

**Verbatim for P969**  
**Seminar on Role of Courts and Regulator**  
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**Prepared by**

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## Session 1

**Prof. (Dr.) Geeta Oberoi:** We are having today only 9 Judges because of other engagement in the respective High Court. We can begin the session with the introduction ...

[Judges introduce themselves one by one]

**Prof. Upender Baxi:** Very - Very nice, small and learned small group than lot more previous group. The group is open for the entire questions, critics. I want to thank Geeta Oberoi, Shruti, for the wonderful invitation to call me here. Chawla, Parekh are more learned than me. We all are here to learn more about the animal Regulatory regime. It is the different method, whether we have regulatory regime in place. We got institution in place; regime is a very technical term in political theory special in the interstate theory which speaks of contradictory unitary of civil ideas and forces and their genesis. Loose sense, smelter give the more rounded sensed definition of regulatory regime. I grew up in the gold old days of the tribunals, I know them, I think I know them. RI came into force only after 1990s with the PLG always the multispecialty of globalization namely, digitization, because tribunals like TRAI without electronics than this no genetics power take, these are new universal development across globe.

I got the GPR technology, semantics, nano, and this digitization and robotics are also flushed development and they mug up the regulatory agencies. Not so much additional policies but hard science converted into policies what we should problem by understand unless regulatory agency that why say it regulatory regime is about to come as of now we got the regulatory institution. We got so much of them and I know few of them and not all of them. I am eager to learn about them.

Let's start by saying that aftermath of the wonderful performance of by Supreme Court, your answer and mine in literal way. I am bound by parliament, judiciary to decide, legislation to decide, constitution to decide, as a citizen am bound by everyone. I think I am bounding myself, and that's the different. I speak something and saw something not as a citizen but as a thinker I am not bound by anybody. The Supreme Court reinvented curative petition decision in jurisdiction 2002, Ashok Puraski's. It is a very major invention because they invented jurisdiction and which is not in the constitution. It is jurisdiction which sensationally says, even the SC may make me mistakes, and mistake is not to be confused with the justice. SC can review its own decision and hear the appeal in the last case in the curative petition of yakoub memon case, they dismissed it and they did not sacrifice the curtailed jurisdiction and as earlier it was bonded by the Lordship probably and in plan the hang man schedule and they did. they even not recognize the day of the execution, they forget the outlook and they hung the man in violation of Joseph Kurian pointed and painted out in the deciding opinion of two judge bench, CJI constituted the benches in violation of Supreme Court they pronounce the order by the CJI and Yakub Menon case, as unconstitutional in legal and he persist. Supreme Court can make mistake. It may be supreme but it manifest that they may can. This jurisdiction is intended to slow the collective mistake. What in coat this jurisdiction has on the regulatory institution is one aspect that revokes can be considered? It is one appeal to the SC that cut off the High Courts in most regulatory institution. So one appeal to Supreme Court can

now be creatively be used by the parties in regulation matters. The future regulation is as uncertain as it is passed. The last petitions should be filed in the Supreme Courts; the Supreme Courts directed the High Court Delhi by written order said that the High Court of Delhi should comprehensible the all aspects of the matter. Justice Shah and Justice Murlidhar in Delhi HC they describe in 10 page judgment because all are specifically cures including health, including privacy, including constitutional, including the central debt. Its wonderful decision, a huge decision, and then under delegated distinction a HC is exercising what I called farming out of a PIL. A PIL is file out to HC, it is originally be filed out in SC. so blither name, Salve, is a good friend of mine, what his son is doing a good business to hear appeal over the judgment. It is the HC which exercise the Suo Motu function. Matter never came before the HC but for the fact the SC directed the HC but lawyer could not argue there because.

They argue on this point, I think it is a decision and I think at first it is very good decision, my guess it was 3+2, they uphold the HC decision by 4 to 1. So in a sense, what Fundamental death is important to the regulation? That's saying. What is important to regulator is they nobody including SC judges may decide because they wish to decide in the matter in a particular way. At this not allow. Judges are not told decide, and regulator not to decide matters on the basis of the personal preference. They may be discussed by the conduct that. As judges as regulators, they any decide on the ground of constitutionality. But it privilege my right or not or and competition commission dot he possible job. Commissioner has no one decide economic development, rationality at large. How commissioners can can ever do that, how we can be more comprehensive and how can

SC judges can be bring in the comprehensive measure may be they take it more responsibility r may be PM knows mater on the planning commissioner or the NITI Ayog. But I don't know. But certainly it is the matter of great importance whether public reason. [00:15:49] San Francis Hollandae, in 13 has nice arm chair; some professor came I forget the name. he said Hollande, w I am sorry I have disturbed you, you already come in so come in, I was thinking about this professor and he looked in puzzle that how does thinking on your head. Sitting posture, you know young man I was just regressing my prejudices. I was not thinking, it is a true story. So the regulators am, inregreasing the prejudices. Regulators may come from judiciary, may come from the bar, or they must have constitutional pre judies. And this constitutional prejudice they opt to rearrange time to time. This it is curative means. Curative means rearrangement of constitutionalism prejudices. Anything you say is the constitution. What you say [00:17:34] [00:17:34] reason and responsibility is the constitution. Judges with the power, precise the constitutional bodies. Judges regards, [00:17:48] even they have to admit till the appeal goes on and thrown, I don't know [00:17:54] or his companion will take apathy with NJAC. I don't know why I asked just say the job of the Judges is always to think, to regulators is think and to rearrange the constitutional furniture time to time. If the fail rearrange [00:18:24] [00:18:25] that they don't do injustice, t[00:18:31] I leave it to you, deliberately to decide what it is. [00:18:41] what to do because I had not the good fortune to be student again. American jurist Prof. Carl Louise when he was a student at Chicago university, he used to say "don't look at what the judges say, don't do that mistake, don't look what they had sad

in their judgment, but look at what they do to what they have state., and this advantage and this is what Justice Chandrachud classic example, of big gesture on the right to [00:19:27] till this date. I have told brother Yashwant long time ago when he was alive. I think it is [00:19:34] [00:19:38] I am raising a fundamental question, what is judgment? It is the reasoning and result. Now reasoning may go 15 pages long to say it is constitutional to have right to shelter on pavement, and result is last paragraph which tell the Minister/Commissioner, SC can't be bother if you throw [00:20:06] Arabian Sea. I am still thinking, whether Right to Housing is now FR under article 21 although the decision failed to Olga Telis, you know in the old time, a Hindu jurist in the great south wrote this 'nibandh' essay... our SC judges are on [00:20:30] path, like Keshavananda Bharti. In judgement but its speaks to many constitutions. I have been asked to speak today about Violation of Separation of power. I want to say couple of things about Separation of Power; first the myth and than it is other things, the myth is that there is something that is called doctrine of separation of powers [00:21:04] [00:21:06] [00:21:06] I always say they all say that separation of power, separation of of power is a myth. our Constitution does not propagate that myth,. Our constitution doubts in the directive principles, the judicial power must be separated from the executive power. They must take the Article 42, 43 or something. Please check. Apart from that, our constitution, nowhere, argues the separation of power. And it is an old story. Going back to in 1951 decision. I have one. [00:22:13] [00:22:17] the SC says this, two judges descent in a dissented [00:22:29] [00:22:31] I ask you to read it carefully, it simply says that Ram jawayya v. State of Punjab, Punjab and Haryana High Court and later by SC, which decide the case on the nationalization of text books for children as they follow Keshavanada, this is also the [00:22:52] [00:22:54] guess appearance in NJAC case, including my friend Justice Chelameshwar, [00:23:03].

[00:23:13] [00:23:15] said they cannot be any delegation of legislative powers period what can be tribunals, regulatory regulations institution. [00:23:29] [00:23:31] if you forward the strong doctrine of non designation, justice [00:23:42] said the following, delegation SC in limited period if no policy is at home, all the delegation are of such [00:23:59] as to amount to adjudication, I just think how many regulatory agencies are functioning today, enjoying proper delegation of legislative power. And one of the [00:24:22] is article by Rahul Singh, second article after the firs; demonstrate a large number of regulatory agencies having sufficient guidelines from the legislature. So so small [00:24:50] [00:24:52] [00:24:54] regulatory agencies are excersing there own discussion, they are bound there jurisdiction like the SC does. Where they [00:25:03] [00:25:05] [00:25:09] now what is intelligent guidance? What is indefinite character of delegation, these are question which are perhaps begin to ask is it. [00:25:32] most of regulatory institution is as there are several which are in insufficient from the guidance from the legislation. Tribunals also did. Two tribunals I got, my students, one was import and export control act, other was [00:25:58] [00:25:59], both these laws central legislation and upon them roast these tribunals, and HC and Scpronouces its jurisdiction is the character very vastly. So is the character of delegation is constitutionally justified, what is the legislative function, the SC in the advisory opinion by the 5 judges, say that this is the first time essential of feature to test is introduced. It takes places in Keshavanada Bharti case in 1973 [00:26:44] [00:26:45] opinion. so SC said, at that time in 1961,

that they cannot delegate the essential features of the legislation which [00:27:01] features of [00:27:03] and the SC did [00:27:08] said two things making offer by the [00:27:13], it is the essential legislative function, and making it policy binding court of conduct is also essential legislative function. How many regulatory institution exercise criminal jurisdictions. It is not provided by the statute, I do not know, or in here not power they are not given by the, they don't have. The court do not have inherent power in CPC an [00:27:50], don't know will they have myth of anxiety.

Now another view of view of argues that [00:27:58] [00:27:59] stop. if you look at earlier side, like 1- 2, there is good book in 2014 in [00:28:19] [00:28:20], and have words [00:28:22], in my opinion. And the book is called is administrative law unlawful. That is the title of the book. [00:28:32] and it says that administrative law is unlawful, [00:28:35] Mukul Rohtagi, don't tell him. Very aggressive on [00:28:44] I just read one quotation from the book, what is [00:28:55], that is why I said administrative law is unlawful. But tit means that all delegation in unlawful. Legislation can't be delegate, non - delegation they do, delegation not the exception by saying that. But why he saying that he says that because he does not go to American constitutional law is common law. And in common law, there is no such thing as administrative law. so in a sense [00:29:36] [00:29:38] [00:29:44] [00:29:48] administrative law is extra legal law breaking. Administrative law is extra law breaking act, and you have been in big myths on the book which must read. At this young age, it's about 800 pages. is called Reviewing the judicial duty. it is wonderful book by Philip and Weber. it is also available in pdf on internet. it goes to the entire history of common law, to find out where is judicial duty lie. Justice [00:30:22], he is very keen and open the [00:30:26] and third schule and all that. Every judge, everybody must take this step, because they have forgotten the common law, what is the basis of the constitution? Because [00:30:44] and many other thing from the common law like article 12, laws in [00:30:56] [00:30:57] that's is

## Session 2

**Mr. P. K. Malhotra:** I felt privilege to be to be among used you and sharing some of my thoughts on this regulatory framework. Prof. Bakshi already dealt with the jurisprudence aspect of the regulatory framework in very lucent manner and off course I will be discussing only the basic and the primary things regarding the regulatory framework, as it is discussed generally, and specifically dealt by the concerned sector regulators who will be coming and interacted with you.

most of the things I am going to see here probably all of you, must have dealt with it, either in the profession or sitting on the bench, so I am not going say anything new maybe you can say it is refreshing your memory on the regulatory framework so that when the sector specific regulatory discuss with you, what exactly they are doing, how they are functioning, what are the pit fall and what are the difficulties they are facing. Probably it becomes an important subject for you.

When we talked about what a regulator is, I mean I was looking for the definition of it and that says, sub system or independent device that determine and maintenance the operating parameter of his system usually within certain prescribed or pre-set limits". Now coming back the function of the regulator if we look back and I will come to it little later was being discharged, by the state only. State was the policy maker, state was the regulator, and State was operative in certain areas where it has to compete with private sector also. that is who I mean, we were working before this regulatory system started and with regard to this to this regulatory, few more statement which are relevant and I thought I should share with you will be. a role of the state is social - economic life, now has dramatically changed from being main provider of service social -and economic to being a role maker and regulator. This is the change from 1950 to what we are in 2015, there is a sea change.

What is regulation? Regulation is an effort by state to address social risk, market failure, and anti-competitive practices, or equity concern through rule based directions of social -and individual action, is another area in which the regulator play role. And another is why we need Regulator? The regulation can be for assuring fair access, non discrimination or affirmative action. Like we have public distribution system, we have subsidy, where you discriminate, but you are doing it for social cause, so that is why we need regulators. now from where did, I mean, so far as our Constitution is concerned all of us know, there are three wings of government - legislature, executive and the judiciary, and this power of regulating the sectors is available to the executive. now, Constitution provision from where the power with the executive will be given to a person who is not strictly part of the executive, we talk of executive because all executive power of the president and the president discharges all the executive function to the council of minister and COM acts through the bureaucracies. Now the regulatory who have been created in now they are independent of the normal bureaucracies. and where this authority comes from and referring article 53 of constitution, the relevant are clause 1 & 3 and more particularly clause 3 (2) which says that nothing in this article shall prevent parliament form conferring by law function on authority other than the president. Normally it is president through bureaucracy through executive through minister and the bureaucracy discharge all these regulatory function but the Constitution itself empowers the parliament to make a law by which you can create independent regulators.

Now why do you need regulator? Which are independent of the government. The three factors which have listed and which will discuss little latter are the : prevention of market failure, to check anti competitive practices; to protect and promote public interest.

