore the emphasis is give bail to under trials as their guilt is not yet proved, he is presumed to be innocent till he is convicted barring the heinous offences where you feel that yes, he doesn't deserve bail. so at least in those cases where for instance, I am reading it they have set the parameters, for the cases where the offences is punishable by 7 years if the under-trial has already gone 3 and half years....

Adv. Priya Hingorani: Amendment...

Justice Manmohan Sarin: so these are the amendments we must go through, and as far as...

Adv. Priya Hingorani: and also, sir, I will just point out at to that most of the trials in the MM court's give dates of 3 and a half months, 4 months, 6 months, in those cases where the under trial is in jail, when you have not given bail, so we need to actually, the court case management has to be in such a way in the MMs court...

Justice Manmohan Sarin: let us sum it up by saying...

Participant: it is impossible...90 days agar charge sheet, impossible..

Justice Manmohan Sarin: no, no let me put it in this way I would leave it at saying the judiciary ought to be have a greater consciousness with regard to right to under-trial to be released on bail. we are and perhaps if at times you are not you ought to be...I will leave at that.

Right? Now coming to other point she made, overcrowding due to judiciary..... yes you want to say something?

Participant: yes sir I am from Kerala, there also overcrowding is a problem and condition of jail is deplorable but in certain, judiciary has a role to play we use to..

Justice Manmohan Sarin: one second....no cross talk madam, Priya ...

Participant: we visit our jails regularly and we crash into the jails without giving notice to them and we keep complaint box, which is being opened by the district judge and also there are jail committees local level jail committees and they monitor each and every case in which, madam give an instance of....

Justice Manmohan Sarin: judge let me interrupt you right here...you know let us put it this way, despite of your supervision or your visitor visiting it, there are not excess committed there that can't be true,

Participant: I cannot say...

Justice Manmohan Sarin: you cannot say but you make efforts towards it, so all please try to understand this when Priya visit tihar jail the fellow who are enjoying it and having a nice time are not going to come to her and tell her they are not having any problems only those who have grievances will point out to her and if a population of over 5000 prisoners are there, the one fellow who is a genuine one, non-genuine one he will cry whores so there are prison reform, are required we can't shut our eyes to it but the whole point is is the judiciary responsible for that? no, the answer is no, can the judiciary contribute to make life better in prisons yes.. so that is the basic... I think I have spoken for some of you.

Participant: sir, Supreme Court has, can choose the state government or central government to set up new jails sir, this is solution sir.

Justice Manmohan Sarin: that's true.

Adv. Priya Hingorani: but that is not within our domain, we can, there are recommendations from the Supreme Court the government the law commission has said so,

let me tell you India is not the only one as far overcrowding goes, you know from my personal experience, I don't know from whether any of you has have had the chance to go to Poland, you know when you travel through Poland and you saw and go through the Nazi camps you see to what extent, what we have is a paradise, what torture and other things can be there, even now in some east-European countries where there is overcrowding to such an extent that officially a bed is required to be shared between 3 persons round the clock, so there are 3 prisoners who will get one bed and one will sleep for 8 hours then next will have 8 hours and other one will have 8 hours, compared to that I think we are better off. Right?

Adv. Priya Hingorani: the other sir, is that.....

Justice Manmohan Sarin: I am not discounting that there are no problems with tihar, let me tell you, from my own experience and I have had the chance to visit tihar and I was responsible for some of the reforms which were introduced there and I will share with you little what can be done, even in large township, I will grant it to Priya there is no doubt that most of these large jails there are fiefdom established, that are of superintendent, wardens, and their writs, their writs which are more effective then the writ of High Court initially now comes to freebies, all persons who keep the palm greased they will get the best of food inside, although we have abolished the classes in prison, you know based on graduate, wealth etc., all that criteria is gone now there is one class even then what will happen is the person who are their favorite ones will get home food, somebody will have more mulakat, best places... I remember one of the writ petition which came up before us was in the High Court, one of the Bihar leaders who have been, one of the Yadavs I think, Pappu Yadav yeah, his case, his wife was MP, right? what was reported was, a complaint came that this person, while the total number of mulakats allowed are this, this fellow has had 6 times the number, so we issued notice and said call the records, we asked them how have you allowed it? can you believe the justification given was, some of those were allowed for visit of the MP to the jail, now obviously his wife is not visiting otherwise she is visiting to see Papu only, but in the garb of visit of VIP, so there is no restriction on that, this is I tell you they play around with rules, more than half the visits were allowed that way, acha when that stopped

you know we said all right withdraw all purposes whatever special is given to him, he will not have it unless health condition then comes 6 medical certificates saying his conditions is serious and requires treatment, now the fellow was virtually like wrestler so, there was no question of treatment required that way, so we visited the jail also at one time, we sent him to AIIMS as led his examination be done by AIIMS whatever the doctors will do we will abide by that, we thought we had accomplished it, established a reform, implemented a reform, corrected harassment, 3 months later informally one of the superintendent reported that the things are almost the same, I said why, he said what he has managed is now there is no way you can prevent it, he had about 4-5 of his domestic staff committing offences and being imprisoned and they are remanded and those people are allocated his barrack, so the fellow was everyday morning having his food cooked by them, malished done by them and looked after by them, his clothes getting washed and everything so, this is how system can be suborted also.

Adv. Priya Hingorani: I just want to share 2 examples of 2 lawyers..

Justice Manmohan Sarin: no, no, I will give you the time just a second let me complete it, so this is what happens at times even when, why I am citing it to Priya is for a different reason, in this is case the High Court went all along to ensure equality of treatment no discrimination but what you need to do is correction at the administrative and also you need have a change of heart, you have jail officers who are not corrupt, need to have people who will follow the character, you know I have no hesitation in saying that so far I mean if you compare it with anyone, judiciary I the one which, which has least aberrations I mean people may be accusing judiciary saying that there are aberrations, alright there are some aberrations in few of us, but that is a minuscule number as compared to rest of us, so a lot of reforms is required there apart from judicial reforms, in the same line as the system as it pervades, I remember I had a client who was imprisoned for extermination now this fellow was a great man, running into millions of his wealth and he was to be extradited for having broken a prison in Canada and his extradition was sort so he was detained at tihar, in my lawyer days I was representing him, at that time his sons came said sir we want to enter into a deal I said what deal, so I was that time a young lawyer full of enthusiasm as Priya is now I said let's do one thing, what are you grieving they said sir, the system there Priya wants him for protection money on those days of I am talking of 93-94, 25k a month to be paid as protection money otherwise

they told that his father would be taken care of, he will receive beatings and everything will happen, now I tried to persuade this man don't worry we will make a representation, we will file an application before the district judge we will take corrective action, so he said sir, I am convinced you do whatever is required I am happy paying this, so you know at times because of the point that I am making now is somewhat different, at times the participation of some of the politicians or the persons who are imprisoned are responsible for suborning the system, now this gentleman who is securing his father's safety you may say under coercion but he is also finding an easy way out he says I will pay 20,000 a month it's all right my father is safe, so these are few of the ills and the other thing which we experience was when I tried to bring in educational reforms at tihar, we found a large number of population which was in there teams but was not educated so we advertise, we got the Delhi government to sanction amounts for education so can you believe it this is another situation we face the stigma, Priya we advertised we offered greater emoluments than what a teacher would get elsewhere, we offered them travelling allowance but believe me none were willing to come forward and teach at tihar, the emoluments were one and half advertised we talk of employment elsewhere, everywhere we say there is unemployment if a teacher's vacancy is advertised you have one post and 1500 applicants but I am telling you for tihar, we advertised one and half times the emoluments they were not willing to go conveyance offer, so ultimately we had to do was, alright the only way to do it is pick up from these detainees or under trials people who have had educational experience let them teach, so we started a school that way, o this is a part of why I am saying it, I am saying it on behalf of judiciary also is alive for reforms and this is what we do.

Adv. Priya Hingorani: that is of course from the high court level, I agree....when the visits are there I think the biggest things which the judicial officers go there has to look at is the medical centers in the hospitals, the OPDs are in a bad condition, there is corruption in the, with those doctors, the just in one of the cases 3 weeks before the learned AC MM dismisses the bail application in an economic offence three weeks later the bail application comes in court to say he has developed suicidal tendencies and he is not keeping well he attempted suicide in jail he is depressed the same AC MM calls for medical report from jail, the medical reports which comes and says yes, he has a reasonable tendency to commit suicide, the words are reasonable tendency to commit suicide the judge reserves the order and next morning releases him on bail on

permanent bail, not interim bail for medical grounds, permanent bail by saying no,no, giving parity to the others who have been accused, we are not objecting to the bail of course he should have got bail year and half ago, there was nothing against him, economic offence but the, within the 3 weeks the change in the mindset of the judge if the same judge would have given him bail on the ground of parity earlier when he had his bail application, when his bail application was on ground of parity and saying that I have already been here for an year an half that should have been fine, the fact that it is seen that there is conveyance of the medical officer with the accused and then the judge giving in this order, these are you know cases which do come out which keep us, get us thinking, see in UK and US as far as economic offences are concerned they first attach the bank accounts and properties they don't arrest, in our country they first arrest in the meanwhile while the person is arrested the rest of the family or the company disposes of the property especially in the cases with all the property dealers, and the developers and this thing and by the time the matter comes up the company goes for winding up, few assess are left he has already sold of his assess so I think we really need to, as far as economic offences are concerned, by arresting the person you are not getting the money, by attaching his assets and property and his accounts we may be able to pay back to the person who have spent money or booked plots or this thing we have so many cases in Delhi with all the builders we have all these big builders whose cases are coming in court one matter goes to EOW they 1st arrest by then the company goes for liquidation and then the poor people who have invested the investors are still running around for years and years trying to get something out of the whole thing, so I think we need to think about these kind of changes arrest is not the solution for getting results according to me. In heinous crimes I am not talking of heinous crimes there is no doubt, there is no, we need to look at the question of...

Justice Manmohan Sarin: I think Priya I am noticing a lot of people wanting to interject and...

Adv. Priya Hingorani: ok I am gonna..... then we will go for lunch.

Participants: we are session judges....

Justice Manmohan Sarin: let me tell you, I will say it only a hint dropped.... Priya just said the answer is not arrest the answer is attachment, of course attachment ought to be there but I am

only reminding her of Vijay Malaya which she must have been reading you see what happens is in such situations possibly arrest and attachment both ought to be there if possible under the law. right that is the way to secure it, and remember something Priya I am just correcting you and you will take it as a younger daughter, all of us as judicial officers know, you know as lawyers you know it also a man who comes to us engaged in a civil matter, you quote him a fee of 10k 20k 30k 40k he starts evaluating where is my benefit when is the suit going to be filed when will I get benefit, when will I get result right? when will I get result and he is reluctant to pay a civil lawyer, but at the same time if there is a bail he is to be arrested the criminal lawyer ask him bail appearance will be 30k 50k he....so the same thing applies also to the accused in other places when you talk of these builders and others now when they are arrested, facing the hard part I am not saying it should be in accordance with law not otherwise, for instance I personally doesn't approve of Supreme Court has done in Subbrata case where in terms of for contempt jurisdiction you are putting a man inside in, but at the same time take another example, take the case of Bansal's now a trauma fund has been created both the brothers have coughed up 30 crores each....

Adv. Priya Hingorani: that was different case because that was a tragedy....

Justice Manmohan Sarin: we are on principle effect.....

Adv. Priya Hingorani: but sir then look at it the Supreme Court has dealt with it I don't have agree with a way Supreme Court have dealt with it...

Justice Manmohan Sarin: this is ladies and gentlemen the right to differ is a whole mark of democracy, the right to have a difference and a different perspective is what makes a democracy vibrant and even our judiciary vibrant.

Adv. Priya Hingorani: no sir the Supreme Court says..

Justice Manmohan Sarin: thank you

Adv. Priya Hingorani: the Supreme Court says they are 67 years old and 66 years old they should not go into jail, when the district court or the other courts in other cases he is poor man he is sent to jail in the age of 70, Supreme Court upheld his conviction at the age of 70 that man is

poor man he didn't have.... he has convicted but because he is 67 years old Bansal he is should not be sent to jail that's where you know the money power even at Supreme Court has different view. Thank you.

Justice Manmohan Sarin: that is not money power.....let's put it that way

Adv. Priya Hingorani: it is money sir...it is money power, had it been anybody else for this kind of crime which happened in Uphar nobody would have done away....

Justice Manmohan Sarin: that's different issue, we can have debate on it... tell me you run an enterprise the rule of strict liability has been applied...

Participant: ma'am one case I have convicted 85 years old he committed continuous rape and he..

Justice Manmohan Sarin: of a step-daughter or somebody..

Participant: granddaughter

Adv. Priya Hingorani: I am saying that, you are right you convict him....if he is wrong, but Supreme Court is saying the reason for not upholding the conviction is oh they are 67 year old...

Justice Manmohan Sarin: ladies and gentlemen lunch or no?

Adv. Priya Hingorani: yes yes...

Ms. Nitika Jain: we will break for lunch and I am sorry we are requested to be back by 2.10 because we are short of time and sir has a flight at 4.30 so we will be back by 2.10 and we will try to...

Justice Manmohan Sarin: no no no need... I would leave they will continue if they want to.