I will be dealing them little later, now how this evolution of regulation in India has a reason, as I said when we got independence, our requirement and circumstances were entirely different at that time PT. Nehru because of his vision, whatever he had his said we should go for socialist mixed economy model. Where by all major projects, all infrastructure projects, all big industrial project were being executed through public sector undertakings, govt. created public sector undertaking

and in certain areas there is monopoly created in favor of the govt. and the private sector is not allowed to take work in those areas. You will find that it is only in 1991 onward that that actually the process of liberalizations started. Off course there were certain steps taken prior to 1991 also. But we are talking financial and economic regulations and freedom in that area. We will in fact started in 1991 when Mr. P V Narsima Rao and MR. Manmohan Singh was the Financial Minister at that time. and the first body that was created after this process of liberalization was SEBI which was off course was functioning under government a government regulation since 1988 but it was given statutory backing when Manmohan Singh was the FM and PV Narsimha Rao was the PM. that is the from that time onward economic liberalization, in fact our country started and many regulatory various sector were created. I still remember when this economic liberalization process started in the Parliament MR. Murlī Manohar Joshi who was the strong leader in that time, he said that the economy which has been moving crushes so far , we want it to run on the Marathon, that was the comment made at that time. Now I think that this liberalization processes gone over 25 years, we are I think celebrating the silver jubilee without any celebration here because we are in 2016 now 25 years has gone, and the results are visible to all of us. What this liberalization has brought to this country. In whatever sector, we have liberalized that sector has grown and n sector sector in which we have not liberalized, probably there is still problems and one oOf the sector I can mention here which pertain to all of us is the Legal sector legal service. Even today also the Bar Council proposed to open the legal sector for the foreign law firms and they are not permitting foreign law firms to enter the company off curse we have been talking them and I have been working on it for a quite some time. at least this society of the Indian Law form as well as the bar council of India is on board at least on principles that well all legal sector should also opener so that ultimately. The people working in the country itself, the practitioner will be benefited. Anyways that is only with regard to one particular I was discussing. The third important point I want to made is independent regulation is required to guarantee a level playing field. If government is doing something and private sector is doing the same thing the level playing is not there. To promote that level playing it is necessary that government should make only the policy and there should be an independent regulator to execute that policy by way of regulation so that the private sector or the public sector is treated as par and there is no difference between them. This tis is the basic principle which all of us know.

Now when we are talking of categories of the regulator, there two types of regulator. There are few regulator which have been in place form the pre independence era also. And after 1950 certain regulator were also created. They are non - statutory regulatory authority. Take for example the TELECOM commission, TELECOM Commission has been in existence of more than 40 years, postal board, atomic energy commission - all these commissions were constituted by Government resolution. The disadvantage of these commission was/ the regulatory body was that they can make policies but when it come to executions somebody violating it on how to enforce them. Therefore, there became a necessity, once we are opening up your sectors, more particularly the economically

sector the regulator must enjoy certain power, certain authorities so that they can function independently and therefore statutory regulatory agencies they came into existence. now some of the regulatory which have come into existence recently and off course there will be deliberation about authorizes here in this room with sector specific regulation but some of the important economic authority which have come into existence very recently, in the past two decades also, am just mentioning what are all those I will refer five - six of them, what is there main mandate given them, may be than we can come to the main issue which is regulator v. the courts, what is the difference and how the two can be reconcile. The TELECOM regulatory authority, I mean it is under the Ministry of Communication and its job is all of you know to promote efficiency and operation of TELECOM services and felicitate the growth in such services and to lay standard of the quality of service to be provided by the service provider. Another important organization which has come into existence is the CCI which is under the Ministry of Corporate Affairs, and this was by an Act of 2002. Mr. Ashok Chawla who is sitting here he has just [00:11:10] as Officer Chairman of CCI. HE was there and off course much of the detail about this commission will be discuss by Chawla ji. Then there is SEBI which has just mentioned, which was constituted by Govt. Resolution and was given a statutory backing in 1991 and I can share with you as I had personal experience with you of seeing working of this as a member of Security Appellate Tribunal for 2 and half year in Bombay. And this one of the best managed regulate in the country as on today. May be initially because little time has taken it was constituted in 1988 and given statutory backing in 1992. But so far as the other sector regulator are concerned may be there are still to pick up those things and come to level of SEBI. So far as the CCI is concerned its role is little different as compare to secretarial regulator. It is on the much matter platform and it travels across the sectors because its main job is promote competition. It has replace the earlier MRTP act. In the MRTP Act, it was the monopoly trade practices which were to be regulated or controlled but here it is the of the objective and earlier different is to promote the competition. And off course I will not go into the details this because individuals will be dealing with it.

Next regulator which I would like to highlight here is the IDRA which is constituted by an act of 1999, and its main objective is to protect the policy holder, in matters concerning assigning of policy, nomination by policy holder, insurable interest etc. than we have Medical Council of India, under the Ministry of Health and Family Welfare. the Council may confer or impose upon it by any regulations such as permission for establishment of new medical colleges, new course to study etc. the another regulator which I would like to highlight here is a petroleum and natural gas regulatory board which is under the ministry of petroleum and natural gas and then the central electricity regulation commissions, some of the Honorable judges are already made a reference to it so I need not to go into the details of this.

but when I am talking about these regulatory bodies and they have come, one of the allegation made against the government is that when these regulatory body have been constituted by the they are controlled by the concerned ministry i.e. is the major allegation which is coming against the

government, in fact there should be like an case of tribunals, SC in many a times has said and all of you are aware that in L. Chandra Kumar Case they have said that why these tribunals are being managed by the concerned administrative ministry because they takes away their independence and impartiality so they should probably be under one ministry, a time has come I think Prof. Bakshi made a statement with regard to these tribunals a regulatory bodies and what he said whether we had regulatory regime or regulators.? I think the observation is well made off. We have regulators, but regularity regime has yet to mature, that is yet to come. and I think that will be possible in case of central organization within in the government when it comes to creating a regulator than probably that organization take care so there is uniformity with regard to the procedure of appointment, with regard to the function to be given, with regard to the powers to be exercised and manner in which those powers are to be exercised so there is uniformity in all these condition which is lacking as on today. and the second aspect is once this regulator work under administrative control of the concern ministry, I mean all off us the age saying, the justice should not only be done, it should have appear to be done. I think the same thing applies here why there should be a doubt in the mind of the consumer or the man on the ground because it is being controlled by the saying ministry which is giving direction to it as constituted the tribunal. The same will be deciding. Thee is control by the government on this particular tribunal so that impartiality independence although may not be working independently. There may not be interference from the Ministry but why the Man on the ground or the consumer should be given that feeling that regulator is not independent. This is another area which needs to be looked into.

I am discussing these issues, issues related to Regulatory bodies in India: Independence, and when I am talking about independence, independence should be given, not only in regard to the they should come under one ministry, the other is with regard to broader policy guidelines should be given by the government. Beyond that it's day to day functioning, who the sector should function that power should be available to the regulator and when we make a law creating a regulator normally this thing is taken care off. When we talk about the function autonomy during the tea break, as one of honorable judges was mentioning, that whether without financial autonomy there is no independence. I think you are right. That goes without saying. If you have to dependent to the human resources, if you depend upon your funds, on the government, obviously somewhere you are independence or impartiality is compromised. I think is another are which is financial autonomy which has to be looked int. generally it ensured in the latter legislation which we are passing, that this kind of financial autonomy is given to the regulatory body because when we make a law, we make a provision for creation of a separate fund on which these authorities have full control it is controlled by the government. And this is whole the spending of the fund will be done that power is also given to that board or the regulatory body or this fund will spend. only thing is may be in most of the bodies, the fund is coming from the grants to be given by government but with the passage of time, economic sector regulator more particularly I am talking about SEBI, now they are so much self-sufficient here funds that they do not need any fund from the government. So that financial autonomy is slowly coming and I think we are moving towards the regulatory regime as instead of regulators.

Next, is the transparency? The transparency aspect is very important when it comes to the functioning of the regulator and when I am talking of transparency is talking two areas one is the process of arriving at conclusion to decision making. Independent from the stakeholders, and the service providers. What exactly I mean by this, the transparency element has two things - 1. When it arrives at any particular decision, what is the process adopted for arriving at this decision should be made known to the public and 2. When you take a decision you involve the stakeholders also before taking a decision. These two things are important for the purpose of transparency in the organization.

I talked about the participation of stakeholder in the regulatory process and this is who the participation can be ensured. Reason for having a represented regulatory process is lack of consumer participation. Lack of coordination between regulator and government department responsible for formulated in implementing investment related policy. Creation of participation mechanism by few sector regulatory think all the legislation in the past, very recently may be with regards to pension regulatory authority, competition commission, SEBI or IDRA, parliament by passing a law or executive while proposing this parliament has ensured that element of transparency is there and there is minimum interference by the government. Government interference only as from the broader policy perspective where a government can give a direction to the regulator, and after that direction they further implementation of the policy has to be done by the regulator independently without any interference from the government. When I am talking of accountability, it is very simply that a regulator is not discharging its function properly there should be some power available to the government to see the duties imposed to the regulator are properly discharge and for that purpose power to give direction is given and also power to supersede the regulatory body is also provided. But supervision is not without reason, they have to record reason, they have to item frame within which further body is to be constituted although safeguards have to be built in the law and third element which we have added about accountability that its annual report must be laid on the table of the house. So that it may become the subject to parliamentary scrutiny.

What are the problem areas when we constituted a regulator and we are giving them power as I said in the earlier remark when I was asking a small question from the Prof. Bakshi. That when we create Regulatory bodies, these regulatory bodies are discharged all the functions, there are discharged regulatory functions, adjudicatory function, there have any interface with the consumer, their job is to see that the consumers and justice protected. Now I can tell you from my personal experience having dealt with the matter pertaining to SEBI that was the time when regulator issues the notice to the violator of the regulation, and even he was called probably the violator had an impression probably he is going to the police station. That kind of treatment was given the ground was to implement these regulatory framework. Within passage of time and kind of intervention which has been done either by the courts or by the tribunals which was supervising the work of the regulator on adjudication side only, probably they see change in there working. At least now I found, some of the regulator, and I am telling you my practical experience that approach has gone and probably the violator is not treated as an accused person he

is first guided. The is first told that this is your violation which you have committed and important of that if he is not ratifying his deed it is only than that the penal action is taken against him after issuing a show cause notice. And finally following the due process of law. Why this happening initially it was happening was because of non - availability of proper infrastructure, and also want of human resource and third the people who were manning it. Probably they didn't have the judicious mind. With passage of time and the training having being given to them I think these authorities are slowly maturing and moving in that direction. Many a time, because of the work load as I said proper infrastructure is not there, in appointment also they take long time, and what happens there is a pressure on the delivery of the regulator and in the pressure, the processes are not followed. When the processes are not followed the burden of the tribunal, burden of the court is also increased. These things are being taken care off and improvements are being brought and I can tell you on the basis of my experience that there will be last 5 - 7 years, I have seen a lot of improvement in the functioning of these tribunals.

Another area is lack of coordination with the government. Many a times, when regulatory is created he feel he is independent in all respect and even the basic policy framework is not followed. This have seen in case of TRAI and the department of TELECOM. The difficulty was TRAI used to say that any direction issued by the TELECOM must be witted by the TRAI. But the TELECOM is of the view that it snot necessary. It is only when we are laying down 2-3 meters which are given in the Act given power to under section 11, only than we need to consult you. I think these are the areas in which there is a dispute between the regulator as well as the government which need to be avoided. Many a time we have come across situation where there is over lapping of function between the two regulators and the regulator also fight with regard to the jurisdiction on a particular subject. And there is no laid down mechanism for settlement of dispute between two regulators when it comes to jurisdiction. I think these are few areas which need to be checked. So that regulator function in a proper way and objective of having a regulator and lesser in the field is reduced. Now coming to back to this particular slide of problem area appointment procedure and time taken, I think this is one grey area when we go and make selection for appointment of these tribunals or these regulatory bodies. I think one of the learned judges also mentioned it that people are not trained in that particular field and even people who are sitting in this selection committee are not aware about the requirement of the particular tribunal and they are asked to make appointment on those tribunals. I would like to make a submission that will be different because I have been associated some of these processes. Calling for the application, qualification which is required for that post is also laid down in the Act itself. The administrative ministry or the appointed authority, it calls for the application based on the parameter laid down in the Act itself. It is there only thereafter so that there is an independent selection committee. tribunal as well some of the Regulatory function are also discharging adjudicatory function and SC in many cases have said that if you are replacing or taking away the power of the court, now I am talking about the

tribunals and the regulator, than normally selection committee should be headed by a judge and the person who is heading the tribunal should also be a judge. This is about the tribunal.

To show little more transparency, the government has gone a step further and even in some regulatory bodies also it similar process has been adopted. The idea is the people who are sitting in the selection board are also independent person making selection. But so far as the qualification is concerned because that is laid down in the Act itself so it cannot be said that the person who is appearing before the selection committee are not qualified. now it is the job of the selection committee to ensure, that out of those who are qualified that selective person who is best suited to that requirement and for that you have to judge him on the basis of whatever qualification or experience he has shown and whatever little interaction you have with him for 5 minute - 10 minute, the committee has. So I don't think that it is left purely to the selection committee.

Participant: what has been done earlier by the policy maker as a government, and also which was discussed in the cabinet which was being headed by the experts from the various sectors of different aspects? Now everything is being bounded and putted in broad regulators and those regulators are being selected by someone and the role of committed has been done to avoid the challenges of the court. Rather than the conspiracy with the objective of the functioning they have. Nothing we will have to experts from the field to be the persons selecting the person, it's like a layman selecting a good lawyer. May you have done a number of cases to qualify the trial? The question is being a good lawyer does it mean that he is well versed with the jurisprudential aspects with all other various aspects of the matter, because it is largely a skill. Even being a very good lawyer he cannot be given intellectual capacity to formulate a policy like what is variation between. Prof. Bakshi, I read the judgments of the judges of the Supreme Court, they had done a wonderful job in laid down the interpretations of law. When we came to the different perspectives which are required to be taken into consideration by the policy maker, I would like to know that person in how will he judge?