SESSION 12

Limitation of Human Rights Court established under Human Rights Act

Justice Manmohan Sarin: that is why, you know when we take a judicial actions, we have to do them irrespective of the consequences, be immune to the consequences and effect of it and that especially is required while you are dealing with high profile or media cases, you know every human being, judge is also human being that perception does affect at times, especially perception created of a person's guilt or you know, that's a fight a good has to do it within his conscience if he feels that because of the adverse reporting a prejudice has been built in my mind or the person is too influential what would happen if bail is granted or bail is rejected, but when you get use to it nothing matters, then you can shut off those things and proceed with your matter. Yes? I was looking at section 18 let Mr. Martin make the presentation and you know I think there is some way out of the confusion which we were discussing earlier in the earlier sessions, you know if you see the scheme of the act, I think it is clear to me now after reading section 18 that these people are themselves conscious of it, once we read it I will tell you what I have in mind, you know they are conscious of it that look which I was telling you make them punishable only fine so that is what is the concept here also..yes..now the I am grateful to Mr. Martin for the reason that he is the 1st resource person who is grating me relief since morning right? so I will go back to my job of being a moderator and not the resource person.....advocate Martin mentioned to you that he has attended human rights court in Salzburg, is in Austria if I am not wrong, France, near border between that, right..that was a 3 day 4 day course what was it?

Adv. S. Martin: it is 40 day sir..

Justice Manmohan Sarin: 40 days course, so you have been completely incorporated with Europe notions...no

Adv. S. Martin: no...no..

Justice Manmohan Sarin: so let's have the field he is saying the subject given to him is limitation of human rights court established under the human rights act. the 1st question which I

would like Mr. Martin to address is limitations comes when it became a starter, what we discussed in the morning was that you know the human rights courts are non-starter so what avails the question of limitation so I think the way to address the question is what can be the functions of human rights court in the present scenario, that's a more appropriate topic for this, what can we do in the present juncture, given the present scenario when the act is enacted and let's look for some answers from Mr. Martin.

Adv. S. Martin: thank you my lord, so good afternoon, so this great occasion given by judicial academy to discuss with you on this topic limitation of human rights court established under human rights act, so as lordship has rightly said we are not here to identify limitations and put a burial to this court we are here the objective of the judicial academy is to sensitize judges and make this human rights court active throughout India so the judges chosen as pioneer of this field and of course from the previous session and discussions I could perceive that these judges can take this forward and do great things in our country. as you all know unlike other loss and other courts this human rights courts act protection of human rights act and human rights courts are established to fulfill a UN obligation under UDHR under the international covenants on civil and political rights and covenant on economic social and cultural rights, it is not just law of parliament above that there is an international pressure not somebody else because India is also part of the UN body so there is an international obligation, to fulfill this international obligation this protection of human rights act is been enacted and these human rights courts are constituted so now there is also a constitutional mandate which you all know to fulfill the obligation of speedy Justice, so here this criminal rights courts are constituted to bring in speedy Justice in human rights cases, so that is also another thing so here by establishing these human rights courts previously would have seen only the High Court and Supreme Court had the power to deal with human rights, now the district, judges have been empowered with not the same powers as 226 but previously for anything and everything recording fundamental rights and human rights we have to approach high court and Supreme Court now the district judges or given this very great power to deal with the human right of the citizens under this protection of human rights act and more particularly human rights court so now you should also know this principle called pairs principle, it is UN principle related to the status of human rights institutions so the, in which India is a party and resolution

was passed in Paris that's why we call it Paris principle where how the national human rights institutions should be, and how they should act and what should be the constitution and what will be their role in protecting human rights all these things are established in the principles, only on these principles these human rights courts and protection of human rights act is enacted now let us see the protection of human rights act as you all know in several sessions you have discussed about section 30 that it is specifically given it is providing speedy trial of offences arising out of violation of human rights, each district a court of session to be human rights court to try human rights offences then now let us see the limitation one to all district in India that are 600 district in India have human rights courts what is the answer, not a big no because in several judgment even in the recent judgment of the Supreme Court the repeatedly the Supreme Court is giving directions to the to establish human rights courts, even in a recent citation which is mentioned here the state government should take appropriate actions in terms of section 30 of protection of human rights act in record to setting up or specifying human rights court, either set up a special court specially to deal with human rights cases or to designate as in Tamil Nadu and other places where the principle district judge or the session judge is empowered or specified as the human right court, so then see in.... this citation also the government of Tripura.... so my point here is several state they have either constituted the human rights court or they have specified any particular court as human rights court this is limitation one, even in UP the designated human rights courts are not designated in several district... all?

Justice Manmohan Sarin: it is a different matter that there are no matters.

Adv. S. Martin: no, no no you know why I am telling you this my point here is Supreme Court and other Allahabad high court in this citation you could see they have heavily on 2000 may be after that may be they have constituted what I am emphasize here that there are places where the human rights courts are not constituted so this is issue one. if it there in UP well, similarly the other one is....

Justice Manmohan Sarin: is there special allowance for any court which is designated as the human rights court..... I think they ought to be...

Justice Manmohan Sarin: nothing..

Adv. S. Martin: ok so some....so you have another title, may be you have another title. so because many time many other cases you have MC/ MACT tribunal like that so this is one thing so they are all district even today may be UP is an exception where they have appointed in Tamil Nadu they have appointed in several district it is high time we take... and there is no statistics available anywhere which state has or which state doesn't have, neither in the NHRC website or anywhere our researcher has made several efforts to find this out of 600 district what are the district have human rights court and what are district not having the data is not available, that is why I have put this 2000 judgment where it say UP has not constituted so this is one thing one limitation is all district in India doesn't have human rights court is a fact then second one is many state government have not constituted a special court instead they have designated the sessions judge who is already the principal district judge or any officer as designated as a special court so as you all know in Tamil Nadu and in some other states also this principal district judge or the session judge who is already burdened with lot of administrative and judicial functions so they are given this task so it is many among one so what we demand is the second limitation is a special court specifically to deal with human rights cases must be constituted the second limitation I see.

Justice Manmohan Sarin: Mr. Martin I have a question here, I think look in every state whenever a court is to be created 1st of all it is sanction of post second situation arises is infrastructure facilities being available a building being available etc. you are advocating a separate court for a special human rights court now, I think it is perfectly valid situation where the state government has taken the position of designating the session judge as the DJ 1 as the human rights courts especially when there are no cases, so there is no great burden being shifted, your criticism would be valid if we had 1000 cases human rights violation case pending and then you say a court to be created.

Adv. S. Martin: yeah ok but our people are not happy with this, because they are already burdened with several judicial as well as administrative functions giving this they may not be able to give much importance to this area of human rights..

Justice Manmohan Sarin: has anybody ever bothered about how judge is feeling happy or unhappy about the charge given to him..

Adv. S. Martin: not happy but yeah so that is as lordship has rightly mentioned when there are many cases that's the time

Justice Manmohan Sarin: that is the time limitation will come...

Adv. S. Martin: so yeah, so that is why the next one is the rules are not framed so any law, many laws can be made but unless rules are not framed we cannot go further, so there is a way of enacting a law but making it inactive, suppose they want to enact a law and if they didn't framed the rules it will not function at all here is a case where human rights act is enacted but the rules are not framed

Justice Manmohan Sarin: non framing of rules

Adv. S. Martin: non framing of rules both the central and state government only the Karnataka human rights courts rule 2006 I could find from the website and other law websites may be the credit goes to our Mr. Assappa, yes? So only Karnataka has, if other states are having rules you can bring into my knowledge so this is one occasion where rules are not framed is another limitation. you would have seen in Karnataka in this citation we quote that has come out heavily on even the rules are enacted the human rights courts are not aware of framing of these rules so the court has given direction to circulate this rules to all the human rights courts, so this is another point where the human rights courts are not aware of the procedure, rule and other things. then you have this Tamil Nadu makalsangam this is the first ever case on human rights courts it was in the year 1997 copy of which is already given to you, it is very good judgment every human rights judge must go through this judgment because for all the difficulties you will have an answer in it, you could see how the court should function, so this ever judgment to activate human rights court because you all know in 1993 it was , this act was enacted but this judgment was in 1997, till that time there were no case either before High Court or Supreme Court but in this case it was elaborately dealt and the judge J. Kapavaagam and J. Janathan they have given a positive note that we should act with which is available, don't say rules are not available, offence is not defined and get away from this, take whatever is available and go further is the gist of the judgment, I make an appeal to every one of you here as a human right judge you should go through the judgment you will understand what it is. then the another limitation is

offences it is not reported so that's why we have given you a copy of, researcher has given copy to all of you, so then offences not defined, punishment not given is another limitation even this morning some other discussion was going on somebody raised that I think you must have seen in section 2 (1) (d) of human rights act, you could see human rights means the rights relating to life, liberty, equality and dignity of the individuals guaranteed by the constitution or embodied in the international covenants and enforceable by courts in India, so there is clear definition of human rights, you know what our constitution says about human rights fundamental rights the rights under international covenants all you know so now,

Justice Manmohan Sarin: how to you say brother it is a clear definition?

Adv. S. Martin: I am going to say my lord, the next point is section 2(n) and 4 of the CrPC which I need not teach you all here because you all are learned people you know well about CrPC, offences are defined, you need not go now, you can read it for yourself, so what is offence, offences tribal by magistrate, committal proceedings, committal offences tribal by session judges, all this is defined in CrPC so, under IPC also there are lot of offences and there are other special laws you all know various special laws, so what I want to say take for example, one offence right to life which is a human right, one person causes a police officer causes injury to his body, is it not an offence under the IPC may be its torture not an offence as per law, but causing injury would be, causing grievous injury or causing hurt is an offence so what you have to see is it is not a case where offence is not defined, offence is well defined, offence is anything related to life, liberty, equality and dignity, so you are empowered with this power to define, link it with IPC, link it with other special laws, link it with CrPC and you will have offences and punishments

Justice Manmohan Sarin: you see judge, Mr. Martin, the difficulty which we all encountered was what we do with any violation of Part IV principles considered in backdrop of Part III enforcement...

Adv. S. Martin: no sir part III...

Justice Manmohan Sarin: just one second let me complete it.. you absorb it

Adv. S. Martin: yes my lord

Justice Manmohan Sarin: what I am trying to put it to you, I am only caveat to only what your statement is your intentions are good but how does a judge find out as far as penal offences are concerned there is no difficulty the offences are defined under IPC we go ahead there are offences under POCSO no difficulty right, the untraveled area or unexplored area is the area of human rights violation where you go to international covenants, you go to what is in consonance with human dignity or not...anything just one second you absorb it first

Adv. S. Martin: sorry my lord

Justice Manmohan Sarin: any violation of human dignity may not be an offence but under your international charter or this definition it is an offence now, for that the act doesn't provide for any punishment the act I was reading 18 gives the option of that also to the NHRC or SHRC to recommend a fine and that is also not the power of the, the NHRC has not the power to impose fine themselves but to recommend a fine, so it is recommendatory, so therefore what we are saying is while we appreciate your commitment to this cause on the practical side what by judicial officers faces and unknown animal, what to put under human rights violation and what not to put is it violation of dignity, not dignity, what has happened that are the areas which has difficulty.

Adv. S. Martin: can you, can anyone of you give an example where there is no offence... like I quoted an example of right to life. sir, it is human rights it is defined as human right under the protection of human rights, it is given under the constitution, and it is given under the international covenants on civil and political rights and on social, economic covenants...

Justice Manmohan Sarin: take during investigation itself the, if an accused is not allowed to meet what do you call, his guardian immediately or access to a lawyer or the remedy given by the court is to grant him an interview but where is the offence there is no offence.

Adv. S. Martin: it is only preventing or...

Justice Manmohan Sarin: no, no, therefore I am telling you martin there are whole number of cases, you are saying one example, I will start from here and I can tell you each of our officers will give you 10 examples.....yes, it is part of human rights, if somebody doesn't provide legal aid is it an offence?

Participant: equal pay, equal work.

Justice Manmohan Sarin: enforceable..

Adv. S. Martin: pardon?

Justice Manmohan Sarin: aree baba... equal work you are bound to get, it is constitutional mandate right? Somebody doesn't do it is human rights violation, is it an offence? so your thesis of.. I am sorry I think the house will agree with me your proposition that every human right violation is also an offence under the local law is not correct.

Adv. S. Martin: that's not my proposition.. that's what I want to correct now, see this is a proposition by law, by various judgments I have quoted, I have, we have also circulating it to you, see as my lord has rightly pointed out there are occasions, there may be many occasions where some of the rights are not defined as offences and punishments are given as rightly you have mentioned that right to life includes right to livelihood if livelihood is denied what is the offence, like that there are occasions stating this you cannot get away saying that human rights act doesn't define offence at all, punishment at all.

Justice Manmohan Sarin: we are not saying that...

Adv. S. Martin: so wherever it is possible...

Justice Manmohan Sarin: you see now, let me give you counter to that, and are you nut? at the same time when you are advocating please go ahead with full force and go ahead and proceed, now at times hear that our young judicial officers.... I think if they want it they will bring anything under the human rights violations.

Adv. S. Martin: see can I ask you a personal question? How many of you have dealt with human rights cases

Justice Manmohan Sarin: none...

Adv. S. Martin: how many of you... I am asking a personal question, how many of you have received a complaint...

Participant: there is no awareness the crime is not defined..

Justice Manmohan Sarin: you see brother Martin must understand none of us have had the benefit of the 40 days course in Salzburg..

Adv. S. Martin: no I didn't say anything like that..