PK: See, Policy making as I said, broad policy is made by the government itself. It is the implementation of the policy which is given to the regulator within the parameters which have already being fixed by the government.

I this liberty you have to give to the regulator unless you give him that liberty, it will not be possible to develop the sector as well as to protect the interest of the consumer. But balancing has to be done and because they are expert in the subject. So it expected that they will be making policy in accordance to the requirement of the people who are operating in that field as well as in the interest of the consumer.

**Participant:** the question what effects the public at large? take for instance that the, you have a secular network, than you say that each State have the Regulator of their own and the selection of the Regulator or the governing body is given to State government and each State makes its retired Chief Secretary the head.

**Mr. P. K. Malhotra:** I think the answer has been given by the Prof. Bakshi that so far as when it comes to the Federal structure and there is power available to the State government also to regulate a particulate sector whether idea available or the remedy available with us is probably the center can make a model laws or talks about the things to be adopted by the State so that there is uniformity in its application throughout the country.

Laws are made with good intention, but the people who implementing it are not implementing than the spirit in which they are legislative than they are obviously you can always found fault. If you can prescribe the correct procedure and you have given authority to an independent organization to select people and if they are not selecting the good people than you can't blame the law. I mean that is one area where we have to look into.

**Prof. Upender Bakshi:** Every law is being made off trick pressing the problems of the people, there are two ways in laws coming to existence. What is object of that particular law? One if the object can be achieved when the problem is solved, two different stages: law coming to existence keeping in view of a particular problem arises. Than the administrative commissioner will have the judicial component. Judicial component is the process of taking and decision making or all the problems are arises when the implementing agency is failed to enrout the problem in the proper perspective than the result is failure. So failure cannot be attributed to the creator, failure can be attributed to who fails to execute the functions conferred on him in the process of execution.

**Mr. P. K. Malhotra:** that is what have said that implementation is not done in the spirit in which the laws is enacted than obviously you can't blame the law. Then I think if taking clue from what you have said it is already in my presentation where I am saying what is the way forward I am saying that's election procedures need to be stringent. I have already highlighted it and when I talking of selection procedure to be stream line off course as I said that the people with proper capacity, capability, and qualification should be appointed. Another point which you have made was that people who are coming super elevation of fixed tenure probably this system needs to change. I think it's a matter of policy whether it should be fixed tenure or it should be a longer tenure like in tribunals. In some of the tribunals, we have full tenure of 62 years of age but in sub

- tribunals which have been created later on, say Central Administrative Tribunal, debt Recovery Tribunal, there is a tenure appointment. Yes there are two views that there should be on appointment people should go there after, There is another view why they should go after because suppose you appoint a person at the age of 35 - 40, to a tribunal and it continues up to the age of 62. He will lose all interest in the world, therefore it was thought better may be there should be a tenure appointment. When you give a tenure appointment than people say, Okay. Younger people will not be coming because what they will be doing after five year. There are two school of thoughts. And ultimately the government decided probably 10 year system is better than this having a person who are serving after 5 year or 7 year or 10 year on a particular tribunal lose all interest and mechanically start working. I mean you can do either way but personally speaking for myself, I am of the view that it should be at the age of supervision because that kind of things are coming now the people generally come at the age of 55-58-60 years than they can't in the tribunal. Probably many a times, we have very good people. Who have really contributed to the system, but at the same time there are people, take an example why talk about bureaucracy, it happen also about the judges. Many of the judges have gone and mend the tribunal. They have done wonderfully well, after 62 also. They are few who have gone there, they have not delivered. So it depends upon the individual temperament and approach, nothing is wrong in the provision of law. So if you want to work, if you want to work sincerely after 62 up to 65 also, you can work sincerely in the tribunals but if you don't want to work even sitting in HC also at 62, you may not do. And the same thing about the bureaucracy also. So I think there is need for processor to be streamline. May be as I said there two school of thought is, there should be no tenure appointment. I think people in the bureaucracy also if they worked in a particular sector and ultimately and after supervision if their services can be utilized in that particular sector itself. I think it helps. The only change which I feel can be brought in this particular area is in all these regulatory bodies, there should be involvement of private sector also. Confining appointment only to the government sector, we have seen in the past where the government itself where people from the private sector have been brought into the system, there are really delivered well. One example is the TELECOM sector, a man was brought from the outside and he really brought certain changes.

ADHAR Scheme, 95 Crore people have got today the ADHAAR number because a man from outside with different vision, with a different ideas were brought. He executed it and it works successfully. probably it should be a mix of experience from the private sector as well as from the govt. sector probably the results which will be given by the regulator will be much better this is my personal; view.

Than probably the proper infrastructure many of the regulator are sort of infrastructure, there is a need, it should be provided. As I said in case of separate department or separate ministry in the government which deal with all these regulators probably that problem can also be taken care of,

on issue of accountability I have already discussed. I don't want to dwell on it, but is there is need of more accountability in case the regulatory is not delivering or probability not passing an order in accordance with the powers conferred on it. If suppose there is a regulatory body, and every order is being challenged in the superior body, tribunals or

HC, and every order being reversed. There is definitely something wrong which needs to be corrected. there should be one more area and I think the very objective of creating all these regulator was the three expert body they will be because of their expert in the subject, so whatever regulation they are framing or action taken by them as per the roles, they should not be interfere by the court, there is too much of the interference and need to be reduced. about this instead of myself saying something, only yesterday night I was going through an article and I found it is very ably summarized here as to where judicial intervention should be there. And yes categorized into two parts, I read two paragraph it says that the judiciary should have the right to review regulatory decision is not in dispute. There is also no dispute about the need to provide for appeal against regulatory decision. We have tribunals for that. The issue for discussion is what should the court, or the appellate tribunals we looking for when they review or entertain against regulatory decision. should they be concerned only, what whether the regulator exceeder abused its power, whether the regulator committed any error of law or breach of rules of natural justice or whether a regulator reached its decision which is not reasonable tribunal have reached, this is one. try on these permanent sand than pass an order, or should they look into the merits of the case into facts and take decision such as setting tariff or pass orders or inter connectivity substituting themselves for the regulator, shall they substitute themselves for the regulator and examine the whole thing on merit, or it should only a power which you generally exercised under power to exercise judicial review. This is what it is. and if this sit he first, probably there is no difficulty because there are number of Supreme court decisions dealing on this issue and the Supreme Court itself have said that where the court have consistently taking a view that judicial review should only address question of legality, and reasonableness of the decision which is not happening.

**Prof. Upender Bakshi:** I want to ask you Secretary Law and the justices here, that a matter came to the agree tribunal and tribunal said certain number of cases could not be registered on certain day. The Delhi government came to SC challenging that petition against pollution, and to highlight the tribunal performance. And the CJ said why appealing against the tribunal, they are doing good job. The petition was to interpret the law as equity is a state responsibility. Law is administered or not but the justice should be administered.

That example I have given you when there is interference by the court and either the court should not have set it has not exceed its jurisdiction, having said that they statutory body has exceeded its jurisdiction, than the further direction probably not called for. May orally many an items judges

are giving and these are the complies with. But putting on record and passing such an order may sometime create problem for the department, for the government.

As was discussing the power of judicial review to be exercised by the court against the order passed by the regulatory body and it should not sit an appeal or examine or the fact so fresh. If that is possible view than probably it should not interfere than the judicial intervention I was talking of probably can be reduced and I think court that Tata Cellular Case in 2002, where SC laid down six principles as to how I mean, interference should be done. I think judicial intervention should be minimum as laid down by the SC and it should be judicial review in this strict sense not he parameters which have been laid down if that can be done, probably regulator will be getting more freedom to discharge duties in better way.

Regulator are in place and those regulators have to be, but some of the regulator have been mature or acquired that level, but the perfection can never be achieved. You can only improve it. some of the regulators are moving in that direction, if they really want this regulatory to succeed which is in the best interest of the country as on today because of no - government interference and similarly if the court interference is only for the limited purpose as have been laid down by SC I think the regulatory regime we are looking for in the best interest of the economy in the best interest of the protection of the consumer probably that will succeed and we will be very soon achieving that objective.

**Participant:** the language of article 226 of Constitution is white, the constitution gives an off course, the prof. has said that there is no constitutional courts - I go by this, the difficulty is with this kind of constitutional language and powers given to the courts, the high courts in 226, the SC and HCs functioning at the level have certain philosophical pre - dispositions, for example article 14 begins classification theory than goes arbitrariness theory, than goes to greater distribution of common good. None as far as the reasonableness, where the representation, rationality, these philosophical readings, Prof. Bakshi have putted in a very milder form, the equitable version of it. this possibly is what was the problem with single bench there that after making the this is not the part of the statute there are certain additional observations, this is the legacy as a part of the doctrine of precedent we will get so many judgement and so many judges in so many languages, this kind of ingrained in us when we are writing our judgement which philosophical tool to adopt and that get reflected and possibly become access what was required.

**PK :** thon one of cricks by justice the Law secretary reacted that one is not aware about the number decision being taken by the government on central and state level. So it is not appropriate to say

that government is running to the Court for every second case coming to it. This impression sworn because number of decision which are taken at the government level that runs not into lacks but in millions. And out of those millions only few are challenged. and those numbers because number of judges are handling it there number I can understand because decision are made in millions every day right from income tax officers level, from commercial tax officer level, the number is so large that government will be the largest [01:04:01] what needs to be avoided is frivolous and vexatious litigation which should not come. And for that off course national integration policies and considerations which will soon be seen like this.[01:07:24] Government is coming out with a public service delivery act, and I think that will bring some sense of responsibility in those person who are not discharging their duties with the best of their abilities.

**Participant:** if the bill will I can tell you, the efforts and work should be from both the sides. Litigation will come down at least 50%.

**Mr. P. K. Malhotra:** the issue is that some of them are not discharging there duty, they should be made accountable and to make them accountable legal provision are to be made. Law is in brought.

**Participant:** that's the reason, as a law secretary I take this opportunity to sensitize you and probably that you follow it,

**Mr. P. K. Malhotra:** that will be done.

**Prof. Upender Bakshi:** the provision should amended, to give the right to the court. Also who are not following should not put them into public office. Minister office, judicial office - any of them. And if this would not be in focus, people will be the judges, the consumer.

**Mr. P. K. Malhotra:** I will go back to my earlier statement, even today saying that the procedure are not in place is wrong. The question is procedure are not being implemented. Take for an example, we have Fundamental rules and supplementary rule in government of India. I am talking about the Union Government. Because similar things will be there in the state government also which specifically provide that there should be a rebuje after 20 years of service or attaining 50 years of reach. These rules are there since pre -independence period. But they are not being enforce. A time has come when government is now strict and they issue instruction ion, government consented instruction, from the last one year. It is being done regularly and being monitored. So what I am saying is procedures are there. Question is only regard to their enforceability and with the new legislation which we are thinking of that, probably that will become a more sense of responsibility. So the kind of cases which you are mentioning, there number get reduced. As said we are more concerned with not with the numbers, we are only concerned with the veracious and frivolous litigation.

To wind up my discussion, regulatory body is the only aspect which I was impressing upon was, once the courts, because the procedure have not been streamlined, they are moving in the right direction. And some of the regulatory bodies are mature and some of them are moving in that direction, system will settle down shortly and procedure will be very clear and there will be uniformity. there should be lesser intervention by courts and intervention should be only be on those principles if it is confined to that, probably the regulatory bodies will be getting more functional autonomy and lesser fear of their order being challenged on grounds that somebody is examining it on merit. If that is possible view which the regulator.

### **Session 3**

**Mr. Ashok Chawla:** I am thankful to the judicial academy for inviting me. As you can see I was the chairperson of the CCI for the last 5 years almost. And now its former so that not the title which anybody can take away from me. The former part. Prior to that I was in the civil service and I retired as the union finance secretary in 2011. That is my background.

Coming to the subject on the courts and regulators, evidently regulator are the new jokers in the pack. And why they exist, I think Prof. Bakshi and Mr. Malhotra has adequate justification and I will only very briefly that Regulation, whatever kind particularly economic regulations, somebody has to do. The sovereign of the State is the ultimate economic regulator if chooses not to regulate or activity expands so much that it cannot regulate. Or as I mentioned if the State is also an economic agent, than clearly there would be a conflict of interest if the State also the regulator and that basically the philosophy which derives the creation of independent, generally statutory, economic regulator outside the mainstream executive. that's the trend which we have seen, in this country of the last 20-25 years, starting with as mentioned SEBI, and clearly the transformation of the regulator role from the government to the independent regulators come outs in the case for instance of the SEBI because prior to SEBI existing whether as a non-statutory than as a statutory body, 1988 - 1992. They use to be in the ministry of finance organization, I am not sure whether you are familiar with it, there was a Section called Controller of Capital Issues. There was a different CCI, and the Controller of Capital Issues, which was part of the government and therefore within the government used to decide what premium could be charge, what could be the amount which a company could float equity or debenture or recoverable debenture so and so for. So clearly that is the role which government got transferred to SEBI and so on. Than over this more and more economic regulators have come into existence. that is the policy and regime which the government is continuing but very broadly my views on this, I am agree with Prof. Bakshi because they seems to be, I get the impression that probably we are over doing it, in terms of more and more regulator, particularity in the field of where they are not necessary. At this particular point of time whether you take the core regulator of the State and where the sectors are not even open to others to participate. I think what it really need to be looked at is the way whether there is any need for the sector regulator. Number 2 what was mention on the design, uniformity of design. The way it is

involved in the 25 years, the architecture is quite dis-similar in respect to one regulator to another in respect for one law to another piece of legislation. There are lots of differences, and I think the reason for that it is handled within the executive different miniseries. So different miniseries try to create, justified the need for regulator, define the parameter, they come up with the draft legislation and cabinet approves, whatever it is. So they are, obviously different certainly. May be some inconsistencies. Some short fall, the point which was mentioned that there is a need for some kind of standardization in terms of philosophy the approach, the mechanism which is put in place to deliver whatever government wants to the regulators to do. And what it was doing earlier. Or which any state require to do that would be an important area to focus upon.

Now coming specifically to the CCI, all the economic regulator essentially arising out of the fact that there is economic activity which is now market eccentric after 1991, the role of non - state player in the economy activity is increased hugely. That is the policy of the State government followed. As therefore evolved very substantially from the original thinking of State being the main player than mixed economy and now more market eccentric economy. So after the market economy become pivotal to the economy architecture. There is filling on the original legislation not the subject which the MRTP Act, way that was the original sort of regulator of business, of big business. but that was clearly found to be out of sync with the new economic philosophy and the whole approach there in the MRTP Act was not to allow businesses to become big, not to be given permissions, if they were above certain size, above market share etc. therefore to prevent the creation of monopoly, and even otherwise, the MRTP commission which was enforcing the body for the MRTP Act. That used to determent what businesses could do, not what they should not be doing. It had the power to enforce the legal provision on the private enterprises but not on state run public enterprises. And also they had no power to impose economic fines, they were like please don't do this. It was felt that while the oversight should be not so intrusive, and it should be basically watch behavior and then come in to be intervene not extensive, put restrictions, but those who are violating there should provision for the economic fines and penalties which can be forced by a body. So this thinking sort of evolved a committee which was set up as usual in the government, Mr. Malhotra will tell you that, to think of a new kind of legislation and they came up with the Competition Act. The original Act is 2002. Once the original act was enacted, there was a legal challenge to it in the form of PIL. And apart from the other things, the main was point was look you are creating and this is something we are discussed in the morning. and the subject of this seminar, the challenge was on the ground that you was creating what is a judicial body and you are not providing for it to be headed by a judge retired of the SC or CJ of a high court, so that not acceptable. this went on in the SC. the Government, came up with its defense and government said look this is not judicial body we are conceiving this as a body of kind of experts of people who will come from different discipline who will watch the behavior of enterprises in the market. so it is not a judicial forum, so it is pointed out but you know you have the provision of benches protecting in the Act, if the body of experts how can you have benches, they will have to sit together

and band and then multiple view point come into decision making and secondly you are not provided for an appellate tribunal which is in the original act. Point that you are making. There should be judicial forum to the appeals of the decision of the CCI should go. So the government accepted some of those and there was an amendment in the Act in 2007 and the architecture which was then put in place and which remains till this stages with no further amendment. through they have been some kind of discussion on that but the 2007 Act provides that there will be CC which will look and am quoting from here "an act to provide for the establishment of the commission to prevent practices having adverse effect on the competition to promote, and sustain competition markets, to protect the interest of the consumers and to ensure freedom of trade, carried on the other participants of India and for matters connected with it etc. etc. so that is the commission than there is an appellate forum which is headed by retired judge of the SC, and presently headed by Justice J S Singhvi, and there are two other members and then appeal lies to the SC. so that's the architecture as prescribed under the Act. [00:11:58] the first one goes to the appellate tribunal and the second one to the SC.

Now what do us understand by competition, and what we look at what are the other pillar of the competition act. Essentially the competition is not in sense that we compete with each other, we write competitive exams, students compete with each other, and this is not competition. The competition here is obviously among or between the economic enterprises where they are why for the business. They have to get more business than their rivals that is the competition that are looking at. The idea is that that it can only be fair and appropriate and friendly for all if everybody get an even chance. There is a sort of level playing fields. And no body manipulate the system. This is something which the mature marketing economies have considered and looked for a very long time. And once school of thought, I mean conceptually and intellectually once school of thought is that the market ultimately will settle everything and the market set of sooner than the later will decide who is better. Who has the support of more users, consumers, buyers, etc. and therefore why do we need regulatory trench. Why do we need a body which looks in for the enforcement and there is also the is known as economist of the Chicago School of Economics who broadly, a way to certain extend try to caveats, but basically this is their philosophy that you don't need too much of structural regulations. Structured regulation but there is also other school of thought. Harvard school, which believes that market is all right, but there can be lot of manipulation etc. which actually goes on. so you need regulation and this is what is happening in the western world, right from the anti - trust, the Sharven Act 1890 in the US and so on which is actually pioneer in terms of competition and then off course the provision in the treaty of Rome which came in the 50's. Than off course Market economies have borrowed this Act. And use this in terms of the competition, policy and legal provisions. So tis a legal architecture or philosophy which is I would say 50 - 60 years old. To which the market economy subscribe fully and the developing company also taking trade. Now there are about 120 countries in the world which have passed competition law etc.

there was a reference in this, to the consumer, the interest of the consumer, but let me clarify that, as you know much better than anybody else, we have a separate consumer protection Act 1986, which provide for three tier redressal mechanism, the Competition Law only indirectly on the end of the day, is supposed to benefit the vast body of consumer as whole, once the market are functioning well , like in the interest of everybody not just a corporate but also the consumers, users of the products so this is not a consumer protection, not directly, not principle, there is a separate mechanism for it. There are four main pillar of the Competition Act. Two are in terms of watching behavior and enforcement if there are violations. Section 3 and 4. Section 3 relates to the anti - competitive agreements, between and among the enterprises and agreement can be of two types. There can be agreement s which are horizontal in nature which are cartel activity. 10 cement producers, tier manufacturer, whatever they come together they have an understanding, that we will operate collectively, we will not wing at each other, when we either cut a production or raise a prices or decide territory in which we will operate. So everybody made handsome profit. Everybody benefits and costumer off course will pay for it - that's horizontal agreement. then there are vertical agreement in the chain of manufacture which is a producers, distributor, retailer whatever etc. and there can be agreement which can calls stress of the users of the products, as either you have ensure that people don't sell below the price or you have to buy something or something along with it. Vertical kinds of agreements.

One kind of things which is agreement, the other is abuse of dominance which is in some countries, in some laws called unilateral action. It is the same thing which means one entity. is big, or dominant, could be a monopoly, the act doesn't really prescribe dominance or monopolies but if there is abuse arising out of the dominance and there is nexus than off course, there are punitive provision which can visit that enterprise. for instance COAL India would be dominant, but being dominant is not really does found fowl of the law but if they are having agreement and they are forcing it to sign on the dotted line and saying that no you have to take this whatever good/bad, your problem and not my problem, we are not tested the COAL, there is no pricing done, and this is the price you have to pay. And there are elements of abuse there - penalties, scam, which ever enterprise it is. These are two things where the commission is supposed to look at behavior and how do we look at it? we can't sort of do it of our own obviously, so what happens this, in terms of private enforcement, somebody comes to us, it comes with a compliant and he called an informer under that see you doesn't even have to anybody who is suffered anything. He can be somebody who never flaw a plane in an Airline, not travelled by Air. But he says that I got an information that these fellows JET, INDIGO and whatever are, we look into it. The commissioner look at it. The commission, if it comes to a prima facie decision that yes there is in decent than it is carried forward. Than it send it to the director general (investigation) for throw investigation. Who is like the policeman and the prosecutor role into one? if he feel that it is not really matter of competition matter, or commission feel it is not a competition matter, it is contractual dispute nothing which will really go very far. The act says that matter will be closed straightway at that stage. if it goes

for investigation the DG and Secretariat establishment, as it is under the Establishment of commission but in terms of his work absolutely at arm's length we are not supposed to interact with him after giving him an administrative direction to investigate and come back with the report - what he does, how he does, how he goes about it, purely his domain, the DG then comes with a whole report with an evidence of whatever he has found, I have seen this from record, I have done this, etc. after that commission sitting all together, I mean assuming that there is a finding that company X is abusing its dominance, there is a report, the report is given to the parties and parties bring their lawyers and other experts, the economists, and CA and make their case for and against before the commissions and the commission can do and has the power to decide. It can impose, economic fine and penalties up to the 10% of the average turnover of the last three years. In cartel cases, it can be 50% of the profits, whichever is higher the profits or turnover. Because cartel is regarded in India and all over the world, as the most punishable form of violation of the competition principle. That is the decision and then there can be appeal. third thing in the act which is not really on the behavior but a kind of pre-nuptial approval which the commission has to give is merger acquisition of our circum thresh hold if above that are numbers that I think we need to into those numbers but if reasonably big enterprises are getting together. [00:23:11] [00:23:12] [00:23:16] if you are above that than the approval is required. So basically, bigger players coming together, apart from other approvals that they may need this is not substitute from either the high courts or the securities regulators or the banking regulators. from purely form the CCI parties come with an application and commission is sup[pose to decide. this is time bound by the commission and the act. commission itself through the legislation, further put discipline on itself because there are something which in a business cannot be held up where they want to do and where there is no problem. so these are the approvals for the mergers - acquisition combinations of the act says, the act provide for 210 days and there is a deeming provision that if there is within 210 days approval is not given than it is deemed to be given but the commission realized when provision is being put in to place in 2011 that majority of cases that 210 days is too long, we should not ask the parties to wait. so in respect cases prima facie there is no impact, the commission decides average of about of 40 - 45 days etc. for the approval to be given. the fourth pillar is not really a judicial enforcement provision, it is advocacy which is interested provision put into the Act that this is something new, the stakeholder may not know about it, to the commission has been enjoying by the legislature to do advocacy to make this known. so the commission engages with various trade bodies and industry forums, law schools, management schools, to trial carry forward this. .... it is the communication and the..... Actually the commission tried to be proactive and the commission has written to high courts, and the state judicial academies. Some of them responded with fair degree of enthusiasm and now people are officers and gone there. Generally also we have at least one member from amongst the total member of the judiciary. Generally from the retired High Court judge. and we request him, as we know outreach with his brother judges and the state judicial academies, so earlier Justice S N Dhingra was there and presently we have Justice G P Mittal of the Delhi High who super elevated from there and is now in the commission. So they do them it up and I passes to my colleagues there. there is no problem, the resources are not really a problem

these are not very expensive kind of things, but the advocacy something which is very important crucial and important for stakeholder, particular for smaller enterprises to learn who may be suffering at the end of the larger enterprises or really don't know that there is a forum where they can probably seek some .....the commission is being out as there are lots of booklets and now they are also brought out at least in the half of the important vernacular languages. Maybe not in all. But yes these are things which are need to be carried forward.

Broadly, that is the architecture. How it has worked. That is more important than some of the important areas where there have been issues. Now it's a new forum, it's a new body, the enforcement is all about what it six years now. the implementation of the merger and acquisition regime not even 5 years, on the merger - acquisition side I think the commission has done well in terms of the speed with which it has delivered and also because vast majority of cases have been cases where they were really know issues involved, no problems from the market point of view involved. There is need for lot of consolidation industry there is huge amount of fragmentation so that has happened, there has been intro pre structuring or there has been purchase of equity of X by Y because X wanted to exit the property and don't have money. Those don't' bother the Competition law, or competition commission so it done well. It is only 2 or 3 cases where the commission has need so far and these last 4 and half year to go into details. In 2 cases at least, what is called structural remedies which means there is approval for what you will have to sell this. one in the case of pharma company, one Ranbaxy and one very recently in the case of wholesale and la forge merger which are the two set of biggest Cement giant in the world, they are coming together and there are some problems so the commission defines the geography or the product market

#### **Session 4**

just let me give you a short instruction to what is in my presentation today - it's on financial sector regulation and like Prof. Bakshi let me take you to 30 thousand feet above, you not getting into the specific field chart because you will be looking at competition, securities etc. I am not only taking you 30 thousand feet up, I will also give you a wide angle view so, the pointing down side to my presentation, the end of it we will have more questions and answer. But the point to the whole thing is to provoke question to which there are no easy answers.