Justice Manmohan Sarin: no brother what we are saying is in a lighter vein as we told you before also these cases have not come up before our judicial officers so therefore it is good to make....he is a good friend of mine otherwise right, to say that you know you must implement irrespective of the flaws in the legislation, go ahead and implement but please show us the beacon light to my officer how do they implement, and today the other danger is there giving a free hand now imagine, assume we give all our people the benefit of bonafide that they will act with fortitude, discretion and judicial discretion but supposing some of them doesn't, the whole field is open to him, he can issue summons and any complaint suo moto also or no, ok I think NHRC has suo moto powers otherwise on a complaint, get a complaint summon a fellow for any offence make it violation of human rights you know not respecting somebody apart from the as it is you have number of cases under schedule tribe act

Participant: SC/ ST PA act

Justice Manmohan Sarin: you know they say this fellow doesn't treat me with, you know genuine ones we have he did not treat me with respect, he called me a chamar.

Participant: dignity

Justice Manmohan Sarin: right? ... that is sufficient to block that fellows promotion for couple of years

Participant: non bail able offence

Justice Manmohan Sarin: so you know see the danger otherwise, if he are officers when compliant comes about allegations of violation of human dignity....

Adv. S. Martin: no I don't think our officers will misuse it...

Justice Manmohan Sarin: listen, law has to be framed in such a fashion that you prevent the feasibility or possibility minimize it of misuse, but tell me what is your objection to the proposition that this is the case where the legislature needs to revisit, needs to re define the law, needs to qualify..

Adv. S. Martin: but I have no different opinion on that...

Justice Manmohan Sarin: that's all..

Adv. S. Martin: but here see this act is enacted in the year 1993 so now we are keeping it ideal, we are not acted but on one side we talk lot of human rights violations, overcrowding of the prisons conditions of the prisons, police atrocities, custodial death, encounter death 100s of cases are coming up, in spite of this no one is acting, so what I want the legislature wants to revisit it I have no second thought about it but still such time are we going to keep quite and wait till good government or whatever it may be the government who sees this as a necessity..

Justice Manmohan Sarin: I think the answer is simple till that time whatever the cases clearly comes within penal offences or offences of statute so it can be taken..

Adv. S. Martin: absolutely correct my lord, my lord suggestion is very good...

Participant: we are taking cognizance of other offences...

Adv. S. Martin: yes, yes.

Participant: every crime is a violation of human right we are trying the offences in another way. POCSO act, SC/ST PA act.

Adv. S. Martin: yeah you are absolutely right

Justice Manmohan Sarin: different statues can be treated as violation of human rights also...

Adv. S. Martin: so this as my lordship has rightly pointed out till such time the parliament revisit this law and change all this we have to take a stand that human rights is well defined and we have to find other law, IPC, or other special laws and find out whenever it comes as offence we try that as that case.

Justice. Manmohan Sarin: we have difference of opinion now...

Adv. S. Martin: you say that they have not received any such offence...

Participant: for the sake of argument it is accepted that courts are established, there is existence of commission, if anyone wants to lodged a complaint, 1st question to whom the complaint shall be lodged?

Adv. S. Martin: that we are going to discuss, that's the next topic.

Justice Manmohan Sarin: that we will cover later

Adv. S. Martin: now we will take for granted our lordship suggestion that till such time parliament amends it we will come to a conclusion that wherever we could find penal offence in IPC or other law and give punishment we can proceed so that is our...many didn't receive it...

Justice Manmohan Sarin: you add the human.... what will happen is you will had there also the violation of human rights that section... over which there is no punishment prescribed...

Adv. S. Martin: and you should also understand this human rights court is going to deal only with offences committed by state or public authority.

Participant: why?

Adv. S. Martin: that is what is under scheme and law

Participant: why?

Adv. S. Martin: the other commissions are empowered with, to deal with other things, but courts..

Justice Manmohan Sarin: is there any exclusion? Point out the exclusion Mr. Martin.

Adv. S. Martin: let me explain then only you will understand if you want to say anything you tell me..

Justice Manmohan Sarin: we are saying is please point out the exclusion

Adv. S. Martin: yeah I am gonna come for that see there is this, if some individual is violated the human rights as sir has suggested then they have the remedy with the regular court they can, suppose somebody want to prosecute somebody under IPC why should they come to human rights court then all magistrate right cases will come to you, you want that situation to come?

Participant: that's the....

Adv. S. Martin: so if human rights is violated by an individual there remedy lies only before the police, regular court, there are several rulings to that effect, I will give you so the commissions in case of NHRC and SHRC even violations of individual they can go approach.

Participant:but we are dealing with offences arising out of violation they are 2 different things, one is violation of human rights that is for the commission to see but offences arising out of violation we have to see. Where are those offenses?

Adv. S. Martin: no what is the difference you mean to say about violations and offences...

Participant: yes..

Adv. S. Martin: all offences are violations...

Justice Manmohan Sarin: no, no please explain..

Participant: it says section 30 says...

Justice Manmohan Sarin: no no your point was right just explain...

Participant: I am only saying that section 30 says the human rights courts will have speedy trial of offences...

Justice Manmohan Sarin: offences arising out of human rights violations, when offences are committed while violating human rights then it should come to the court, but when we are talking of only human rights violations it will go to the commission

Adv. S. Martin: no I don't understand....

Participant: it has to be... all speaking together.....human rights define fundamental rights.....

Adv. S. Martin: As yeah as she rightly pointed discussed, we will again take up this discussion... huh? 40 IPC ok so what I want to say...

Justice Manmohan Sarin: in section 30 as you were saying the words are speedy trial of offences arising out of violation of human rights, now arising out of violation of human rights does not exclude offences which may be penal in nature also, so therefore it will cover those things can be brought before the human rights commission but what you need to point out is 1st that its a human rights violation penal part that is why in this situation if you see under the human rights act....just let me complete it that is why in the scheme of the act even for the commission there is a provision for recommendation and recommendation for prosecution so the way they visualize it is per se human rights violations will be taken up they will make the recommendations to the state for corrections with regard to offences which are penal or covered by statutes those will be referred to the either themselves they will have them prosecuted or referred that's the way scheme works.

Adv. S. Martin: so I mentioned that only offences of criminal court in this human rights courts will take up cases only if it is committed by the state or the public authorities, I no no....no see

this is not my opinion, I am not giving any personal opinion I am talking to you based on the citations which I will give you, I am going to give you also, so I am not speaking on air or I am not giving my personal opinions, so please hear me, so that is what Supreme Court and High Court has held that in the cases where the violation or offence or anything, violation of human right by a public authority alone or triable by the special courts because in all other cases if it is committed by an individual the regular courts are there so have it we will again go deep into it, but my thing is based on citation..

Justice Manmohan Sarin:only distinction making is that look for those offences which are there the special courts will look at it or the normal courts will look at it.

Adv. S. Martin: yes.. then next point is impunity and sanction to prosecute public servants, you all know about the legal position, there are varying citations some of them say that sanction is always necessary some of the courts have stated that in case they are under duty when they exercise their duty as public servant then it is the prosecution is necessary if they exceed their power or duty but in cases of, in cases where under the protection of human rights act in all these cases the court has stated that sanction to prosecute is necessary, so in case of a public servant the previous sanction under 197 CrPC is looked before taking cognizance and passing an order before issuing summons, later citation by Supreme Court but the Human rights activists and people who are against it because this will put an end to the story as soon as you say the human rights court says get a sanction and come there ends the story, sanction they will go to the government and it will go on prolonged it will, normally the government will not give us sanctions immediately so this all, under various....yeah this they will be giving it to you, they will give this PPT to all of you. the previous sanction under 197 is required before taking cognizance passing orders or summons this is the recent Supreme Court judgement, then there are some laws where it is specifically stated that sanction is not necessary but here is a case of water prevention and control of pollution act where it is specifically stated that no sanction necessary for prosecution under the act in such cases sanction is not necessary but in cases of our protection of human rights act there is no any such thing is given so under, since it is not excluded we have to go with sanction from the government

Justice Manmohan Sarin: the matter of the point you are making is in this act also when the legislature revisits it there should be provision made for no need of grant of sanction

Adv. S. Martin: absolutely....

Justice Manmohan Sarin: the minute they take it up every public police will say I did it in the course of my duty, although we go about rejecting it all the time, right, duty cannot be to cause torture

Adv. S. Martin: so in one of the Supreme Court...

Justice Manmohan Sarin:there should be an amendment that done away the sanction

Adv. S. Martin: ... there's another citation in which the Supreme Court says unless an impeachable evidence is on record to establish that their actions is indefensible, malafide and vindictive they cannot be subjected to prosecution saying sanction must be pre condition to there prosecution so the court would say that when there is impeachable evidence on record to show that there action is mala fide or vindictive that is what we could read from this citation. then the next point is no original jurisdiction here also the human rights courts they don't have original jurisdiction.

Participant: sanction jab private main complaint file hoga tab kaise hoga?

Adv. S. Martin: yeah even in case of a private complaint it has to be filed before the judicial magistrate, there must be a committal proceedings

Justice Manmohan Sarin: here also Martin the judgments are...

Participant: prior to issue of summons....

Justice Manmohan Sarin: always the law provides for it

Adv. S. Martin: yes you are right, in similar way here also there are some laws where special courts are constituted with the power of original jurisdiction but in the human rights courts it is

not so.. We have to go through the process of committal proceedings from the judicial magistrates

Justice Manmohan Sarin: PCA cases.... sanction

Adv. S. Martin: the human right court has no power to entertain a complaint directly, it has no original criminal jurisdiction, the private complaint will have to be preferred...

Participant: ek min sir.....

Adv. S. Martin: see the answer is yes...

Justice Manmohan Sarin: he is saying it will have to be committed by the magistrate or you have to take cognizance the power to take cognizance is not with the special courts or the human rights court it has to be a committal, unless the statute for which violation it been prosecuted itself provides for the.....

Adv. S. Martin: yeah in all these cases of protection of human rights cases, all the cases I have mentioned are only under the protection of human rights cases, magistrate to committing them to the court of session judge, courts cannot take direct cognizance of any offence without committal to it then, the remits the complaint to the concerned magistrate for committing to a special judge for trial and in accordance with even in private complaint cases this is the legal position now. so there are some laws like Tamil Nadu protection of interest of depositors act these all laws where the special courts are given original jurisdiction to take up the complaint themselves they can take cognizance but under these human rights act there is no such provision so we have to go for....

Justice Manmohan Sarin: do you visualize a situation where a case under Tamil Nadu interest of depositors act also comes under human rights act violation?

Adv. S. Martin: no...

Participant: sir private complaint mai jab cognizance....

Justice Manmohan Sarin: that would be an expanded jurisdiction

Adv. S. Martin: so only committal proceedings... here also as you rightly said law is, need to revisit law.

Justice Manmohan Sarin: Priya you are baffling..

Adv. Priya Hingorani: no, no he is reaching more toward you...

Justice Manmohan Sarin: if it is not to be taken as sexist move you better move forward rather than him.... chalo...

Adv. S. Martin: then torture..... Torture, it is not made an offence, it is already recommendation by the law commission.

Justice Manmohan Sarin: are you talking of mental torture? Physical torture? There is a difference.

Adv. S. Martin: both torture...

Justice Manmohan Sarin: physical torture could be hurt case...it is offence under IPC...

Adv. S. Martin: any type of torture, this has to be done...

Justice Manmohan Sarin: that's the distinction we were pointing out to you, you say human rights violation can be mental torture.... it may not be an offence under IPC....

Adv. S. Martin: no it is an offence no? Cruelty...

Justice Manmohan Sarin: cruelty under the matrimonial part that's different..

Adv. S. Martin: but torture if it is defined then it will certainly come under threatening them under false cases...

Adv. S. Martin: it is under right to life also we can bring it then the onus of proof in case of custodial violence as I have told you...

Justice Manmohan Sarin: Please, kindly hold on... please

Adv. S. Martin: yeah I am going to finish it

Justice Manmohan Sarin: please pay attention to Mr. Martin

Adv. S. Martin: onus of proof is

Justice Manmohan Sarin: just one second let me....you see let me put it this way.... Mr. Martin is a great human right enthusiast he has done research and there is commendable efforts been put in and I only wish if that had happened you know the judgements which he has got and the case material that he had got it should be circulated to you people a day in advance if that had happened possibly the appreciation of what he is saying would have been greater but nevertheless since you are getting this opportunity please listen to him what he has to sum up and say.