Essentially I start with what is the industry, the financial industry we are not looking at so competition commission is out of the purview of what I am dissuading. Broadly the financial sector regulators, the industry, the players. What is the objective to be achieved because very often we get into the detail of the Act and we forget what the end objective of the we seek to achieve, and unfortunately very often the crunch everybody use is investment protection. Pretty much everything can fall under the investment protection. This is a very abstract policy. It's exactly is probably as broad as public interest and if you see any SEBI regulation and they run into inches and they do not run in pages. Each of them are the source of the power which is cited in Section

11. Which is regulation and development and investment protection. very abstract policy which gives SEBI a very very free hand in terms of they conduct and they are taken up very very free hand in terms of the number of regulations, there debt and the intrusion and thereto the regulations. We look into the inherent weaknesses of the various security market, banking, all the financial sector, there are the areas which need to be addressed. in broad responses to what can be find tunes and improved. Who are the people who are the in-charge of finding tanning and improving. Basically the regulators in the mainstream and specifically we will get into how each share of weakness can lead the rest. Ultimately the judicial oversight review, and have a little perspective based upon my experience and finally I will end with lots of questions.

let me say that if this session was 10 year back, I had answers to all those questions, in post 2008 I think all the answers were very clear - private sector vs. public sector, large universal bank vs. side lows of the financial sector industries. all these questions have been reopened and the answers are no longer clear. we will get into all these current issues.

the industry is broadly divided into three parts, I. deposits and loans, which is essentially banking and non - banking which falls within the domain of RBI. RBI off-course if you ask, are they regulator. they will say NO, we are not regulator. we also do regulations. they see themselves many as central bank and not as a regulator. but they indeed, they are regulators of both banking and non - banking institution. what is the deposit, essentially any payment which, any amount which paid financial institution which is redeemable at par. so that kind of broad economic definition what a deposit is. and off course deposits are regulated by various other acts. the others is investments and pensions. investment is regulated entire sphere is regulated by SEBI and pension we have specialized regulator - Pension Fund Regulator. so that is the kind of second bucket which we look in to. third is insurance which is some what different. it provides, as the name suggest regulation in the sector of insurance and intermediaries. the couple of given areas which we will not talk about but just want to keep the scope not completely blank these are Collective Investment Schemes, its become the hot topic in most of High Courts, this includes things like raising money to invest in orchards, tea orchards, amuse farms etc. so there are all kinds of schemes. 97% SEBIers are asked to regulate this and its a very very broad definition. the scope what is a collective scheme is really very very broad. essentially any polling of money, you collect money from somebody and you invest somewhere. that fall in the scope of the collective scheme, that has to be registered with the SEBI. the other new areas in India are the fields of derogative which is again falls between various regulators. derogatives are basically financial instruments which derive the value from some other underlines like you derive from currency derogative and it has an economic perceptive and its not a gambling pro. it is useful and it is also called by some people the weapons of mass destruction by Warren Buffet because many people don't understand it and they play with it. the most famous case is Citi Bank's Robert Rubbin, who is the finance minister of US, he said on the board of Citi Bank in 2006 - 07 and he was told about this product after it went bust and he did not understand it at all. so if the director of Citi Bank who was the Finance Minister of US undersell the product with the trend to paddle and which goes bust then there is something serious with it.

the third thing is very very recent, which is few year old all over the world which is peer - to - peer financing. essentially instead going to bank I can go to essential website where I can seek to where is money and another person who is surplus can lend me the money to me. so its without inter mediation. the website is just the connect to both of us. and we can borrow and lend to each other. similarly appear insurance for example, you can offer the insurance to me and to 4-5 other people and co - relate all the risk. this is very very new. in India it is started to years back. it is active, right now it is regulatory vacuum, so its operating without regulatory . RBI is looking at it. probably another year or after some time you will have some regulatory framework.

whoa re the players? you are the investors, which are of two types. one are large investors. who typically left to work enough. they can protect there own rights and they can go for arbitration, courts. level of protection is larger which the investors get is obviously less. the best example of this two security products - one is mutual fund which anybody of 100 rupees can go and invest. the level of regulations very very intrusive and very weak, lots of inspection, orders etc etc. and you have the other side of this factor in something known as alternative funds which essentially SEBI says, we leave it to the law of contract but the minimum investment size 1 Crore Rupees so different regulation for different classes of investors. you have very detailed set of regulation for oddly inter intermediates.

Regulators are all important, because if you look at the size of the Acts, the RBI Act, SEBI Act, and specially SEBI Regulation is 18 inches book. so obviously , practically nothing is contain in the Act, except very broad policy framework. and to summarize a framework is what I started with interest to protection which means very very broad switch. SEBI had all financial regulators. so I would actually argue that depending on cost

Legally policy might be set aside by the Parliament but factually the policy is actually set by the regulators. they get to the law, SEBI Act says trading shall be prohibited which means nothing. there is a 10 page regulation which defines who is an insider, what is trading, what is persist information, when there is violation occur, very very detail set of rule making get into. finally the judiciary which has, obviously this is an area where the tribunals have got a lot of importance. start with securities, 2015 both insurance and pension have moved to Security Appellate Tribunal and from there direct appeal to SC. there are very few cases actually lend up in the HC under Art. 226. the system is really very important as we are pretty understood and appreciated post - 2008. the entire system is melt down. I mean if you told somebody in 2006 or 2007, the Goldman Sach , Citi Bank or Government Institutions, the people will laughed on you. both of them were salvage, by the US Govt. so the the risk of melt down is not theoretic. it has not happened, it will happened again and again. it is one of the areas which we should look upon when we looked at objectives. there is a very famous quote,"the result of shielding man from folly is to fill the world with fools". and there is constant struggle between what the regulator doing and what many investors want. and there is very famous saying by US SC Judge "the aim of regulator is not to remove the stupidity from the market, it is to improve ignorance from the market. there is constant struggle going on in terms of what is the outcome which we are seeking. are we seeking market in which everybody is protected, everybody get the 10 rupees or we are looking at the market in which there is rule against

fraud which is enforced. and you may get your 10 rupees back, or you may get three rupees back or you may get nothing back. it depends on how that particular company is doing for example. so is going back to the first slide, there are three types of industries, for the banking industry the protection of deposit is very very important. so your 10 rupees have to come back to you. there is no way that the government will ensure. in fact you have seen the last 15 - 20 years, there are probably 5 or 6 banks which have failed in India. not in a single case, the depositor loses a single penny. you may also want to keep in mind these are, bank organizations which are very safe. there are in fact the riskiest organizations in the world, and when I said riskiest ....

## Session 5

Prof. Baxi: Welcome and good morning to you.

Prof. Baxi: I don't know what we all are proceeding here we have Mr. Ranganayakulu and this is me and you will listen to Mr. Sinha in course of time and I am supposed to make some useful bakwas which as the day goes on you will forget so I will also do that now on what is Economics and Politics of Regulation. There can't be a more (...) subject than that and I have taken the liberty of circulating with you as will as an organization called CUTS and something like Competition UTS something I forget run by a chap called Kulig Mathine Bombay and it gives you a very nice 2007 report on the state of regulatory institutions in India and how much there is economic and political interference in the working of regulators and now obviously this report has stated that it is a very useful report and it is no use carrying (...). It is no use carrying MIC to Bhopal, it is wrong to (...) new castle but old expression. it is wrong to concentrate on what they say, obviously this is part of the general OECD idea of regulating regular. I am not going to take you through that report because you have got it and it will be unnecessary to point out the details of that report (...) and Cuts stands for what Competition and I don't know what they call CUTS they have something called as Competition Regulation but this is a very nice report and there is plenty of interference with the idea of regulation, with the institutions of regulations, with the ways they function and there is interference according to this report and as you generally know, arises from two sides of the market and now the free market and the from the political side, umm and obviously this is good to say the economic interference takes from the state takes the shape of funding allocation decision and regulatory institutions are very often umm starved, I would say, of resources. we heard yesterday from the Chairperson of Competition Commission who held the outreach programme with the consumers, with others and young people who were likely to be affected by trade finances and trade abuses ordinary people are rightly dependent on the subsidies finance subsidies given by the minister. there is also the problem umm that the report discusses and we know, the problem of political interference apart from funding which is in the shape of a relationship between the ministry, the nodal ministry or the allied ministry and the industrial and the regulatory tribunal and that's when the conflict comes at the highest in the working of trade TRAI, the Telecom ministry and there is a TRAI there is conflict with the ministry and the tribunal

and the regulatory institution. Also there is full (...) quiet clearly in relation to appointments, who appoints the members of the tribunals or regulatory institutions, I beg your pardon alright, who appoints people, the government or may be sometimes a committee a single committee but ultimately lets say the executive as distinct from NJAC affiliated especially with the facilitating tribunal regulatory on one hand and judiciary on the other. But the appointment of the personnel of (...) is in fact made by some sort of executive procedure. I am not saying its wrong, I am saying its there. So in the CUTS report is very interesting, it goes beyond interferes and I leave you to read that, thats not my main concern today. I think and these are the primary issues that (...). now very important design issue, how to design regulatory institutions, how can u ever make them independent of the State and the Market and there is a lot of economists good economists who got through the (...) some reading on economic and Political Weekly in your file here, if you must pay compliment to Shruti Jain by making this book a constant companion as I would think because they got a lot of good material, we cant discuss it all, ya anyway in this discussion we must keep company (...) and (...) so they could find some articles which deal with distinctly economic interference as distinct from political interference. Now I am, and they will find a lot of discussion by economists on how this would be a super regulator and they super regulator some say should be RBI. RBI ultimately regulates via issue markets more than the others although SEBI might differ and a lot of might differ, there is lot of disputation about whether there is a need for what is called as super regulator while the central agency regulates all the regulators with the full task of regulation or there should be multi sector regulation as we have now and economic analysis is one way of doing analysis through the (...) but do not include for example anthropological analysis, anthropological method depends on the economist in the sense we concentrate on the decision making behavior, the entities and their behavior in the context with which they are located, there is a different kind of analysis. so you have got economic analysis, anthropological analysis, political science analysis, you have got also sociological analysis of regulations as combined and of course you have got the judicial analysis of institutions that work. all these doesn't go before Parliament, before Parliament what goes is the annual report of the regulator and we heard yesterday distinct speaker say that these reports are rarely read by Parliament as a whole which is true. I differ, they are read by committees and subordinate legislation but then Parekh yesterday said that you get SEBI or some other agency could put a bull around the Parliamentary Committee and subordinate legislation by writing contradictory part in the analysed edition report by SEBI which he has presented 67 contradictions in one document and you should know what SEBI is doing (...) before you can advocate. May be its right may be its wrong I am not interested in that but there are ways to mystify the operations of regulatory agency and the non experts may find it difficult to walk through that mystification. so there are limits to what this report achieved by way of accountability, that's the main idea that they are good instruments of accountability and I always say and I will elaborate on this point later, that in all two, I will distinguish in two types so A) I dont like the word accountability I call it responsibility, accountability really a nice profession auditing term book keeper's term which is read and (...) keep the accounts stake something called creative accounting of, very complicated, as a citizen I emphasize on the word Responsibility but

this word is gripped as it were by corporations so here we have corporate social responsibility. now the company's Act as a chapter the new Company's Act, 2013 on something called Corporate Social Responsibility. I dealt with Bhopal for last 32 years, I am still in Supreme Court here and I am Advocate on Record advocate as they say in the American and the United States and bhopal litigation and we just finished a massive round of (...) we will do it again I don't have a problem with that. So to be Corporate Social so much that doesn't exist, what exists is what I call corporate neanderthalism is doesn't acknowledge any form of human rights, it only acknowledge the drive for profit. It denies all sorts of social responsibility except in that you cannot murder your rival, CSR has gone through three phases, three types of CSR, first if winston Friedman in mid 20th century when he got the noble prize, winston Friedman of Chicago said Corporate actions have only one social responsibility and that is to its share holders. then there is second phase of CSR where they talk of human right responsibilities of corporate actions and that worked in south Africa where there was apartheid and there was through default oh i dont know I am sorry or (...) report and O'conner report where atleast 200 american corporations who actually stopped doing business with south Africa, whether as an impact or whether they do the business through subsidiaries or the main company I do not know the details but taking the facts as granted, the second stage of responsibility of corporations is that they are good citizens good players they will not murder their rivals murder their competitors oh Indians occassionally do but that's a different matter. the third stage of corporation of CSR is whole literature is there I was just talking business management in my school in universities and i know that where corporation fails to be a good citizen and you are a system of global compact copy anand and we activists call that yes global compact with little impact, little impact because corporations pick and chose human rights instrument by which they are marked but unlike the State they were not bound by human rights at all. The market cannot be bound by what State is obligated to. So State in the Indians way in globalization, liberalization and privatization divest a lot of state companies to private companies the national hijack. I say globalisation can be described as three Ds - de nationalisation, dis investment and de regulation that economically defines globalization good or bad I am not going through where I say it is bad but that doesnt matter. So there are several generations of CSR languages but CSR languages do not respond to languages and norms and ideas of human values and now a serious conversation, you can look at these issues and important design issue is as judges would certainly find it an important issue, how far regulatory institutions ought to have regard for core human rights but then embodied in constitution and core human rights were embodied in international global instruments or is economics something separate altogether analytically, normatively, and ideologically separate from aspirational or aspirations were as just worth or aspirations for human rights oriented governance, present slogan for global governance maximum something minimum something maximum ah..what is the place of human rights within it that's the question you have to ask whether it is Manmohan Singh or it is Modi.

Participant: Professor Bakshi will you please enlighten (...) smart governance?

Prof. Baxi: governance doesn not mean human rights.

Participant: except governance everything is been done except governance. law and order, health, basic infrastructure these are human(...) I will give ur 10kg rice or I will give you 30 days rice and litres of kerosene and 5 litres of this roti kapda de dunga free I am looking free (...)

Prof. Baxi: a great German jurist a great jurist of the 17th century a man called Jurgen Habermas habermas was a big head poke or low on facts low and norms and (...) and he discussed coming at your point and Habermas said that his question was how has capitalism survived and he didnt want to go the way Marx went he went his own way the liberal way and Habermas essentially said that Capitalism may survive but including some justice or social work that demands with it so he has two paradigm one is free market paradigm and (...) and the other is social justice paradigm. So the State Perseus the free market paradigm according to him largely but inter relates it sugar coats it with some social justice measure for social welfare State so paradigm of legality according to him meant two paradigms - the group paradigm and the social (...) and this conflict comes at a time when you see Mahatmi Gandhi.. MNREGA.. have you seen MNREGA (...) conflict- one side you say this to be universal anti poverty measure and 100 days is nothing compared to 368 days leave it. so ultimately the State has to limit the has to administer the social justice programme within a capitalist paradigm and Habermas's answer was exactly (...) he never visit India (...) status of Tamil Nadu but you can see welfare state as a whole has to arrive in India, there are pockets where aspects of welfare state is emerging like tamil Nadu, like Kerala, like gujarat Model economically, Andhra Pradesh probably, karnataka probably u can name there must be Uttar Pradesh or there must be Madhya pradesh types or any other northern state i m not going to go there u may want me to go there.

Participant: Sir if any problem comes from this State issues, see ultimately the state has to have resource to cater to the concept which you advocate someone trying to (...) etc. and the state resource be the basic concept of governance is given a go by and the process of this election in every five years vote bank oh yes vote bank.. so the basic concept of governance is given by totally and in the end ultimately the entire concentration is only on this vote culture mechanism and (...) from the overall world leveling situation, now how do we integrate both the things (...) pattern after that thing that trying to say (...) this is one of the way of the (...) that gives you some curbs or may be appear that social welfare is being catered to but the reality is there is so much of social welfare and there is no governance account..

Prof. Baxi: well these three ..

Participant: (...) future governance because we are governing ultimately with real conscience is going to interpret. Otherwise the Supreme Court says u stick to what is there in the letter of the law.

Prof. Baxi: what the Supreme Court says is, what is the headlines today in Hindustan times scheme on Bombay Cricket Club case, that (...) ayee if its not mandatory we will make it mandatory, the

counsel argues that this is not mandatory, lawyer or the chief Justice Lodha committee report is mandatory not binding on us, so the that is what I forget I didn't read the whole thing, I saw the headline on the television and it says the judge has said come back again counsel, your argument is that it is not mandatory, we might make it binding on you. Discuss it in separate session there. so the judicial governance undoubtedly exist as executive governance exist as governance by regulatory institutions exist, as political governance exist. There is different forms of governors, governors as far as citizens are concerned they are all governors, the Market is governors, judges are governors, the politician political class is governor, for us everyone is we are all governed, as citizens are not in any power or position to make decisions, that are binding on the community, governors are those people who are in a position to make their decisions binding on the community, so there are two classes of people, one class which is heterogeneous very large, the ones who obey, those who are ruled and those who rule. each governing institution has its own logic, RBI has its own logic, SEBI has its own, TRAI has its own, regulatory institution alone and the political class has the elected logic, you cannot. Elections are very necessary if you want to tackle democracy, so I entirely disagree. Vote banks are necessary, if a party is going to stay in power. If you criticize vote bank politics you seem to have criticize politics as a whole. you criticize the election, the representation of people's Act, you are saying in effect that party funding should be regulated election funding, a candidate has to declare the election law, the amount of expenditure, but parties completely free to receive donations. American Supreme Court has held during Bush's time that its the First amendment right of Corporations should give money to political parties and they cannot question it, you cant really judge if you question party expenditure party nominations criminals are voted to power, how parties nominate who will go to election, if you question all that, you basically question democracy, you can ask for reforms so each sector of governance has its own logic and there is limits to what one can question, if one is believing basic structure, democracy is a part of basic structure. There are difficulties, I agree with what you say but that difficult as to what you or what gets said about the political class, governing class has to win elections, parties have to win elections, there is competition for power, competition for profits SEBI can regulate the way you can make profits with all the financial regulatory institutions but it cannot regulate politicians their market for votes, that means it can regulate all governance, there is this supreme work and I think there is a yardstick, a constitutional yardstick and they apply yardstick to political class so I Justice Bhagwati gave his judgement long time ago saying that party funding should be included, shall be accounted, they should ahmm.. party funding ahmm should be illegal and immediately there were reform of electoral that was Representation of People's Act by Parliament long back. Now is that legislation of RPA invalid, even the Supreme Court did not did not find it invalid, so candidate had been having a criminal background be able to contest elections, wrong in Lilly Thomas, this Supreme Court after a long time in 2013 said- no presumption of innocence if you are convicted by the District Court, out you go from the political system, you cant contest elections,(...) from Lilly Thomas there is no time to flip even if Supreme Court has ruled.

Participant: Sir one second, the judgement has of course our honorable chief minister after he got (...) therefore she became a chief minister but this condition was not there. In fact (...) was suspended but the condition was not suspended. The matter was taken before Supreme Court where in this Balucha Case, Courts gave an order for (...). once a condition is there stigma will be attached, therefore she committed (...). therefore (...) once all the conditions are set up less stigma will be there.

Prof. Baxi- I dont know how far Thomas over rules (...) cant look his bench.

Participant: Of course sir only one team. if its a government servant he is commuted and set off after few days he can go back to service where as (...)

Prof. Baxi: So in a sense the Supreme Court can lay down some norms of how political classes will behave. the political classes through parliament may however upset this norm or may go with it as they did in Lilly Thomas its decided. My difficulty with any such decriminalization of politics by judiciary , my difficulty is where judiciary itself sustains the presumption of innocence till proved guilty by the court so am I guilty or not guilty, if I am a politician I am guilty for contesting office when so declared by the District Court, my presumption of innocence and right to appeal ends. Lalu Prasad yadav is disqualified, so may be Jaylalitha in the Supreme Court if they follow Lilly Thomas, I have nothing for or against this person i respect him because they are elected and not more than five people come to public spaces. I have always worked on the theory of (...) as a teacher no other way, so in fact at Cochin where I delivered the Bath rule access, bath rule is a just and linear perspective which i published in (...). large number of people came and then I was in % lectures in Trivandrum, so I said so many people I have never seen us time my classes 80-60 but this was hundreds of them and there was no place to sit and i remember a story, a story about everybody left but when I went after speaking, it was a man but one person so after one hour of bakwas I said to this man very patient you stayed all the while, may I ask you one simple question why you stayed and he said I was not paying interest to what you were saying but I am the dariwala I am the carpet man.. laughing.. he stood there because he had no choice. So I cannot address, I have highest respect for the politicians who work in summer, I cant go out in summer I will fall ill, and address thousands of people, hired crowd or what crowd doesnt matter but the people come and speak all types of things, so i respect them my basic point. So I think you as a citizen, as a citizen do i respect political classes, i would say yes worse and off they got many difficulties, I respect everybody but do i respect Lilly Thomas. What happens to the system or the systemic presumption of innocence on which our own adversary communal justice system is based, can the judges bite into or cut away that presumption of innocence.

Participant: sir that is why there is a condition that course- four conditions that the concerned parties (...).

Prof. Baxi: How am I disqualified by first conviction, first conviction can be over ruled by High Court and if sustained by High Court then can be over ruled by SLP. So I am a free man until the Supreme Court speaks.

Participant: Sir that was a general High Court Practice (...) until the final appeal conveys in a condition he is presumed to be innocent.

Prof. BAXi: therefore I am questioning whether presumption.. my brother my friend mallimath in his report says there must be presumption of innocence says there must be cotton rule system, mallimath committee report and two other reports, and our critics state very harshly, sorry because I like Mallimath, but there are no choice. So anyways this shouldn't matter, I was not going to talk about all this, this is way of saying, I am not talking about all this. Every governing institution has its own logic, I am talking I want to talk about some jurisprudence of this criticism the assessment of regulation, and I want to raise the question I want to put a question as one of State differentiation. Why should there be so many institutions of State, there is SEBI, TRAI, why is it necessary, why is there this myth of separation of powers, why cant be central, why cant those who are willing to do just try to do, why this jars, this furniture, this cacophony of voices, SEBI is ah.. something else is something else, duty of legislature to the judiciary, why, you got to rule you rule. And capitalist demarcate them like many rulers , it wants to be ruled by one agency or by two agency not large number of agencies, citizens also do not want so many, why is this State differentiation made that is the basic question of political theory, why would intelligence be a part of it while I go through two answers, a) the answer given by uncle Marx, I call him uncle, ideological uncle, if (...) and you look at his foot notes, he foot noted every assertion he made also by long hand and he wrote a book on the 1857 mutiny of war independence, he never based it India (...) and he lyrics the map and describes out Awadh in latitude and longitude on his map and this is earth and ...you kindly read his dispatches through dipute tribune, so he is amazing that's why I call him uncle. The man highlighted my class to be like him in acknowledging others in cycling work not just say everything in my own. So uncle Marx, he asked a question..

Participant: what is his book called on 1857 mutiny?

Prof. Baxi: its published its in quote in my MARx lectures published by long time ago, MARx law and justice, Marx dispatches through tribune, its a collective work, there is also a separate publication called Marx on Colonialism or Marx's researches on India and its about two hundred spaces and in between it mutiny was taking place.

Participant: British rule in India by Karl Marx.

Prof. Baxi: number of editions have come up, so he used his bail power and (...) I mean at least he was one of them who gives them both, he answers his questions, he said why is State differentiation, why State, why does the capital need State, why do capitalist classes need State at

all, why do not the, why doesn't the bourgeois class the capitalist class reject a rule why intellectual of bourgeois class that was main point, why the media at this stage why not directly rule the State like it rule the people why indirectly rule the people and before Uncle Marx, this question, in his communist manifesto, he and Engels asked the question of what is the State and he barely misquoted sentence in Marx. Marx said that the State is a managing committee of the entire bourgeoisie, now the word entire is crooked. it makes no sense, entire bourgeoisie by entire is very important the entire bourgeoisie is at conflicted class by itself. Merchant Capital is in war with Finance capital, (...), they are in conflict with the speculative capital, so there are various fractions of capital and they are inter locked and inter fighting, their interest are not always the same, interest of (...) is not the same as interest of industrial class, interest of finance capital is not the same as interest of speculative capital so uncle Marx came to the conclusion to answer his own question by saying, in Waring fractions of capital you need an arbitrator and that is the political class and that's why you got the State. The State is a managing committee there is no mistake about it, its an arbitrator and state includes Article 12 include Cricket control board is also there. The Supreme court says in Cricket control board case that it is not a state under article 12 but it is doing some public, it is looking after public in its jurisdiction, now that is not if you ask me but Supreme court can say anything it likes. So if State is the managing committee of the conflicting fractions of the capital institutions. That was Uncle Marx's scientific theory and regulatory institutions are managers or governors of this competing fractions of the capital and every administrators worth is named every regulator knows it, whether regulator is statutory, almost statutory or non statutory. Yesterday we heard the Competition Commission raise the question of section 60 which says no vote shall apply except in competition commission and the competition commission for Mr. Chawla ordinarily answer it, he said its a standard provision in all legislation (...) drafting product is there, I have got all the Parliament in Delhi University, I will come across such a provision like section 60 in competition Act and moreover accepting this law will apply, that is (...) will apply, consumer protection Act will apply, they may not take decisions but entire legal system I have only come across an SEZ situation, I have never come across, I know the SEBI act will apply, I dont know where but look at the answer, the answer is very assertive, so there are some regulators who do not find exemptions from law problematic at all, exemption immunity from law is a standard thing, some apologies Mr. Chawla is not here to defend himself. But Statute is a dumb thing, statute is a (...), so how to structure that impunity of law, how to break it, how to rupture it from time to time in the interest of the capitalist class, in the interest of the free market how it is regulated, that is the task of SEBi, Market Abuse, What is Market abuse, some people will make a pass but they are not regulators. But free competition is peaceable level playing field. So uncle Marx first thing he said is n our terms regulations occur, if you take Marxist perspective, occurs only because fractions at the capital is fraction ridden it is not one thing, it is not some other entity free market is not one thing it is many things, the market depends on consumers, the consumers will (...), market prominence is a bad thing because then it is not free market, its not a good thing therefore you must regulate. So in order to regulate the arbitrators of capital in (...) state, this was Uncle Marx's answer, it was a good answer. He also talked many things, this is not a time to talk

about it really, the thirty or I will come by time right so (...) never to think in singular, always think in pairs and I told my students and i found it absolutely essential to think multiple not single, think double not single. The hunting pair he said in chapter 7 Capital volume 1, he said the rule of law must co exist with the reign of terror and (...) rule of law without the reign of terror. In order to understand free speech, you must understand censorship, there is no such thing as free speech and a good thing I am not (...) unless you understand censorship the things like you to do situations to free speech. My brother Deepak Mishra Ji in one of the freedom of speech cases, there is a marathi poem 'Gandhi Mera Batla', I met Gandhi by lalit (...) poet, he says his prosecution of this poet is reasonable restriction because the Supreme Court says Justice Deepak Mishra has in number of decisions said insult to national figures is a crime and Gandhi is a national figure, the ten more decisions stumbled to Gandhi that he normally dont worry about these people and they dont know about gandhiji's jurisprudence that is jurisprudence of Mohandas gandhi but you dont find a judgement unless Krishna iyer refer into it. so there is a problem and he invented a new ground of reasonable restrictions under article 19(2) namely offending a figure held to be a national figure but the judiciary is also a reasonable restriction,. Most of the things in the contempt for contributions for his nations etc etc, the ground for reasonable restriction Parliament may pass a law. There is no law regarding national figures, Mr. Deepak Mishra invented it, so if you cant understand the freedom of speech and expression in India you have to understand the history of censorship, not censorship by anybody else but by the judiciary itself. The executive censorship there is a bit more but there is a law of reasonable restriction and the institution of censorship to understand. Marx taught us to think in different ways, if I am, 5 minutes I think shall wait 5 minutes, i will go to liberal answer to the very same question, many people not comfortable with the good reasons of Uncle Marx but this his question is very important, why the state differentiation and his answer is typical Marx answer. If you go to liberal thinkers (...) there is man called Luban a German philosopher of law, Luban died recently, Luban Nicholas Luhmann was the first thinker in law to my opinion who combined law and biology and he said, Luban said, what is law basically and his answer was very briefly, was law or legislative law is nothing but positivisation by court positivisation of arbitrariness of the political class that too for legislation a) positivisation/arbitrary will they know of the political class. there are legislation under Article 17 and 23, Parliament has power coupled with duty under article 35 to make law as soon as possible otherwise when you will make a law, what kind of law you will make, how will you amend a law, when you repeal law are questions left to political class, when I talk of legislative practice in the University, they look at the beginning of the bill Act, whereas it is expedient to enact a law behind them, there is a duty to enact a law, law is legislative (...), the foundation of judicial law, it does something to legislative law or you can say supports it, judicial law making deals with the arbitrariness of the state. Now on what basis judicial law making binding, why is today Gopalan not binding and Maneka is binding why, I am bound to ask why, (...), why is substantive due process more binding which was exiled by the Constitution makers more binding Maneka decision now. Then for 51 Guruthnathan decision, in that case why. I distinguish between creative judicial arbitrariness and destructive judicial arbitrariness or despotic judicial arbitrariness, it is difficult to (...) I admit but there is

something called creative judicial arbitrariness on which this social action litigation rests. Social action litigation rests on creative judicial arbitrariness, Cricket control board, I gave this case just now, it is not a State under article 12 yet it is in public interest and it is regulative, what about hockey, tennis, what about Kabaddi, we will consider it as the betterment there, they are already raised since the common wealth game, I love cricket don't get me wrong, so did(...) I share cricket as my passion for cricket and passion of music, but if I am a judge would I make my passion be the basis of my judgement, you might that's creative judicial arbitrariness but carries its cost, so free market capitalist also (...) every time that he parks there is new bugging of car but why do we need 200 varieties of tooth paste in India, you got promise, you get colgate, sensodine, you get n number of palmolive.