Adv. S. Martin: so now this onus of proof in the case of custodial violence or death under 113th law commission it has recommended for amending inserting section 114 B in the Indian evidence act to give onus of proof to the person who is in custody, so if somebody has injuries while in custody so the onus of proof is on the authority under whose custody he was there, it is recommended by the law commission in 113th report but it has not been done again so it has to be revisited by the parliament. then violation of individuals not in the purview of human rights act which we have already discussed..... no we will again discuss may be after finishing this, maybe you can note down which point.....yeah reserve your questions for further orders. then no special task force, see the human rights courts as we have already discussed it is only violation by public authority then suppose some police officer tortures him, asking him to give a complaint to the same police, how will they investigate. lordship was telling about fair investigation and we were talking about fair trial, so here there needs a special task force so that is what I mean here, the human rights commission has a special task force with them, but there is nothing before the human rights courts so that I see one of the limitations...no that is only for the human rights commission it is not at your disposal, you could see there only at the disposal of the, because the in several citations the courts have stated the human rights courts cannot investigate the matter, you could see in the definition itself they can only try the cases so

you cannot investigate, order investigation or you cannot have your own personal to investigate and give a finding and file charges and all....yeah so my suggestion is there must be a special task force at the disposal of the human rights court, this type of serious allegation of human rights violation particularly by law protector themselves or left without proper investigation it will shake the confidence of public in the entire Justice delivery system in particular in democracy as a whole or in order a CBI inquiry, there is a madras case where there was a heinous crime but the police since they are the investigators they refused to do it so court ordered CBI inquiry, then the state government shall launch in all cases see when normally people complaints to the magistrate when they are reproduced for remand if they say they are tortured what normally judges do? you have hospital in the prison itself they will treat you, they will what they say and send you, but what the Supreme Court says when the law in all the cases where an inquiry establishes culpability of the person on whose custody the victim has suffered death or injury an appropriate prosecution for the commission of offence disclosed by such inquiry or investigation is in accordance with law. in another case also it will be futile if the appellant, petitioner have made oral complaint before the magistrate that he has been assault by the police to direct the police to register case and investigate which normally people don't do. then this Tamil Nadu paalgudi makalsangam case which I have already mentioned the court has stated nobody has taken human rights seriously and have exploitation continuous unabated the trend as it appears is that man in power sitting in the....power how incomplete the protection is as yet how deep seated or the causes of the violation and how limited the strategy or organization which seeks to protect them or the questions agitated the humanist. so this is what we are discussing now. see there are, everybody has accepted that human rights violation are in the increase our High Court and Supreme Court has heavy come on that but what is the mechanism available to check it, bring those people who are violating to book even the available mechanism is not effective and needs lot of change. so that is why we are here to discuss how, what could be done with the available resources, law, power with us, so then as madam has rightly pointed out there is lack of awareness, how many people know that there is a human rights court in your area, some courts have board some court doesn't even have a board of human rights court, you may have it but in many places people doesn't know that there is a human rights court. yeah there is a need to popularize this you may think suppose we say this people will come with a complaint and we will be overburdened with work but there is a, we

have to popularize it whenever we go for legal aid camp and distribute pamphlets so this will have a check on this, so the NHRC and SHRC and legal services authority already have provision for creating awareness on this so they have to do it, then there are several studies by several people like.... international and government bodies all of them have studied only about NHRC and SHRC no one has studied about human rights courts this is actually fate only I think the effort by you now is a pioneer effort under the lordship direction and judicial academy has taken this initiative, this is not something to teach you this is a meeting to access the working of human rights act so you are all pioneers, what I say, what madam says what lordship says is not the end of it is not the final opinion, so we have to work on it as our lordship has rightly mentioned that the parliament has to revisit it and we ourselves has to change our perceptions on human rights, and get started to make human rights court actively functional, let us try to protect the human rights of a common man so I stop here, now maybe that point we will discuss.

Justice Manmohan Sarin: we will discuss any particular point in mind you have?

Participant: ... it is the last point.... therefore the question of IPC offences and some other offences are ruled out now.

Justice Manmohan Sarin: why

Participant: Public servants are not responsible for the human rights act

Adv. S. Martin: no what I said mentioned is the offences or violations of human rights, that is what he also raised.

Justice Manmohan Sarin: I think he wanted to include public servants, who are acting on behalf of the state especially police and others there is exclusion with regards to armed forces and others and that too for certain parameters when you see one of the sections for NHRC but a police officer would definitely be included it's not that if he is a public servant he gets excluded.

Adv. S. Martin: no, what I want to say is the human rights have courts have jurisdiction only for offences committed by state and state authorities, public authorities.

Justice Manmohan Sarin: areee bhai what he is asking is supposing a inspector commits an offence would he come under state or not?

Adv. S. Martin: yes..

Justice Manmohan Sarin: that's what I answered why are you contradicting that?

Adv. S. Martin: no no I didn't contradict..

Justice Manmohan Sarin: that's what they understood. So he would be representing the state put it that way

Participant: where it is taken

Justice Manmohan Sarin: let's put an end you have had enough of this. aha now put it this way sum it up for you after that if you like we will discuss it. I think we thank Mr. Martin, you have anything to say Priya, we thank Mr. Martin for a very impassioned he believes in what he is saying but if you would give me a minute the greatest thing which it can do I see the benefit of the human rights act is this as far as the district judiciary is concerned barring some cases in public nuisance where you can exercise and implement the fundamental rights, the right of drainage Bombay municipal case and others the district judiciary had really no role to play as far as fundamental rights are concerned I think you look at it from another opportunity this is the 1st time the district judiciary is getting a forum into implementation of a fundamental rights and human rights violation that is an area which has hitherto been the domain of the High Court under 226 and 227, under article 32 the way therefore I would request you to look at it as a boon in the exercise of your jurisdiction where you are getting an opportunity by looking at human rights violation essentially under part III and part IV so you get to implement those provisions so you look at as your expanded jurisdiction and an area which is empowering you, to implement the constitutional provisions..... after committal yeah even that or once supposing the act is amended the special statute is there then directly also the point that I am making is it is empowering you jurisdiction there is the 1st time you are getting the opportunity to look at human rights violation part III IV of the constitution which you would otherwise have not dealt with till you reach the High Court you know that is the ultimate many of you do some don't so

this is the occasion where you will be getting the taste of implementation of fundamental rights and human rights violation.....no, no physical torture he meant I clarified it mental torture, would be violation of human dignity na? Supposing...

Adv. S. Martin: that is...

Justice Manmohan Sarin: Areee.....mental torture is not but physical would be.... aree bhai can't we help out somebody....

Adv. Priya Hingorani: no, no it will be mental torture as well....

Justice Manmohan Sarin: so thank you gentlemen I guess you will excuse me I have a flight at 4.30 it has been a pleasure being with all of you and I hope we give you a opportunity to participate and we had an interactive session and let me put it to you the object that we gain from each other's experience, we impart the writ jurisdiction what we have been doing and hear from you inputs on what you have been doing on the grass root level because let me tell you there are many of judges who have not had the experience of, exposure of being an trial court so I personally believe a lawyer is not complete till he has practiced in the district court, because to my mind if he straight away come to appellant or writ court he man is lacking in basic knowledge, he doesn't know how evidence is to be laid, what is cross examination, what is relevancy, what is not relevancy, all those things you can't reach or learn in writ jurisdiction or appellate jurisdiction. so this is I must tell you on that token only after I corporate job I took over to practice I 1st went for 5 years in the trial court till you mastered that art there is no point in coming to the High Court. Thank you.

Ms. Nitika Jain: can we please have a big round of applause for sir.

Adv. Priya Hingorani: thank you very much and on behalf of sir and myself I would like to invite all of you whenever you are in Delhi please come and see us, you can see sir in his residence and me in Supreme Court in chamber 40. Thank you.

Ms. Nitika Jain: we are done for the day, we will be starting tomorrow at 10 o'clock and thank you sir on behalf of NJA, sir has been very kind taken care of the entire day even after we could not get 3 resource person or four but sir very well took care of the... thank you sir.

Justice Manmohan Sarin: thank you.

Adv. Priya Hingorani: you are most welcome to come to Supreme Court you will get enough.

Justice Manmohan Sarin: what they really want to say is I prevented them from answering you.

SESSION 13

Human Rights of Victims

Dr. Geeta Oberoi: a very good morning to you, it seems all of have become great friends and musical chairs are being played I see lot of shifting actually, so new group, new arrangements, what should I say, all people from this side have gone that side, all changes are there.. yeah ok..due to task..ok.

so, very good morning this is last day and we have with us Hon'ble Justice S. Muralidhar, Dr. S. Muralidhar, a judge of Delhi High Court Justice Muralidhar started his practice in Chennai in 1984 and in 1987 he shifted to Delhi to practice before Supreme Court and Delhi high court he has done a lot of pro-bono work which includes cases for victims of Bhopal gas leak disaster and those who are displaced by dams on Narmada he was appointed amicus curiae in several PIL cases and in cases involving convicted on death row, he was also counsel for NHRC, election commission and part time member of law commission of India he was appointed judge of Delhi High Court in year 2006, he is awarded PhD by Delhi university in 2003 and he is author of book law, poverty and legal aid access to criminal Justice which is a book published by LexisNexis Butterworths, I have for today's both session Hon'ble Justice Muralidhar so this is actually a discourse between you all and Justice Muralidhar, I am sure you are going to enjoy this as much as you enjoyed Prof. Moolchand Sharma that day, so I leave it to you now.

Justice Muralidhar: a very warm good morning to all of you yeah, we couldn't have some exciting 2 sessions, the second is going to be a bit depressing I am going to warn you right away because we will be sharing stories of victims, the first session is on the rights of accused, so what I have done is like we use to do earlier in the judicial academy here I have done case studies which Nitika has probably distributed to all of you, I would require the groups to split up, see what I am really trying to achieve through the session is to brush up our knowledge, we are all sitting in courts and dealing with all these issues in different context, just to bring together all that learning and experience and also give a practical side to it, many of these issues may sound hypothetical but some strand of the problem may have arisen to you at some point in your judicial career, it's also to exchange notes from the colleagues of other states because there can be a geographical peculiarity for instance the experience with the bar, each one of you may have

a different experience with lawyers and the quality of lawyering how far have you taken a personal initiative when the lawyer is found wanting because we all know that the system of legal aid in this country is much to be improved upon we don't have the kind of lawyers which we look for in many of the sensitive case at the same time there is also problem of dealing with prosecution and protection of witnesses, much comes to the responsibility of judge I think the media doesn't realize how much the judge has to do the balancing act, while making sure there is speedy trial and also ensure there is no miscarriage of Justice, it is these kind of experience we want to bring on the table in this session, so which is what has gone into planning these case study 2-3 are new and some 3 of them have been used earlier, I want us to 1st identify the international covenant, because you must have been told about it in civil and political rights and where are other conventions and covenants which you can recall you don't have to specifically tell us the precise provision the idea is not that you straight away apply the international covenants the idea is to recognize that under the protection of human rights act the ICCPR has become part of the Indian statutory books so when that act refers to human rights it refers to rights under the ICCPR and one broad principle that you need to keep in mind is as long as the international covenant is not inconsistent with the domestic law you can take recourse to the international law, so whether it's a child rights conventions or the international covenants on civil and political rights it expands the scope of the right which is defined under the statute so keep that in mind and now you will find under the unlawful activities prevention act I don't know how many of you have seen that act one of the problems precisely deals with it although we have not set out when we said what are the provisions of law you have to invoke, unlawful activities prevention act is a new species although the act is the new one when they disbanded the POTA they brought many provisions of the POTA into the unlawful activities act, and you will find a schedule to the unlawful activities act which list out several conventions, so who is doing group 1 it's better they have the unlawful activities act and in that schedule you will find a large number of international covenants set out, conventions are set out, on terrorism and all kind of things, so no longer is it open to that trial court to say I have nothing to do with the international law tomorrow if you get a case under the unlawful activities prevention act if you are looking into the definition of terrorism you have to know what these international covenants and conventions say, so that was the whole idea of dividing problem 1, one of the problem touches on the issue of age, we only say it is a young looking accuse, so as a judge when you find a young looking accuse

how do you respond to that is the question, last I want to request all of you if you are 4-5 in a group, you must be 5-6 in a group, I would just, it's like a role play I will request one of you or 2 of you to become lawyers of the accused, 2 to be prosecutor and 5 person like judge so that you get within the group all the possible points and when you make the presentation one of you or maximum 2 can make the presentation so what we will do is we will break now, it's 10.05 we will come back at 10.30 I think 25 mins is more than enough for you to discuss and note down your points the person making the presentation will make the points, I have raised 4 questions in the end those are very relevant questions because there are many instances you will find the trial collapsing before you so what do you do how do you responds to that when someday standing without lawyer some key witness who has to appear has not appeared or who has appeared and turning hostile before you so these are situations like as a judge what you do while you are deciding the case with something extra that is what we want to bring out so that is the whole idea of the exercise, so if you can sit in different places...no because it can get noisy that's why I am saying if they can go to, there is one table here I will just move from table to table in case you have doubts about the problem you can ask me, any questions you can also ask..

Participant: ... please can you identify the group because I am not able to find my group

Justice Muralidhar: I thought.. Yeah so whatever the group number indicated on the sheet that will be the group..

Ms. Nitika Jain: can group number one raise your hand. Sorry to interrupt sir. Group number 2, group number 3... group number 4, 5 , 6

Participant: just the 2 of us..

Ms. Nitika Jain: so you 2... group number 6 sir...

Group Discussion....

Justice Muralidhar: I am afraid the time is out please come back to the table, yeah... kindly come back to the table... can I request group one speaker to join me here, group 1... or if you want to sit there and speak you can, alright. what we will be doing right now is that we will

be distributing the problem to all of you so that you can follow what is happening so that no time is wasted in repeating the facts, just for your convenience I am going to read the facts of case 1.

this is a case of a terrorist attack... yeah you can see on the screen also in front of you, the important thing is the series of arrests follow and the person is remanded for police custody for 100 days, so that is one thing you need to make note of the second is being taken to an unmarked location where the person is tortured for about 10 days and he makes the confession, another arrest is taken place and there is a narco test conducted so there is an issue on narco test and based on the statement made during the narco test the residence of Z is searched but without a warrant and a series of pamphlets and books containing Marxist teachings are collected so Z is also arrested and interrogated and he refuses to make a statement then, because this is a terrorist attack the bar association has passed a resolution saying no lawyer will defend any of the accused, so both the local bar association in Bastar as well as the state bar associations passed these resolutions and this is the scenario and we want group 1 to tell us what issues they discussed, what are the provisions of law they looked at including the constitution and international covenants if you can meanwhile I will put on the screen what is the possible response, yes please?

Participant: I am representing group 1, very good morning to all our problem has been enlightened by the Hon'ble judge now the questions allocated to on the basis of the problems are 1. which provision of law would you invoke and to what effect... a terrorist attack has been taken place and bomb blast has been there in a major city in India in such a situation section 15 and 16 of the Unlawful Activities Prevention Act is attracted in this case and section 121, 121 A IPC and section 122 IPC are attracted moreover section 3 read with 5 of the Explosive Substances Act and section 3 read with section 25 Arms Act and section 9 B of Explosive Act is applicable in this case, then regarding the procedure adopted by the Investigating agencies, there are serious human rights violations including violation of article 20, 21 then article 22 is also there because the bar association is reluctant to give...