Participant: but they are only brands ultimately taste is taste.

Prof. Baxi- I don't know whether it is, I am not a chemist, I don't know what it is, I even don't know what it is, the point is Soviet Union had only tooth paste, one brand of tooth paste, socialist soviet union and the death rate is the best default. I will go with the Soviet Union and become CSR.

Participant: those are only for one rate or only the substance

Prof. Baxi: they all want equality and there are two caste like our Hindustan we have 2 caste and they have 100 different variety of tooth paste and that too lowest in the world, I am not building a co relation with the tooth paste eventually in the topic, something should also be decided about noodles, the harm to the public interest, there is something called creativity arbitrariness but Luban said legislation that he related this life chances he said body, body is a series of system, digestive system, reproductive system, there is cerebral system, all kinds of system that seeks to social structure, each system is an environment to another, think of regulation all the time, each system provides what competition commission provides environment to SEBI, SEBI provides environment to another, limit and opportunity to act, each system is separated fraction, each system is the change it adapts to new learning arises you don't know everything and each system is capable of what you call structural coupling of linking together, Luban was a master he was reading sociology of law where there is 'Poor man's summary of Luban' and his latest translation is three years ago its called sociology of law by Nicholas Luban translated in 2013, its a very good book a different book but its a good book and he has developed his notion of what is called auto poetic theory of law, auto poetic jurisprudence. In other words he says the desire to have a normative unity of a legal system is a myth, all you can achieve is systems learning from each other, all you can achieve is segmentation of law, you cant have a meta law, you cant have a law which binds everybody every system, you can have only fragmented law and can only have fragmented regulation, the idea that there is political and economic interference with regulation is to conclude in one sentence is a myth. Its a myth in self proposition but law itself is politics, legislation is political accommodation. When a personal God given war human war is political creation as a result of my American friends used to call it law or legislative law or judicial law is he said - a

treaty of peace among war in actions. Legislation is a treaty of peace of between war in judges or so is a decision by SEBI or RBI a decision between waring party temporary then again to disrupt, treaty of peace regularly so law you can have only by fragment regulations you have by fragment and you must have to be very careful about when talking about not that there is no interference but you must go one step backwards and ask yourself difficult and deep questions about the theory of law when you complain or write interference, it's not easy, interference is in built as autonomy is in built and the (...) between A1 and A2 , there can't be A2 without A1, A1 is autonomy, A2 is accountability, you cannot have A@ without A1 and therefore in regulation you need autonomy as well as accountability. So the total of interference is in fact somewhat messy. Sorry I responded to the arguments rather took a long turn on my own thing..

Participant: Professor just a small addition to what you pointed out.

Prof. Baxi: Ya

Participant: yesterday I was going through my notes from a book by Australian legal Prof. Brian Holligan it is a book of Adventures in law and justice exploring questions in everyday life, so Holligan makes a point that I Just made a short note for this conference. He says the law operates at three levels, level A is a final set of legal rules, Level 2 are norms of community governments and regulations and level 3 professor as a systemic and institutional feature which makes law and justice as in the dispensable forms that we see it. Now with regard to regulation he said regulation and rules deliver a certain legal certainty in respect to simple phenomenon and when it comes to judicial verdict, he says principles are more applicable, so when the regulatory bodies function according to their rules, Holligan interprets it that law in law context is everything. He says that these rules and regulations operate in a simple phenomenon and whenever it comes to question of interpretative situations, he says principles would be more applicable, so he tries to tie the legal operations in these three levels as Professor you also has explained them what is the basis of..

Prof. Baxi: no that's a very good mapping out of what the Australian jurist says inoperative book i will forward it i should congratulate her but it begins at a particular level and ends with a particular level and its very good it make a distinction between great soviet jurist Edward B Pashukanis, who was killed by (...), he killed a lot of people and without reason and of course we suppose that we can kill a human being with a reason which I leave to regulators, I am a poor man simple man, but EUG Pashukanis was killed why because he made a distinction between that you seek to make between regulation and law. Pashukanis said socialist law is impossible, if by law you mean regulation it is possible, if by law you mean politics it is not possible. Regulation is the roads of fruit of (...) which stands in the right side or the left side of the road that's ok. regulation is technical or hyper technical whereas law is by definition political decision, it is what you should do and what you should not do and Supreme Court and High Courts are to abide by these decisions. So if you take partly convinced then I don't think the Australian jurist to make distinction between law and regulation, if you don't follow Pashukanis I promise to look him up. His move is assuming a

theory of distinction, he assumed already that law can identify, regulation can amplify at a certain level and then he makes up his summary, its very important. Thank you.

## **Session 6**

**Mr. U.K Sinha:** Good morning everybody. Dr. Oberoi, Prof. Baxi, my colleague Mr. Ranganayukulu. Honorable Justices. It is an honour and privilege for me to be here with you. I am grateful that all four sessions have been provided today. I only hope that it doesn't become too boring and difficult for all of us. So, I would request that at any state I am talking, please interrupt me and let us make it very interactive and auspicious. Because, the law that we are talking about or going to talk about the regulations are still evolving in the country and there is no finality about everything. That almost on every board meeting of SEBI, we have a proposal for making amendments in one or may be more than one regulations. So, it is a new evolving situation. So this is the current environment. The current landscape, the parliament of course is the supreme and then we have the Ministry of Finance. There is a financial stability and development council 'FSDC'. This came up after the 2008 crisis and this also best on the developments in the USA, where they created some similar body. In India, this body was in existence in a slightly different form through an executive order but ultimately the law was amended. Now, it is a statutory body. Besides other things that it can help in coordination. It has also has the power that the chairman of the council that is the Finance Minister can intervene in inter-regulatory disputes. Some of you may recollect that there was a dispute between SEBI and with IRDA with regard to what is called ULIP- Unit linked insurance products. It became a messy affair and ultimately this law was amended so now there is a coordination mechanism through FSDC. This body besides settling inter- regulatory disputes has very important function that it need every quarter and it discusses matter of financial stability because our country like any other country is quite linked to the developments outside India. So, what are the global developments and how they are going to affect us? This is a forum where, a view is taken on those developments. We issue a press release but the minutes are not released to public but we just issue a press release. Now reserve bank of India does the monetary policy banking and non-banking regulations, forest market, public debt management. SEBI does the market and commodities market. IRDA deals with the insurance market. Pension fund regulatory and development authority deals with the pension funds. Ministry of corporate affairs through the companies act regulates the working of the companies. Certain sections or certain portions of the companies act are by law that is by the provisions in the companies act administered by SEBI. So far as the listed companies are concerned. These are mainly area where we are talking about issuance of security, issue of dividend and matters related there to. So, those matters although they are part of the company act but SEBI has been authorized to administer those area. Now, there was a financial sector law forms commission which was chaired by Justice Krishna. This committee submitted its report in late 2012 early 2013. This commission has made some hard reaching recommendations in part they have said that there should be consolidation of regulatory system because there are too many regulations in the country and when I discussed about the scheme we discovered that the situation is horrible there are so many agencies looking

after collection of money, collection of deposits from public. So on the one hand they have recommended that there should be consolidation and they are calling it unified financial authority. SEBI, IRDA all will be merged. Securities, market insurance market and pension market they all will be immersed. The rationale for them for the discussion of all these recommendations is that everything which deals with trading in some way. Trading of securities or trading of any scheme where trading is involved that should be one authority and they are calling it UFA. When they were also mentioning that when recorded the forward market commission which deals with commodities market regulations that should also be modest. This has already happened. The commodity market regulator that is the forward market commission that has been formulated and the announcement was made by finance bill of 2015. On the other hand they have also recommended that central bank which is the reserve bank of India is doing too many things and they are working should be, their functions should split. So they are recommending that central bank that will be the reserve bank of India should do only the core functions which are monitoring policies, banking regulations, formation of foreign policies. These are the areas that need to be dealt but we all know that the Reserve Bank of India is also the debt manager for the state government debt and our risk management system which was designed in 2001 was designed by experts in India. We don't want to go to U.S and anywhere. There are professors in IIM's and in IIT's. With their help we have devised mercifully. It has improved in the test of time. So the margin requirements for example what could be the margin. There are huge things in these subjects in itself there is an initial margin, extreme margin so all those things are there by and large we have been able to ensure that there is no segment failure and the margining system or we call the risk management system that works. Coming to the point raised by the honorable Justice I would like to say I drawn a quote from the famous supreme court order " It has said that SEBI by design has been given all the three ... It was against conventional wisdom. But we have been given. We are very unique in that respect. We have been given that power legislative, executive and judicial, Ranganayukulu will deal with it when he later talks in the next session. We have been given power it has been approvingly recognized by the Hon'ble Supreme Court. That this is the situation. So we don't have adversarial system. However you are right that what are the checks and balances SEBI can misuse it. In the 2nd part of my presentation I will cover what is the accountability of SEBI and how we do that bit that risk is there. I will be honest in admitting that with SEBI management is not very careful. These are subjective misuse. I will give you some examples of how we have awarded that misuse. We have dealt with this quasi-judicial powers are under section 11 (b), 11(4), 11(d), decision making powers adjudication proceedings, prosecutions. One major change here as compared to other parts of the world, other laws within the country is that no other investigating agency can take investigation of matters concerning SEBI act violation. No court can take any cognizance of criminal violation of any SEBI Act provisions unless the complaint has been filed by SEBI. So this is by design provided. Structure and accountability of SEBI we have a 9 member board. Chairman is appointed by the government. Three whole time members are appointed by the government and these are four of us are permanent senior team of SEBI. In our board there is one representative of ministry of Finance. The secretary department of

Economic affairs is a member. Secretary, Ministry of Corporate Affairs is a member, one deputy governor of reserve bank. These three are ex-officio. There are two part time members which are again appointed by the government for example Dr. Mohandas Pi used to be our member, Dr, Mohan Gopal used to be our member, that name will resonate, he used to be our member. So we have normally we have got people of eminence we have the chairman and the whole time members we have executive members. We have 8 executive directors and then we have various departments and divisions important I would like to high light here are our integrated surveillance department, investigation department and enforcement department. These are three very important departments. Mr. Ranganayukulu heads the enforcement department. Accountability so far as our quasi-judicial function including investigational government debt. For that they have recommended that there is no need for reserve bank of India to do it. There should be a separate agency created. For the public data management agency. So that should be a separate agency. Many countries have got it. In case a banking company is in distress who does the resolution. Right now the regulator does it. So this committee has recommended that this should be done and taken away from reserve bank of India and it should also be given to a separate authority called financial resolution authority. Now there are rationales for this requirements I don't think we are interested in knowing those rationales but if anybody is interested we can talk about it. Coming back to the securities market regulations, what are the main factors underlying the principles behind these market regulations. First and foremost is the protection of the of the interest of the investors. Second is to develop the market. Third and the very important is to build the trust in the market through uniform and transparent regulation or code of conduct. Effective, fair and predictable enforcement actions. SEBI in the initial years have been rightly criticized that our enforcement acts are not fair and also not predictable. For example, for similar offence one set of offenders were given a different treatment, they were given a lighter penalty and another set was given a very severe penalty. So we have learned over period of time. We have also evolved over period of time. But the expectation from the securities market regulator is that it will be able to provide a fair transparent and effective enforcement action. All these things I am saying is part of the statement of object and reasons for the SEBI Act. Also part of the functions that is section 11 of the SEBI Act. This is provided there. We administer a number of laws. For example we earlier had a law called capital issues control act. 1947. They are used to be an authority sitting in the Ministry of Finance. He was called the controller of capital issues. He used to decide at what time of the year in what quantity and at what price a company can issue shares. So even the price was determined. So, earlier we were having a discussion at the time of coffee. I like to take that issue right now. That why is SEBI not deciding the pricing of the issue. The answer is that the regime which we follow and this is best on the best global practices. There has to be disclosure. There should not be any fraudulent disclosure to the people. Whatever is material must be disclosed. Whatever is important and relevant must be disclosed. We are provided formats and very detailed guidelines about it. But like the controller of capital issues these securities regulator in the country that is SEBI doesn't believe in prescribing a particular price for a share. Because it has inherent risks. The first important risk is that SEBI would be giving a guarantee that this is the right price