Participant: elaborate on 20

Participant: article 20 protection in respect of conviction for offence, that no person shall be convicted of any offence except for a violation of a law enforce at the time of the commission... nor being subjected to penalty greater than that which might have been inflicted under the law enforce as the time of the commission of the offence, 2. no person shall be prosecuted and punished for the same offence more than once, 3. no person accused of any offence shall be compelled to be a witness against himself... *Selvi v. State of Karnataka*..

Participant: as far as the provisions of CrPC are concerned... section 93... 167 my lord

Participant: 167 is violated in this case

Participant: what provision of 167?

Participant: when... yes we have to analyze section 43(d) and section 167, 43(d) of UAP act and 167.

Justice Muralidhar: so up to 90 days is permissible beyond 90 days it becomes impermissible

Participant: but with the, on the request of the public prosecutor the court can extend the remand for 180 days

Justice Muralidhar: that's right, so in one short you can't it for 100 days.

Participant: yes that cannot be because the maximum police custody is only up to 30 days in this case, then that is against the provisions of law, then regarding the confession is also not legally.

Justice Muralidhar: what about a search without a warrant?

Participant: search without a warrant that can be in this case it is no problem because an authorized officer of investigating agency is competent to make search in this case even without warrant as per the notion of 43(c). it says...

Justice Muralidhar: 43(c) of the UAP it says the court shall apply, there is no modification of what the courts says.. no, no section 165... Because the earlier search if you look at 92, 93, 94

this is only for stolen property and under 95 only publications that have been forfeited you can have search warrants..

Participant: no that is section 43(a) power to search, arrest etc, any officer designated authority empowered in this behalf..

Justice Muralidhar: no but there is no modification of the CrPC provision for that...

Participant: yes that is there, the chapter is kept out concealing any building conveyance or please authorise any officer subordinate to him to arrest such a person or search such building.

Justice Muralidhar: true but this only about authorizing an officer to search but while undertaking the search CrPC provisions has to be followed that is what 43(c) will tell you, 43(c) of the UAPA all arrest, search and seizure shall apply..

Participant: no that is in so far as they are inconsistent with the provisions of this act, to all search and seizure...

Justice Muralidhar: correct so where does this act permit you to deviate from CrPC for making searches and seizures there is no deviations, it is only about authorizing an officer to undertake the activity but to satisfy the requirement of CrPC you have to go back to CrPC so if you look at 95, unless certain publications are fortified you cannot go there and search without a warrant they are now looking at searching without a warrant.

Participant: so if you look at 165 you will have to make a noting that it cannot be obtained by undue delay, she has to write the grounds of his belief you have to ask for case diary you have to see whether this noting is there what it means is, what is the procedure for search and seizure, right.

Participant: so it is an illegal search

Justice Muralidhar: that's right so that could be a point, what I am saying is there could be a point that is an illegal search where you have to ask whether the police officers recorded his

reasons for being satisfied that if he doesn't seize it immediately by having a search the seized material may not be available to him

Participant: then the confession on torture it is that the confession is dealt by section 24 to 26 of the Indian evidence act that is also there and whatever he said discovery is there the mobile phone has been recovered from the place of incident.

Justice Muralidhar: no see on the point of the accused since the bar association is on strike, how will you deal with it? And from what stage the accused is entitled to a lawyer

Participant: from the date of arrest on wards article 22 is there

Justice Muralidhar: correct but he cannot, he can have a lawyer of his own choice but not to a free lawyer.

Participant: free lawyers we have to provide my lord...

Justice Muralidhar: so we don't have fundamental right of free legal aid we only have 39 A, but we have the legal services authority act section 12, alright. Anything else? have you noticed the change to section 164 and there must be a problem there, the proviso have you seen the proviso to 164 so in the *Ajmal Kasab case* the Supreme Court has said you have right to have a lawyer even in at this stage and it's a fundamental right as part of the right to access to Justice, yes for all cases, how will you give effect to this have you ever thought of this the proviso says provided that any confession and statement made under subsection may be recorded by audio video and electronic means in the presence of the advocate of the person accused, see this has to be read with sub section 4 which says that I have explained that he is not bound to make the confession, if he does so it may be used against him so traditionally if you look at the case law you have suppose to ensure that there is only person making the confession and the judge and there is nobody else correct, you have to make sure that this person is not under any undue influence or under any pressure to make a confession so now when it says it has to happen in the presence of the counsel of the accused how do you going to satisfy both these requirements have you thought of that? yes because also the privacy look at the classic case like it is a terrorist case it would be for instance a rape victim, her statement is been

recorded under 164 and the accused now says in term so the proviso to 164 a lawyer has a right to be present so what does presence means here? so it hasn't come up for interpretation and this is only my way of reconciling the conflicting situations here one is so that we can have the lawyer seeing it and not hearing it and under the same time the person making the statement not knowing there is a lawyer so maybe he can hear what is happening you can have mike, a speaker outside but there is no way you can make him physically present this is my reading if anyone else has any other interpretation you can give it how will you do it? because usually called them on 2 days on the 1st day you call the person you make sure in fact there is a recording that I have explained to the person that you are under no compulsion to make the statement and then you adjourn it to the second day and on the second day you say he has again come and he has again said he is in a clear frame of mind and wants to make a statement and usually you say that there is no one in the courtroom except me and the person so how will you give effect to this, so my own understanding is, I don't know how they have started this without looking at all the case law that has gone bad, so you can possibly say that where the person is there the lawyer is there he is present but he will not be able to see influence or intimidate the person can give the statement that's the only way you can reconcile it, yes... sorry proviso?... correct...right.. no even if you.. 1st of all the audio video recording he might ask for it now because of the proviso.. may be advocates have still not noticed this proviso but if they ask asking for it they will start asking for it...

Participant: recording the confession through electronic media is different in case the statement is recorded through electronic media alone the presence of advocate is necessary because there is no authentication by the deponent that is for the.. Obviously the presence of advocate is necessary...

Participant: sir here the court is putting a very difficult situation, lawyer community is boycotting the accused and they are... even in the state level they are... the court should be able to give protection...

Participant: ok request Hon'ble High Court to transfer the case from this place to another High Court.... no state because state bar council has passed the resolution therefore the High Court can transfer the case to other state.

Justice Muralidhar: see there the case law is and the High Court has to intervene and point out is that this right to be defended by lawyer, *Panduranga v. State of Karnataka* and *Mohammad Rafi v. state of Tamil Nadu* these are important decisions which all of you should note or I can also leave it to Nitika she can also distribute it to you, so you need as a state legal service authority to probably file a petition in the High Court and make the bar association respond to that and say that such a resolution is illegal, I think there the legal services authority will have to take a positive step because in every step you cannot do the transfer it's not practical.. yes.. Right, no see the only difficulty is that all are part of bar association also.. see the only thing about security safety and security of the lawyer, see we added that because the lawyer should not be beaten up in the court so there is no safety of lawyer when he leaves the court.... and this is known to happen even in the Kasab case if you remember they went to the residence of the person and started attacking. I think we should thank group 1 they have done a very nice presentation we will move on to the second...yeah case study 2 I will just... so this is about a women being picked up she is a primary school teacher and she goes to the cinema and comes from there she is arrested by 2 men in plain clothes without identification tags... so that is one issue and she is accused of kidnapping a 10 year old child she is taken to a police lock up she ask to speak to the lawyer and family members she is only allowed to make a phone call to her sister then the lawyer comes thereafter but she is allowed to meet only in the presence of police officers, the lawyer demands that she be released that no case has been against her but the police says that we have photographic evidence of her talking to some unknown person and missing child but denied to show the pictures to the lawyer, she is diabetic she requires regular insulin shots her sister is permitted to bring her medication and the police station to administered by the doctor and she is kept in the police custody overnight taken to the magistrate and she confesses that a person has approached her the previous day stating to be the uncle of the missing child and she allowed the child to leave in her custody, then her statement under 164 has been recorded, in the remand application the judge says that subject to daily administration and medication he grants police custody so she applies for bail for 3 consecutive hearings and the prosecution seeks adjournment saying that the child is still missing the matter is sensitive, now they have run out of fees because 3 adjournments, and the 4th hearing there is no lawyer and it's now more than 2 months and she is continued to argue that she

is a diabetic she is innocent and the prosecution seeking some more time to find the challan so how will you decide the matter? so this is quite straightforward whoever is the case to.

Participant: yes, my lord 5 of us formed the group, 2 for prosecution and 2 for defense my lord and it was argued by prosecution that the allegation is under section 363 IPC kidnap and kidnap from lawful guardianship and added to the allegation the police have the material of a photograph the women herself made the confession to court..

Justice Muralidhar: let us all the procedure, procedural violations you noticed CrPC provisions..

Participant: then the defense has noticed my lord violation of section 41, 41 (b), 46, 54 304

Justice Muralidhar: what about 41(b)?

Participant: 41(b) my lord identification, tag is not available for the...

Justice Muralidhar: no but what will you do as a judge, suppose all this you notice what will you do as a judge suppose all of this you notice what will you do, t6he question is regarding notice, ok there is a violation this man didn't have an identification tag or you draw some conclusions from that you will say yes, yes there is a violation now go on to next point or what will you do?

Participant: there are 2 things that were brought into the discussion my lord one is to recommend for action against the IO by reporting to higher officers and the second one is in terms of section 15 contempt of courts act a contempt application to be moved to the Hon'ble High Court for violation of D K Basu..

Justice Muralidhar: but what you do for the accused that can go for next 2 years your contempt application, the accused is not having bail the prosecution is seeking adjournments after adjournments..

Participant: we found in the discussion that no offence under 363 is made it is a case of 336 IPC my lord negligence in handling affairs of custodian allowing the child to be harmed

Justice Muralidhar: no but every time a remand is sort or extension of remand is sort you should write in the order the series of violations will you grant the remand in spite of being pointed out that these are the violations or you give a conditional bail, see this is the whole point, it's not a mechanical order of remand see when somebody is pointing out you have to make sure that you make note of these violations whether somebody points it out or not is also, she is herself telling you may be there is her lawyer telling you that, you have to make a note of these provisions only then you will be able to justify order whether you know refusing the police remand for further custody so there has to be a consequence to the violations of the CrPC although it's not spelt out, it should help the accused asking for bail because the arrest is illegal otherwise the whole purpose of inserting this provision is lost, the D K Basu violation suppose you say there is that violation I will refer you to the High Court it doesn't help the accused. Yes. this examination with the medical officer did you noticed those provisions?

Participant: yes my lord, medical examination was not done.

Justice Muralidhar: there is 55 A I think which is important which you need to note of the CrPC, see there is a duty now on the police to ensure health and safety, so you should actually ask for an independent medical examination as a judge you can ask for medical report ask the accused to be taken to the best medical facility available so that you are satisfied that the health is not deteriorated in custody, see these are all very vital provisions because we have so many deaths in custody where the police comes and says can you ask your colleague to participate there is a need now to make sure that you participate as a judge, what would seems like insignificant at one point level but procedurally it becomes very very critical because we have numerous deaths in custody and we are told that these are all due to natural causes heart attack, usual excuses are given a very little relief is actually available because even if they file a writ the compensation it is too little, too late you can stop some human rights violations at the level of magistrate courts we should make every effort to do that, now this right to be defended again there you have issue so when you have a lady who is an accused any special you will take for that?.... no no let the group speak yes?

Participant: my lord as...

Justice Muralidhar: no, no after the 4th hearing there is no lawyer they have run out of fees, did you notice that? in fact most cases by the time bail is over most people has run out of money that is the harsh truth very few accused are able to afford fees for a lawyer, if she is a lady accused you make sure there is a lady lawyer because there will be somethings she will be prepared to tell a lady lawyer who she's not able to tell a male lawyer. so these are sensitivity of a matter. Anything else? This Hussainara Khatoon and D K Basu how many magistrates actually have these judgements with them? And how many of them are following it? Because you are all dist. judges now I am sure some of you are part of the DLS the dist. legal services authorities are these supplied regularly these kinds of guidelines which are here in Hussainara Khatoon and D K Basu are they provided to the magistrates.

Participant: Karnataka they are following my lord, during the time of arrest and investigation...

Justice Muralidhar: but how many orders have you seen that magistrates make a note of violation of D K Basu.... see that is the point I think in your own levels when you have sessions in your state legal services authority I think you must sensitize magistrates and make sure, I think you need a manual regarding arrests which needs to be prepared because the remand thing has become a routine thing most magistrates don't even look at the accused they just mechanically signing, whatever be the pressure of work ultimately it's the liberty of a person and they need to show these extra sensitivity when it comes to these kinds of issues. Thank you, thanks to group II case study II so we will move on to case study 3 and then take a break for tea and then come back for.. case study 3 it starts with S. is a young man so when somebody is a young man who only speak assamese anyone here from Assam?... sorry? who has case study 3 we will have the case study now, this is your case study so S. is a young man and he doesn't speak the local language he is a cycle rickshaw puller and there is an anonymous called received by the saying that S. is the person who is involved in rape and murder and in a hurry without making any case in the case diary he rushes and picks up S, S then tries to run away then he is bitten up with a latti, handcuffed taken to the police station taken to the station kept that for 2 days and asked many questions in Hindi, which he didn't answered, so I think judicial mind will already start noticing several provisions here which get attracted, then he is shifted to a prison produced before a magistrate to simply sign an order and put to questions in Hindi, the magistrate also put

question to him in Hindi which he didn't answered he repeatedly asked why he is arrested but no one could understand him he was taken back to the police lock up where he was kept for 6 months no communication to outside world and then charge sheet is filed and the main evidence is the voice sample of the accused being matched with the person who phoned the victim just before she disappeared, he tried to state that he is not involved with this case he has no lawyer he also asked to get represented by AJ who is a senior advocate whose name he had seen in the news and then the police applied to collect the DNA evidence to match the evidence collected from victim's body including slobes of semen and saliva, so what are the issues now?

Participant: he is not been arrested as per section 60 A of the CrPC no person can be arrested except under the procedure laid under the code.

Justice Muralidhar: what is the 1st issue that comes to the mind when he produced before you.

Participant: whether he is a juvenile or not.

Justice Muralidhar: so what will you do, as a judge what will you do?

Participant: we will refer to the medical board to ascertain his age because there must not be any documentary evidence to ascertain his age instantly so we can refer to the medical officer to ascertain the age by medically then after fixing the age he can be remanded to the custody either to the house, if he is an adult...

Justice Muralidhar: what do you do suppose till such time the age is not determined, do you fix a time limit for that? Where do you keep him? Where do you keep the person?

Participant: with some NGOs there are any NGOs available he can be given custody or to the home authorized home of government

Justice Muralidhar: no, so will you send him back to police lockup. Where will you send him?

Participant: we cannot send him to police lockup.

Justice Muralidhar: but is that what is happening?

Participant: this happened in this case...laughs..

Justice Muralidhar: so you fix a time limit for age determination.

Participant: immediately we will send my lord.

Justice Muralidhar: will you fix a time?

Participant: within 24 hrs. the age can be ascertained.

Participant: 7 A not in terms of medical report age has to be determined...

Justice Muralidhar: that is one issue as far as juvenile Justice is...

Participant: yes my lord again there are violations of D K Basu case 40, 41, 41 A and all other violations, ...

Justice Muralidhar: see I am only curious as I have told in the previous, when we notice these violations to what effect these are violations, merely because the CrPC is silent about any consequence it only says you have to do a, b, c, d suppose you don't do that what are the consequence otherwise it all will become meaningless.

Participant: we can consider, take a note while considering the bail application my lord simply because there are some violations that we cannot release the accused instantly in case of a grave crime like this rape of a minor girl so we cannot release the accused on basis of violations alone you can consider at the time of granting bail

Justice Muralidhar: but as and when you notice, my only attempt here is

Participant: violations in the remand order the magistrate has to know arrest at particular time, produced at particular time there are violations, everything has to be noted

Justice Muralidhar: so there has to be some kind of a check list? what I am saying is you have to prepare a checklist so unless you talk to the accused you can never get this information.

Participant: I think there is a problem my lord the language of the accused is assamese no magistrate no police officer is able to understand words spoken..

Justice Muralidhar: so as a judge suppose the man is not replying

Participant: the judge has to arrange for an interpreter, translator.

Justice Muralidhar: so let's say you put 3 questions in Hindi you get no reply.

Participant: necessarily he has to engage a translator who knows his language he has the rights to be conveyed the grounds of arrest in this language. Then alone remand can be passed my lord, in this case no remand order has been passed he has taken back to police custody and he was kept there for 6 months, it should have been the judicial custody and not police custody

Justice Muralidhar: just one minute, when you have language issues what how do you deal with language issues, because there many such, lot of migrant labor a lot of movement across the country like in Kerala you have many people from Orissa and Bihar..

Participant: just body movements my lord

Justice Muralidhar: I think in Tamil Nadu..

Participant: some person moved from west Bengal

Justice Muralidhar: no, people from Nepal

Participant: we are not able to understand their language, they are not able to understand our language, only body language....

Justice Muralidhar: so what do you do to those cases?

Participant: we have to follow 279 and section 282 of the CrPC...

Justice Muralidhar: yes, yes...yeah you will have to requisition, I think you will have to discuss some of these issues because of large movement of labor from different parts of the country, you

must be able to raise these issues in legal service authority or to judicial academy better is to raise it to state judicial academy, then get the High Court to talk to the state government for administrative side. to make sufficient arrangements for these things because police officers want to throw up there hands they don't have means

Participant: sometimes they will produce some person who knows the language of the accused at the time of producing the accused, if the magistrate is strict they will produce some other translator, we can record the assistance given...

Justice Muralidhar: see all that requires a judge to be pro-active unless you have judge who knows the law and who proactive many of the violations is otherwise will go unnoticed and become a mockery we have all these provisions in CrPC, constitution, international covenants but actually not on the ground.

Participant: further in this case he was in custody for more than 6 months my lord he is entitled to statutory bail on...

Justice Muralidhar: but somebody has to point it out unless he has a lawyer nobody will point it out...

Participant: even at the time of extending remand we use to grant bail..

Justice Muralidhar: now what about voice sample and DNA, what is your reaction to that?

Participant: as far as voice sample is... it is electronic evidence it has to be recorded and the person has just now, it has to be recorded in the presence of an advocate...

Justice Muralidhar: DNA sample what are the new provisions for DNA?

Participant: there are provisions in CrPC my lord, 53, 53A and 54 of CrPC it provides for medical examination and tests

Justice Muralidhar: let's see 53, 54, because there are amendments now. 53, examination shall include examination of blood, blood stain, swabs, semen, including DNA

Participant: yes my lord 53A, when a person is arrested on a charge of rape or an attempt to commit rape there are reasonable grounds for believing that the examination can be done.

Justice Muralidhar: now how will you test this, suppose this is challenged being violative of 23..

Participant: but there is a provision now, the law is changing is my lord...

Justice Muralidhar: it can only be corroborative, only secondary that's right. Anything else?

Participant: after trial we can award compensation 358 CrPC to the accused.... 250 CrPC we can invoke 250 CrPC

Justice Muralidhar: anyone else wants to say anything else on this problem? He insist on being defended by a particular lawyer whom he has seen on TV?

Participant: that cannot be done my lord he is entitled to defend by a counsel but not of his choice, because he can opt for Jethmalani...

Participant: ... I think Hussainara Khatoon the lordship has said state legal aid cannot be extended...

Justice Muralidhar: no that will no longer be good after the legal services authority act, in fact that has to be reconciled with legal services authorities act, and section 12 says everyone in custody is entitled for legal aid, so no question of denial of aid, that doesn't arise any more now. Anyone else with any reaction to any of the issues? any practical issues here? so language is definitely one important element we could also have people who are unable to speak so we don't have even sign languages, may be people who are poor don't know sign language

Participant: in such cases we call for the... who know the language of the.... for deaf and dumb there are some signs which denotes something but the witnesses doesn't know the signs.... it is very difficult my lordship there is one practical problem.. in one case that is the case of assassination of CM of Punjab Beant Singh, one accused has been arrested who has proclaimed

offender he has refused to engage any counsel, he said he will not have any legal aid counsel, no other counsel, what is to be done in that case?

Justice Muralidhar: there are 2 ways one is to record order what he is saying but any way request an amicus curiae to assess the court, you can always tell the lawyer to assist the court he is friend of court so no difficulty in that, so that you make sure there is no violation no provision goes unnoticed so this is important

Participant: exact role of amicus curiae my lord is not to take briefs from client

Justice Muralidhar: no but these kinds of violations he will point out the position in law that is important...submissions.. that's right, and may be after seeing for some time the lawyer or accused gets confidence that he is a genuine person see many of them say no because they don't trust lawyers 1st of all they believe that lawyers will demand money and unless you pay the money they will not perform see this is the kind of impression people have we have to make an effort to change that for which we need cooperation of the bar so as a judge you should be able to locate in the bar some better lawyers who are more responsible

Participant: this is very difficult my lord everyone is on money

Justice Muralidhar: no there will be one or 2 lawyers in the bar association, all depends on the good will you generate

Participant: even if we appoint a lawyer from legal services authority to defend the case he may not come at the time of trial

Justice Muralidhar: true that's why I am saying we have to engage with the bar there will be certain members who will be more reasonable with the others, we have to make best of whatever we have I agree with you 90% of the bar are lawyers looking for the next case to make money, they may not have the same sense of responsibility but as judges it is extra burden on us to try and locate those lawyers so it is an effort we try and make despite that we are not able to find of course nothing can be done, but I think we must make that extra effort. ok we will break for tea, 15 min break and come back at 11.45

SESSION 14

Human Rights of Accused

Justice Muralidhar: so we now move on to group number 4, the facts are that again a young looking person picked from a slum in Delhi, he refuse to disclose name and age is, he is sent for medical examination the doctor signs a report after glancing at him and without conducting thorough examination, his fingerprints and DNA samples are taken and he is kept in police lockup with 3 other men he is produced before the magistrate and private complain who says his wife had confessed to him that this person has engaged in sexual intercourse with him before the marriage when she was still 17 years old, so he makes strange sounds and doesn't answer any question the police request for a 15 days remand for collecting a DNA evidence then the magistrate allows the remand in the sessions judge the lawyer and the legal aid cell was sort to be appointed no lawyer could be appointed for a period of 6 months, finally a lawyer was assigned who without meeting or interviewing M defended him in a trial which took place in 4 years due to repeated adjournments, a guilty verdict was reached on the basis of the lady's confession and consent was irrelevant for statutory rape, the lawyer refuses to appeal another lawyer was appointed who on talking to M realizes that he had some mental disability and sort to overturn the conviction on that basis, M having been convicted of the offence continued to be housed in the state prison along with other persons, yes do we have the group? Yes please... I think you have to speak into the mike...

Participant: according to section 391 of the CrPC the appellant court direct the lower court to take further evidence and inquiry about these points because the accused is young appearing and unsound mind and to inquire the matter magistrate, appellant court directs lower court to inquire the matter about 2 points, 1st the age of accused person and secondly the mental status and position of the accused person, duty of magistrate before the, because it is the duty of magistrate before the starting of the trial, he will examine the age of accused, in this case magistrate has not done his duty and several provisions of CrPC are also violated, section 41 (a), (b), 46, 53 A, 54, 55 and 60, all the grounds trial is volatile and remand the matter to further inquiry and collect some evidence also... confession, there is very much regularity in...

Justice Muralidhar: would you say there is a miss-trial? you should be able to say that, you said everything thing except that, see it's a plain miss-trail... gross mistrial you know in a case law by the Supreme Court saying that these kinds of cases are clear mistrial and miscarriage of Justice, so the only doubt is you stand up for a back trial or declare a mistrial, if he is a person of unsound mind and you didn't notice it in the 1st place then the entire proceedings gets vitiated.

Participant: but some inquiry should be made

Justice Muralidhar: certainly you have to confirm that there is no doubt about that so I am saying it's so serious a violation that that should have happened in the 1st place, see these problems comes because of not enough interactions that is the running theme of the problem the magistrate has no interaction with the accused at all the judge is not participating you see most of these criminal trials we don't actually deal with the accused on the face to face basis he is just one other entity who is appearing before the court and being hissed away we have no time we just pass remand orders and there is no interactions and if he really did that interactions I think many issues can come up sometimes you may feel helpless but at least you will do something you will talk to the prosecutor or senior colleagues because unless you give this feedback people will lose faith in the system they will only think that you are extension of police most of them don't make distinction between magistrate court, the police, the lawyer for them the whole system is against them for them there is no one to listen to me that's the feeling they have that's why they don't want to engage with the system at all, if you have to make a system responsive and sensitive that interaction with the accuse is extremely important ultimately fair trial will hinge upon the judge it will not depend on the lawyer, in these problems we saw some lawyer comes into the matter he realizes that the person has some mental disability but this may not happen in reality you may not find such a lawyer at all so it will all depend entirely on the judge and it is the judge who is regularly interacting, the lawyer comes on the date of the hearing and depending upon the fess he might or may not appear and the law is unfortunate that is the other problem highlighted here which is what I wanted to emphasize when you appoint a lawyer and I do it in High Court I make sure I write in the order that the lawyer has to meet the accused in prison if the lawyer is unable or unwilling to talk to the accused and he is only willing to interact when he is brought to the court lock up that lawyer is not a good lawyer he is not doing his job so.. that's right if he is a legal aid lawyer

please change the lawyer please say that this is not the lawyer we want have an interaction with the accused ask him did this man come and meet you in prison after all at the strength of your order they can go and meet the prisoner in the prison, they have to do that if they don't take some time out to go and meet the person in prison have interaction, actually I would go the extend of saying that they should interact with family also if they are around of course in a case like the earlier problem he is from Assam his family may not be there but the least he should do is meet the person in the prison so these are very small things which can't be written in any law you can't have the CrPC write it but as a judge you can make a difference this kind of sensitivity you can bring.... yes 318 is it?... that's right.. Excellent, so you have to forward a report to the High Court... correct

Participant: yeh pehli baar bataya hai kisine?

Justice Muralidhar: this is for the earlier thing...doesn't speak that language

Participant: I have a point my lord, it is a case under 497 adultery it can be done only on the complaint, here is the case the offence took place before marriage the husband is not entitled to give complaint in respect of the..

Justice Muralidhar: no we are talking about statutory rape she is just 17 see that is the twist here... and now you have POCSO, so actually this straight away becomes statutory rape plus that... whatever now because it is punishable with more than 7 years there is no limitation...anyway anybody else any other reactions? can we move on to 5, problem reads like this R is picked up by the police in connection with the conspiracy and assassination of prominent national leader he is arrested on 1st March 2016 after he makes a public speech vehemently against the said leader he is kept in an unmarked building and interrogated threats to his family and his given beating he is taken to police lockup on 8th produced before the magistrate he stated that he was arrested on 8th he express his wish to confess, the magistrate records he doesn't have means to engage counsel and further directed him to produce on next day for recording in 164, he refuses to make a statement he wants a senior counsel that is turned down subsequent legal committee appoints B, R then writes to the trial judge asking that C be appointed as defense lawyer with remuneration in par with the

public prosecutor, B files an application that he wants charge sheet and other evidence to be given for defense, the application treated as writ and dismissed that A doesn't have option to engage counsel of his choice, it is directed that charge sheet and evidence be given to R, only the FIR and charge sheet is given to him. B doesn't appear in court to defend R who again writes to the High Court who declares in the letter that he hates the said leader and he is glad that he is dead after seeing the report if the trial judge the High Court orders the trial to proceed as the accused appears to be defending himself and merely causing unnecessary delays this order is not communicated to R he is convicted and was sentenced to death, it is bit complicated because it involves the High Court but think of it not as a judge but a person reading this problem what are the issues..

Participant: sir the 1st issue arise in this case is that illegal detention and torture that is the 1st issue, because he has been picked up and then kept in unidentified house and then after many days.

Justice Muralidhar: how do you deal with unidentified places of detention?

Participant: he should be kept in...

Justice Muralidhar: is there any requirement, if you see interestingly what provisions of the CrPC require a person provides that a person should be taken to a police lockup only

Participant: that he is to be kept in police lockup only there is no other place to be kept.

Justice Muralidhar: no does the CrPC actually says that?... no, no see the requirement is if you just see the new requirement under the law that is you have to give a place where he is detained, correct? just see 41B, and 41C, it says that you will display in the notice board kept outside the name and address of the person arrested and the name and designation of the police officer who made the arrest, I think there is lacuna in the law because there is no compulsion, I mean there is no nothing here which says that... we will come to that right now I am on the place of detention... is there any provision of CrPC which says a person can be taken to a police station and nowhere else

Participant: reading of 56 and 57, immediately after arrest within 24 hrs. The person has to be produced before the judicial magistrate meanwhile he is in custody the place of custody is police station...

Justice Muralidhar: no it's not natural that's the whole point..

Participant: CrPC says only such custody...

Justice Muralidhar: 43A, 43?

Participant: Such person should be taken to the custody in nearest police station

Justice Muralidhar: ok he is taken to the police station, does it says he has to be detained only in a police station, see what is happening let me, I mean all of us know it is in all the states now, there are unmarked detention centers.

Participant: 43 deals with the arrest of a private person yaar!

Justice Muralidhar: no, no let us say my son gets picked up I am a mother living in a slum my son gets picked up and he is not picked up by a plain clothed policemen, but all of us can make out who is a policemen and who is not because we live in slum we deal with police every day, my immediate reaction is to go to the police station so most police don't take them to the police station now, you know if they want them to kept outside they don't necessarily take them to police station, and also the requirement that there must be CCTV in police stations, I am just telling you these things as judicial officer you must be aware of these things, see for every requirement in law there would an alternative root and you should be aware of these alternative roots, so how are we going to deal with it so you should be able to note that if the person is telling you that he was taken to an unmarked police station then there are log entries in the police station, there supposed to me a logbook kept as who entre the police station and who leaves I think if you really get proactive but as one of the judges was telling me during interactions there that if we insist on strict compliance then the police itself will help the accused to make the case weak the police will deliberately will weaken the case and make sure that he gets benefit and comes out on bail and this is another problem also

sir one proposition arose me when I was in Solan, one political leader was arrested because he has taken some property of trust to his own residence then remand was police remand was given for recovery of property, he was kept somewhere else, not at police station Solan after 2 days that report 2 advocates were putting and visiting and marking their presence there that evidence came before me, then I objected for further remand which purposes he was remanded he was not taken to that place he was kept somewhere else

Justice Muralidhar: so think these are the important point, yes which is the next issue?

Participant: the next issue is that he is been denied legal aid, proper representation before court in the sense that he has not been provided a counsel to be defended by like the provision first he demanded an advocate of his choice, no doubt that the advocate was not available, then he moved an application to the committee but that advocate didn't appear in court and then the petition was treated by the Hon'ble High Court and when the court come to the conclusion that he has no right to be defended by advocate of his choice but there I think there is somewhat violation of, because that should, proper court, he should be appointed legal aid counsel, because the legal aid counsel scheme itself speaks legal aid and competent legal aid, that's why we have to make an interpretation like that

Justice Muralidhar: so I think in all these problems one issue that's why I put legal aid in all the problems, how we prepare that panel of lawyers and you should take to the bar association whatever the office bearer and have a good rapport with them so that they don't raise problems when you call a senior person a more well informed person you know a person who is sincere a person among the younger lawyer you will find some are very sincere they want to make a mark and are willing to take that extra effort so mark out those lawyers, encourage them you see also as a judge there is way of monitoring we have all done it as judges some young lawyer who is enthusiastic we notice, we say ok this person has potential we say let us encourage this person so that slowly you also contribute to the developing standards in the bar see we are working in a failed system one thing is to say that there is nothing and we can do our job and get on with it why to get into all these issues another is to genuinely feel concerned like, allow all cases to go by default, let me see how I can improve the bar because we cannot have an extra sensitive bar which are aware of human rights violations we can't wait for all that to happen so let us start

making an effort we prepare panel of lawyers even if the legal aid panel is there keep aside some people whom you will be able to trust and deliver what you looking you are looking for, like in earlier problem going and meeting the accused and in this issue.... no you have to explain that you know because of the failure of earlier lawyer, you see this comes when earlier lawyer appointed fails to do his duty, so when he fails you should have a backup this is like plan B, you go by the list that is there but when the lawyer doesn't do his job that is the question that extra effort he has to make. Anything else?

Participant: there is also non-compliance of the mandatory prison of section 200 207 of CrPC, evidence because copy of evidence was not given, the trial was vitiated because he is not having the copy of the evidence what he has to depend.

Justice Muralidhar: correct in fact I would just advice after the decision on Mohammad Hussain if you just read that decision even, no hearing should be that will be a situation there is no lawyer for accused see after the Kasab case from 164 stage itself you need a lawyer and now under the CrPC you can have a lawyer of your choice at the stage of interrogation of also, new CrPC gives that provision so no proceedings before you should happen without a lawyer for the accused and even if there is no lawyer for the accused let's say at an important stage like framing of charge, let's say the lawyer of the accused doesn't turn up appoint an amicus even if one date is going by let it go by don't have a hearing where there is none for the accused, the accused is present he starts framing charges because more serious the crime, more serious for you to ensure the presence of lawyer because this will otherwise completely vitiate the entire trial once we had as a High Court a case of rape and murder of 2 and half year old girl we had to set aside the entire conviction and send it back in a time bound manner because charge was framed without a lawyer being present, such a serious offence punishable by death and you can't possibly do this, he may be anxious that there is delay should not defeat Justice but you know unnecessary adjournments are being asked but this is too serious a violation so make sure there is a lawyer always present. Anything else? Anyone else wants to make any comment on..

Participant: efforts, my lordship efforts should have been taken by a trial judge to appoint him as a competent legal, that's the only personal efforts, otherwise we have to choose an advocate

from the panel, choice can be given to the accused to choose any one of them from panel, we have 2 panels, one is under legal services authority and another under 304..

Justice Muralidhar: I just want to add what you said under 207 we think that merely giving documents to the accused satisfy the requirement of the law, most documents submitted by the charge sheet even a prof. in a university will not be able to understand the kind of the photocopies the handwriting of the police officer unless you are in day and day out you cannot make head or tail of remand report or seizure document nothing, so you know it's also whether the accused understands the documents or not that's why you need a lawyer so this is additional reason that why presence of lawyer is must.... he may not but I think its a time to take to talk of this, I couldn't understood why legal services authority cannot fix fees on par with the prosecutors, I have prosecutors who are also not paid very well the least we could do is equate the fees of the 2 and there is enough money with the legal services authority... can work out in average, what case what will the prosecutor get, you can make out.

Participant: sir even CrPC 303 and 304 they say that the accused has a right to be defended by advocate of his choice, but there is no such writer on this...

Justice Muralidhar: right correct, so we will go to case 5? 6? the last one... yeah... yes... actually that is a good question that he is asking which is what came up in the earlier session also the violation of CrPC provisions for arrest, you sit on illegality or irregularity?

Participant: it is illegality it is violation of human rights... he can immediately be re-arrested there is no bar

Justice Muralidhar: see that is the problem is the CrPC is silent on the consequence of violation of these provisions...

Participant: I think when it is silent the consequence is illegal

Participant: when, this is the direction of the Hon'ble apex court that accused should be medically examined before their production and must be... this my personal experience that about 30 persons were produced from the remote area and very poor community stride as

activities of jon yudho in west Bengal, in that case they were not medically examined in fact the complaint before me was they were brutally assaulted by the police I didn't receive the arrest I released them at the moment I don't know whether I did correct but in compliance of apex court I did that.

Participant: ... in this situation I will say that if there are allegations of ill treatment in that case accused can't be sent to police custody has to be sent to magistrate custody... he will be released on bail and ultimately we are causing in Justice to the victim.

Justice Muralidhar: ... have they picked up the right person, ultimately you will not be dealing with a wrong person if you are 100% sure of the right person then what you say is right, it is only you who as a judge who can decide on that point in time whether the person picked up is a right person, you should have some assurance that he is a right person, so that we can't say hard and fast in every case but there ways to find that out... should we go on to case study 6?

so this is a case which arise out of the immoral traffic prevention act so a women she is 46 years old she is waiting outside the hospital and a jeep with policemen and a lady constable stops she orders to get in she is kept in custody for an entire day subjected to threats not informed her grounds of arrest and the police calls her family to come to the court next day with money, next day the money is taken from a son before the arrival of the magistrate the court martial writes something in the register and the magistrate comes to the court he merely signs the paper and returns to his chambers, A is asked to give a 100 which he does and he is subsequently photographed, she becomes suspicious about the inquiry she finds out she is been charged under section 8 and has already pleaded guilty to the charge. so how will you decide this, this again happens dat=y in and day out most people don't know that they have pleaded guilty and they have already, they are said that you better pay this and you can go they are not explained the consequences of pleading guilty is, so this has become a very important aspect although the crime may not seem a heinous crime or anything of that sort, it can have grave consequences for a women because its about her dignity her reputation her fundamental right to life, so let's hear...

Participant: the issues in this case section 41 B, D 50, 50 A and 54 and possibly 57 has also been violated

Justice Muralidhar: now there is a particular provision on women being kept in custody... 46(3) I think its not noted here, let's see 46... yes 46(4).. it is a mandatory provision, here she is kept overnight... in the police custody

Participant: that becomes illegal detention and 60 A is also violated, she is not been medically examined and 54 and possibly 57 because we do not know whether she was produced within 24hrs. After she was taken to the court, violations of 207, 251 and probably the police officer was illegally gratified by taking money from her son and no interaction with magistrate..

Justice Muralidhar: this 41D this is again a new provision which...

Participant: but the fact doesn't say that she was interrogated

Justice Muralidhar: but she was at the police station the night, see I think what is happening in most police stations, what is happening is they are not told they have a right most people picked up are not told it's just that when they happen to know that these provisions exist they insist otherwise this all goes on paper so we have been saying that in every police station there must be a board put or something explained because somebody can be illiterate not been able to read a word so how will those people know, this is where I think the legal services authority or the state has a very important role to play

Participant: we have PLVs assigned to the local areas they mostly visit the police stations and see if

Justice Muralidhar: but if you own panel lawyers I think of course they should be assigned to certain police stations

Participant: yes sir...

Participant: what happens is even after being appointed...

Justice Muralidhar: right

Participant: now there is direction by NALSA that....earning will be affected.

Justice Muralidhar: now this is why we need to revise these panels we need to get lawyers who will perform the task I think also fixing fees for these things become very critical or attending police station or attending jail you must have an extra fee for this thing

Participant: presently there is a direction by NALSA that legal aid clinic should be established in every police station,

Justice Muralidhar: that's right but I am saying the dist. legal services authority or taluka legal services authority when you drop the panel you must make it incumbent and assign lawyers to police stations and rotate it, can keep it under rotation also otherwise these 41D will be meaningless.... the other thing was in my experience is jail adalats, I don't know in how many states jail adalat takes place, see the what happens in Delhi at least when you hold the jail adalats, you ask legal aid lawyers to meet some of the accused one week earlier, usually these are arms act matter or petty offences and when they are brought before the jail adalat before the magistrates most of them are asked do you confess to guilt or not, they min. they said yes they will ask you to pay some fine and can go home so a man is desperate to go home so it's the arms act a knife he must have been carrying or planted so he is probably a rickshaw puller some cobbler somebody who wants to go on with his livelihood and he doesn't realize the significance of saying yes and he becomes a history sheeter the minute you have a conviction recorded against your name it has severe consequences so this is again that is what I wanted to highlight that not explaining to her what the whole procedure is, merely asking her to sign the register I would only advice that this kind of procedure, signing the register admitting the guilt you must have great caution ask the person twice or thrice do you know what you are doing.

Participant: because the magistrate didn't do anything he just signed and went back to the chambers and the police papers were also not supplied to her,

Justice Muralidhar: ... if you take your inspections to the magistrates court, I am sure you go as inspecting judges, you find out you actually find out ask for the these registers see if there are columns saying it has been explained to her and tell them it is not just a column merely for

another signature but you know have you actually done this, have you explained to the person what will be the consequences of pleading guilty are because many of them do not realise that.

Participant: section 251 has also not been complied here

Justice Muralidhar: correct, this is a very serious infraction and actually the offence seems to be a routine kind of an offence, I think this is violated, people are only keen on one more disposal... sorry?

Participant: appeal could not be filed.

Justice Muralidhar: that's the whole problem..

Participant: only recourse to 397 can be taken.... revision can take place.... under that the session judge may acquit.

Justice Muralidhar: but not the guilt he is already recording a guilt, she is admitting and this is a serious problem.

Participant: legality of the sentence and not the guilt...only recourse for her would be 397 to...

Justice Muralidhar: the problem you will face is who is going to come forward to do that...

Participant: because she has after being photographed she become conscious.

Justice Muralidhar: only because she was photographed, if she is not photographed may be she....

Participant: possibly yes.

Justice Muralidhar: this problem I think I will consider most significant of the problems, other problems you know, one this is something which we don't pay enough attention to these offences.

Participant: that's why I told you sir this is the problem

Justice Muralidhar: okay, any one has any other comments on case study 6?

Participant: sir, human rights has also been violated...

Justice Muralidhar: of course that's the main thing

Participant: human rights, fundamental right, article 21 is also been violated

Justice Muralidhar: I would suggest you people take back these case studies give it to the state judicial academies and have sessions with the magistrates on this topics and can improve the studies, this is something which I have drawn from my experience, but you can add local situations, like you said about West Bengal the old De notified tribes even today those are the tribes which are immediately picked up by police although its a colonial relic, like in MP itself in Bhopal is anyone here from MP? so you have the pardhi tribe they are living in a colony in Bhopal even today if there is any crime happening somebody will be picked up from there, is there is theft, robbery the suspicion is immediately on the tribe and although they have moved on in life they are actually in object poverty now but there is always the suspicion it happens in each state there are notified communities so we should be careful about how we deal with them and maybe we can have workshops involving them people from their community, so how do we these workshops that's also important I suggest you bring some police officers prosecutors apart from the magistrates, it's only then you get both side of the picture like today we don't have any police officer sitting with us, maybe he will be having serious reservations about the things we are saying he will say yes, yes it is easy for you to say unmarked detention centers but know this is our problem so that we need to factor in.

So with that we will move on to the next part of the morning session which is the rights of victims. I will make a quick presentation because what I really want to share with you is a video see there is a problem with the definition itself of victims, it's a new definition that's been added in the CrPC if you took at 2(w)(a) and it is not consistent with the international conventions and declarations definitions, under the UN declaration victim means a person who individually or collectively have suffered harm including physical or mental injury emotional suffering, you will find that this is not linked with the person who has caused the harm, the problem with our definition is it's restrictive, it says

victim is a person who has suffered any loss or injury caused by any act or omission for which the accused person has been charged so the min. you link it with that there is an accused and the accused is charged when I say charge in this sense it means against whom the charge has been framed not just a charge sheet so this is the only victim who can be recognized, so let us assume that subsequently the accused is acquitted, does the victim cease to be a victim? so that's the whole problem the victim doesn't seem to be a victim it is tied up like an umbilical cord or three legged race you are tied with the accused who has been charged so we should be having a broad, for instance unknown accused persons there are still victims, they doesn't cease to be victim because there are no accused, so there is a limitation to this definition which is not in accord with the international convention.... yeah but that is also in accordance with 357 A, if you just see 357 A... it says like subsection 4 of 357 A says that when the offender is not traced or identified but the victim is identified and no trial takes place the victim and his dependence can make an application for award of compensation, but I thought the definition should have been much broader then tied up with the accused... in your Jharkhand no, I am talking of CrPC... no, in terms of w, a, victim includes, legal aid and guardians the earlier part for which the accused has been charged so if it has to be... if it is tied up with the accused who is being charged then there is a problem when there is no accused, you don't know the name of the accused, he is a unknown person so I am saying this definition can't be restricted to that.

now we have victims at several stages, at the stage of investigation most victims don't seem to be recognize as victims with rights, they know who is being left out what line of investigation to take but they are unable to influence the investigation so they have a serious problem which is why having victims being represented even at the stage of investigation is important, which is what the Delhi domestic women case 1991 Supreme Court that was one of the earliest cases where they said that rape victims should be able to have representation even at the stage of investigation because they are best person to know where the accused is in fact they will be telling you the accused is freely roaming around here and there and police officer is doing nothing.

at the stage of prosecution what is important is the say that the victim has at the stage of framing charges most victims are not heard at the time of framing of charge and that again is a serious lacuna now you have engaging of a lawyer for the victim many of us are doing it unofficially

whether it's a 498-A case all domestic violence of course the complaint is there.... yes you can but now there is a provision which permits I think 26 is it?... 24, one min.... there is proviso... that's right the court may permit the victim to appoint advocate of his choice to assist the prosecution so we still have the assistance to the prosecution that is I think bringing in line with 301 but.... correct not to the regular prosecutors...at the stage of trial there is very little protection given to the victim we don't have scheme of witness protection yet although there is a law commission report which has recommended many many years ago nothing has been done at the level of the states and the states have to do it, they have to have proper schemes.

Participant: in our state MP we have victim compensation scheme...

Justice Muralidhar: no, I am talking of victim and witness protection scheme because many if you take the POCSO cases many of them are ending in acquittal, yes because there is no protection given to the victim it could be a young girl, a young women and who is under tremendous pressure.... correct, and we are a very patriarchal society so you know there is no protection given to women who are victims of violence and post-trial also that continues for the victim and therefore they cannot challenge the acquittal in appeal and there is a stigma attached I will skip over the constitution provisions this 24 A proviso we have seen, the second proviso to 157(1) also recognizes now lets just see that, for the offence of rape the recording of the statement of victim shall be taken at the residence of victim or at the place of her choice by the women police officer, I think it is a welcomed introduction because very often women are afraid to come to police station if they are victim of rape and in history we have no of cases where rape are happening in police station, custodial rape that's how the Mathura case came up, we have the participation of the victim at the stage of plea bargaining which is again not enough understood that the victim has a say at that stage then under the legal services authority act a number of victims has been recognized as being entitled to legal aid and every woman is entitled to legal aid under the probation of offenders act to award compensation to the court, we had large number of law commissions report I am not going to go over it because of lack of time, what here I want to emphasize is restitution, see most of the schemes of compensation we are talking about even 357 A is only monetary compensation and there you will find that there is no method of determining the monetary compensation unlike the MV act or the workman compensation act where you have tables at least some guidance here there is no guidance it's all ad-hoc many

states have given some poultry some of 25,000 some states give better amounts but its all ad hoc, it does not address the needs of the victim, needs of lifetime as we are going to see in this film on acid attack victims and we will have a discussion around that because I believe that this is one issue which is there in many of the states and which we are not paying enough attention to there are 2 documentaries here one is called scared.

Video Playing....

the 1st part is extremely traumatic so I'm not going to go into that yet....it's really traumatic when you see the whole documentary I have tried to minimize it as much as I can, there seems to be one aberration, incurable aberration that we have men like this in our society who do not think twice about using this kind of tactics to scar a woman for life we do have provisions in the law, why I thought we need to talk about it because it is a reason change that was brought in the law as a point out the parliament may think it is done you know what it should do it's tells us how inadequate monetary compensation could be in a situation like this, and secondly this is a treatment for life that's why the clip about the doctor the number of surgery a person has to undergo and how expensive that can be thirdly of course the mental trauma, you know where you cannot go out in society, your family cannot your children cannot so it is a cascading effect of trauma and that stays with you for rest of the life, so I think this very sharply brings into focus the plight of victims of crime and the inadequacy of the laws to deal with it and why judges need to be extra sensitive in dealing with this so now in the Laxmi case they are now have minimum compensation of 3 lakhs but that also I think is highly inadequate there is another judgement of Justice. Iqbal in the Supreme Court it is a case that came from Chhattisgarh where 2 sisters both of them Dalit sleeping on the terrace they were attacked by 4 boys in one of the acid was poured and it fell on her sister as well and completely scared the sister arm so, Justice Iqbal has awarded 10 Lakhs of compensation for the main victim and sister got 3 lakh where it is very sensitively written judgment where he has talked about the everlasting trauma the victim faces throughout life and why monetary compensation is totally inadequate so, he is asked for continuous medical relief a monthly payment to be made so all kinds of measures to be taken, so I will also ask that within your state judicial academy take this message back and documentaries and generate discussions, I think also invite groups like Seesaw who we saw here, like Mrs. Verma, people like her I 'm sure. In fact I was shocked, I thought it was some

Delhi phenomenon or North Indian phenomenon till I realized how many cases are there in Bangalore. I don't know many people are there from Karnataka. It is an eye-opener that it is across the country and this is easily available to anyone to use. So these are more newer challenges that are coming before us which we have to be equal to. So with that any questions that you have, any thoughts you have on victims and compensations, any experience you have you can share it with us of how you have dealt with victims of crime. It's happening in many other instances as well. The minute we designated the Mahila court, they immediately get overburdened. The experience in Delhi, those Mahila Courts I mean they are working overtime also, but they are not able to deal with the caseload. So there is this irony of the need to designate special courts and transfer all cases to that court....9 months exactly... this is the other thing judicial impact assessment, so the more and more provisions we put into the law and the more responsibility we put on the courts, if we do not increase the strength or the number of courts we are going to have the same problems..... in fact I did not show you the more disturbing aspect...of this documentary which is, if you look at it you really break down so, you are right I think we need to sensitize more and more judicial officers... I would also urge the legal services authority you hold workshops in colleges in fact if there are male colleges, you know these kind of issues should be taken to men's colleges we have this problem of talking of women issues only with women like rape trials will be conducted by women judges there may be logic to that too but personally speaking I can never sensitize men unless men preside over rape trials, so I think we need to carry it to made colleges, boys even in the age group 11, 12th standards because they all start early, as now everybody got has mobile phone, everybody is in everything so we need to sensitize as legal service authority I think we can reach out to society with some issues because we have responsibility it's not only about dealing with it when it comes as a case before us. any other thoughts?

Participant: 2 component of Justice one is victim and one is accused, accused participation is right from the investigation, there is a proper representation how to make larger participation of victim right from the stage of collection of evidence, whether it can be done that at every collection of evidence the victim is present so that the principle of natural Justice follows, he cannot complain about it, another point is that if the government has not provided adequate fund for the rehabilitation of the victims like in acid attack whether legal service authority can take a

venture to collect like the district collector is collecting through paralegal or some other so that out of our discretion one fund is there from government side and another from legal aid, whether it can be done.

I think that's a good idea 357 A where you have to frame a scheme I think there is some way given to the legal service authority to ask for other sources of funds it's about administering the fund and making sure the compensation is adequate also tying up with hospitals and doctors, let's say we get commitment from private hospitals also as part of their CSR or whatever they will give free treatment to at least 2-3 victims, you can you know have the legal service authority interact with doctors and hospitals to do that because in this kind of situation I think medical treatment becomes a very important thing and also psychological counselling how to help victim cope with mental trauma, so that then brings us to the end of the session.

Participant: my lord apart from awarding compensation the victim has to be provided with job opportunities by looking their qualifications

Justice Muralidhar: in fact one of the victim who spoke on the film she is a doctor herself, so fortunately she was able to continue with her practice but you are right many others lose their jobs and opportunities, you are right on that....

Participant: plastic surgery... like x-army men there is reservation for others also there is reservation by implementing reservation policies for the victims you can provide them with opportunity of job

Participant: there is a quota of disabled persons...

Dr. Geeta Oberoi: so I need to ask you one question I know you are busy filing this form for next academic year, should we have this kind of conference courts designated as special courts, is that helpful?... this was introduction ok, because you know it becomes very important for the institution to know whether what we are doing we are doing in right direction or are we wasting time of all judges, I mean this is something we really need to know..

Participant: if some other wings of bureaucracy are included in such a seminars it will be more helpful.

Dr. Geeta Oberoi: some other?

Participant: wings of the executives like police..

Dr. Geeta Oberoi: stakeholders. Alright. yeah we were thinking actually for next year, this is just an idea I am sharing with you, for next academic year if we could have state human rights commission, NHRC and the human rights court together in one roof and then we can actually think about what are their and our responsibility or how we have coordination with each other, I mean something..

Participant: and my humble submission is that report should be send to law commission for rectifying the areas of human rights act.

Dr. Geeta Oberoi: yes.. yes sir?

Participant: if the officers are permitted to come with their spouses, it is our sincere request

Dr. Geeta Oberoi: yes.. I will take this matter, I will

Participant: with reasonable conditions and other matters....

Dr. Geeta Oberoi: will do that sir..

Participant: ma'am this is very practical problem especially for lady officers we come from far off we have to stay overnight at certain places, spend the night there is no direct flight and when we come alone we face certain problems, so I think it's important.

Participant: ma'am I have a suggestion after 3 pm we will be getting the food at 8pm

Dr. Geeta Oberoi: what?

Participant: at 3pm we get tea and thereafter food is there at 8pm

Dr. Geeta Oberoi: oh in between some snacks okay, you can always ask actually there is no restriction, you can always ask room service reception. so then next year we do stakeholder meetings.

Participant: there are opportunities available to the judicial officer of remote corner if we come...

Dr. Geeta Oberoi: I have noted that, small children too also be allowed.... I will definitely take all of these suggestions of yours. So with this thank you so much till we meet for the next time, all of you were really, really nice and I am really happy that I saw good friendship among all of you, I was like wow, it reminds me of college days, so it was really nice. Let's meet again, thank you so much and thanks to Nitika and our intern, I forgot your name I am so sorry, nitika I don't know where she is gone, she is busy I will tell her also. so have a safe journey back home. Bye.
Thank you