which we do not know and equity investment is by nature. It is a risky investment. So the risk is on the investor. Let me also tell you that in 2013, when we are looking at the time period before 2012-2013. 3 years before that we discovered that almost 2/3 of the issues which we have made in the last 3 years, they were selling below their issue price even 6 months or one year after. So naturally it was a very worrying situation. There was something wrong in our system that we were allowing in a manner a particular issue to be sold to general public where, in 2/3 of the cases the trading price was continuously was below that of the issue price. So, we have taken a number of measures to tighten the disclosures. We also had drastic solutions in our mind and that is a solution of providing safeties to the investors. So we had suggested, we came out with a suggestion in our discussion paper that for those who are investing a rupees of 50,000 in the market and 6 months after that issue is listed. If the price is still below the issue price also after adjustment of the general fall in the market, then the promoter has to compensate them however, when we spotted this paper, there were huge opposition to it that this is not the right thing to do this was completely against the philosophy of securities market and public issuance. We dropped the idea. However what we have done I wish I could show some example but we don't have the copy of the latest draft of the final prospects or even the abridged prospects. I will request all of you to kindly look at and it is available online. The latest prospectuses that has been issued. On the first 2 pages, we don't have to go into 300 pages now. First two pages you will find out what are the risk factors. Earlier it used to be lying somewhere and it was difficult to find out. Right on the first and the second page the risk factor is given. Has been any criminal case against the promoter. Is the company involved in any income tax case or any other statutory case or legal case. What is the 3rd to the company and also more importantly, what is the current evaluation of the years in that interest. If it is an IT company. If it is a health care company then at what price earning ratio. The shares of those companies are selling. That has to be disclosed right at the top of the prospects. So when you are finding that this company is offering at 40 times. Your attention is being drawn now that the peers are selling only at 20 times. So, your given a word of caution that why you should be looking at it more seriously whether you should invest in this company or not. That is one. Secondly, we have also introduced now and it is available in the first two pages that the merchant bankers of those issuances, what has been the track record of merchant bankers. For example, if this merchant banker in the last 5 years has brought out 10 issues. Then are those shares of the 10 issues selling above or below. So 2 types of caution that we are providing right in the beginning. One is the peer comparison and the second the track record of the merchant bankers and obviously we have also now provided that the due diligence which the merchant banker has to do. He has to keep a track record of that and the document of that and inspectors from SEBI can go for the next 3 years and see whether the merchant banker has been in due diligence. I would like to augment by argument by giving you the example of China. China has something similar to fixing the price or determining the price. China has the system that whatever is the peer price in an IPO there is no need for anybody who is applying for it. To pay for it funding is not insisted whereas in India you have to give 100% money. So only serious investors can come in we had a problem that earlier retail was paying 100% and institutions were not paying 100%. We introduced it that everybody has to

pay 100%. Secondly, in China the peer group whatever is the peer group price say it is 30:1. Then in China they say that it cannot be more than 2/3rd of the peer group. If the peer group issue is 30, then I cannot issue a share to public where the peer ratio is more than 20. So obviously there is a gain of 50%. On the day if I am lucky and I am allotted that share there is again a 50% for me by design and you will discover that the IPO market in China is undergoing a serious problem. They have at times banned the IPO for about 18 months they banned the IPO. Then they have reintroduced the IPO and you will be surprised to know that the number of the applications which came in the period of 6 weeks ending last week in that time period the chances of getting a location was only 0.5%. So it has become some sort of a gambling because if you are allotted. If you are one of the successful in the gambling were allotted. You will be getting a 50%. I have got one copy of the prospectus. I would like to share with you may be after the session. All this information's are saying are now published on the top of page. So we are trying our own way, how to caution the investors also in India we have what is called one common group for retail as well as for the institutional investors. There are many countries where 100% of the location is made only to the institutions. Retail comes through the mutual fund route. In India we have reservation 35% for retail, 50 % for institutions and 15% for non-retail institutions for example like company or high networking individuals and all. So we are going to continue with that system but we are providing more and more caution. Other act which we regulate is the security's contract regulation act, 1956. Certain sections of the companies act, the regulations SEBI act 1992. The depositories act 1996 and there is an appellate mechanism through the securities appellate tribunal. The securities appellate tribunal was first created in 1995. As per the act, it was to be headed by a serving or retired Supreme Court judge or a serving or retired Chief Justice of a High Court. In the year 2012-13, they amended the act because the surprisingly they didn't find anybody of that qualification ready to move to Mumbai and head that. So they amended that and now have provided a judge of a high court having 7 years of experience. He is also now allowed. The current presiding officer Justice Devdhar who is from Mumbai High Court. He came under that qualification. He is now functioning there. The SEBI act was amended in 2014. We had a new companies act in 2013. The financial sector law reforms commission recommendations I have talked about. As if you talk about the how the law has evolved. The capital issues control act of 1957, then the securities contract law. SEBI was first created in 1988 through a government resolution through an executive decision. It didn't have any statutory power that came in 1992 and then there is a history behind it. After the economic liberalization in 1991, there was lot of entrepreneurial development in the country. There was hope that now it was a free market and large number of companies came into the market. Unfortunately we didn't have the capacity to regulate that and we had a very major issue of market misconduct called the Harshat Mehta scam of 1991. So between 1991 and 1998 we could not get the SEBI act passed. There was lot of opposition. But the moment this thing happened, the act was passed. Not only that the act was passed, it was first introduced as an ordinance. In the last one, I am saying that mostly through ordinances this is another thing to be noted that evolution of the securities law in the country has been very very reacting it has never been proactive. So whenever we have a crisis then we realise we must do something and so we

have passed this ordinance and then the ordinance is later on converted into an act if SEBI act has been amended may be 910 times, 70 or 80% of the time it was first done through an ordinance and then it was finally enacted by the parliament. In the evolution now I am trying to come to certain important sections or certain provisions of the SEBI act and I will be happy to answer any questions here. The first major amendment after 92 was the 1995 amendment. Now the provocation for the amendment was that as I was saying that after 1991 economic liberalization. Lot of activity in the market has started taking place. Once sort of activity which happened because prior to that the pricing used to be determined by a government authority called controller of capital issues and suddenly we had a situation there was no body deciding the price. It was left to your wisdom as a promoter that you decide what could be the price all you expected to was give information about the company(21). So in 94 and 95 we had several instances of which we can call IPO scam. But the companies have strong fundamentals they didn't give any information about the company. The share were mis-sold and we had a serious problem. So the first amendment which took place in 1995 and section was provided section 11 A regulation making power regarding disclosure in terms of issue of the capital. SEBI didn't have a right to provide for a regulation that in what way the disclosure has to be made by companies. So that was provided. Another important thing was power to issue directions. 11B if you have dealt with SEBI we will discover that 11B is the most important section in the SEBI Act. 11B, 11(4), 11D because these are the sections which gives power to SEBI even without having any hearing even without having any inquiry even without having any investigation. So we can issue any type of directions to whom to the intermediaries and also to anybody who is connected with the security. So these are very powerful sections. Then we didn't have power to call for information. If we wanted to investigate something or enquire something we didn't have power. 92 act didn't give us power to even call for information. This has also evolved. For example, 95 act we were first given power basically to call for information from those set of people whom we regulate. Who are our intermediaries? For example, mutual fund stock exchange broker from those agencies we could now call for information. Earlier, we didn't have the power before 1995. Then this has now evolved in 2002. This power was expanded and finally in 2014 it has substantially been improved I will come to that. It was this 95 amendment also provided that we could adjudicate any offence and we could impose penalty. So division chiefs of SEBI who have now powers of a civil court and they can impose monetary penalty. Since, we could impose monetary penalty first time in 1995 parliament also provided that there has to be an appellate tribunal. How can somebody impose a penalty without appellate authority. So the securities appellate tribunal was first for created in 1995. When it was first created it was single person's act. Later on in 2002 it was as made into Multi person authority where the presiding officer had to be a high court chief justice or supreme court judge. Later it was diluted to anybody who has 7 year's experience as a high court judge. The 95 act also provided for bar of civil courts on order passed by SEBI. It also provided for the first time that decides, adjudication and other actions we can also file a criminal prosecution and In the earlier session Prof. Baxi was talking about regulations, one important development happened when the 1992 act was passed SEBI had even power to make regulations and regulations are very important. Regulations are very important

purpose in our system because ours is an extremely technical area. So just getting the powers given to SEBI without a specifying the procedure and the content through a regulation it can lead to a very very arbitrary situation. So regulations are required here. But in 92 act we had power to seek regulations but we had to seek government approval. So in 95 the act was amended and the power to make regulations was given to us, our SEBI board and we didn't have to send it to government approval all subordinate legislations under any act in the country that it has to be laid before the parliament within a certain time period and there is a committee of subordinate legislation of the parliament which can look into this area we don't have to go to for government approval after 95. In 2001, there was another scam that I called the Khaitan Khariscam and the UTI scam We can get into the details of the scam but the important thing is that we had a very serious issue of market misconduct. A joint parliamentary was committee was setup. They also discovered that there are serious weaknesses and lacuna in the various existing SEBI Act . So again an amend was made first through an ordinance and then the bill was passed by the parliament. Here, Section 11(4) was added which gave power to SEBI to restrain anybody from accessing the market. If we find that somebody's conduct has not been good. We can restrain that person that he can't issue securities. He can't trade in the market. All those powers were given in 2002 amendment. We could also suspend trading securities if we find that there has been inside trading, there has been fraudulent behaviour in those particular securities. We can suspend the trading. Earlier when I said if you go back to the 95 thing we had right to call for information only from those who are registered with us. Like a mutual funds, brokers etc.2002 Act gave us power not only to call for information We can get into the details of the scam but the important thing is that we had serious issue of market misconduct. that range was expanded from where we can call for information. Let me take you to some feeling in many corners that there is a feeling that in the U.S.A in case of insider trading, Iam sure Mr. Ranganayukula will deal with it and there is any incident Of inside trading they are able to catch it and punish that them and all that. However the important thing is that there almost all the big ticket cases Raja Ratnam cases and all the other it is not the SEC which has prosecuted them. It is the department of justice of the government that has done it and how they have been able to do it is because the FBI and another government agencies have also got power to do world tapping . So somebody telephone conversation or email or anything they can have an entry into it they can intrude into it, they can access in to it. Whereas in India the law prevailing at that time was only we can call for formation from our intermediaries and those who are playing in the market that's all. We cannot call for information from anybody else. There was a second provision that if there is bank or there is a government authority created under any estate or central law. We could call for information from them. For example we suspect that A and B are working together and they have done some fraudulent transactions. They are saying that we don't know each other We can get into their bank accounts. So the banks are organised to give that information. But beyond that we don't have power. In 2014 that has further been established. Then I will talk about that. Power to issue of prospectus. If you find that somebody has done something which we are not happy about, where we suspect something wrong has happened we can parliamentary committee we can predict the issue of prospects. We have been discussing the SAHARA case for example

besides other actions in Sahara case we didn't allow them to come into the market. We don't have power for search and seizure and for search and seizure we have to go to a magistrate. 2002 act provided for this. If we suspect that somebody is likely to destroy the evidence. We cannot come there but 2002 act says that we have to go to a magistrate. Now here there is a problem. The problem is that if that person has got assets or offices in multiple cities we have to go to all the cities and go to the judicial magistrate there and take their individual orders. In 2013, after this Sharda scam in Kolkata, an ordinance was passed in that ordinance power was given to SEBI chair-man that if he is personally satisfied he can order for search and seizure but the parliament in its wisdom thought that this is very draconian and chairman SEBI cannot be given the power so they have said that instead of going to multiple places, multiple judicial magistrates. There will be one designated magistrate was there in Mumbai and he will be authorised to give you permission to have certain seizure anywhere in the country. That is the minor change that they did. The penalties were enhanced here I would like to tell you that the entire section 15A-15(H(b)) provides for penalties in various cases. In cases of trading and market regulations and fraudulent transactions and in our case these are most serious offences and other various offences. So here the penalty is maximum. Now, the penalty is rupees 25 crores or 3 times of the unlawful gain that the person has made whichever is high. It includes many things including criminal law. Normally, whichever is lower is prescribed but here it was consciously provided that whichever is high. I would like you to a recent order of the Hon'ble Supreme Court. This order was passed on 26th November, three months back. This order has brought a very important point of law, the point of law is that sections 15 a, b, c are written. If you read them carefully it looks like this is the amount, you have no discretion. 25 crores or 3 times the local gain whichever is higher for insider trading given period. There is no discussion section 15 (j) of SEBI act gives 3 principles that what are the factors to be kept in mind by the adjudicating officer. Those factors are what is the amount of gain he has made or what is the amount of loss he has caused to other. Thirdly, is he really a repeat offender. Is he a first time offender. These are the 3 parameters. We raise these issues with the government that the language of the act is such that even if you are satisfied that this person is not liable for such a huge high penalty we cannot use all discretion. So let us amend that and on our request the act has now been amended. If you can look in this in 2014 in every section now there is a minimum penalty. Earlier, there was no minimum penalty so now a concept of minimum penalty has been brought in. So, there will be minimum penalty and the maximum penalty. Coming back to this 26 November 2015 order of the Honorable Supreme Court, there was an industry called roofit industries. In roofit industries, SEBI imposed a penalty of 1 crore. The appellate tribunal reduced the penalty to rupees 60,000. There were 5 other entities where SEBI imposed a penalty of 75 lakhs. Later, reduced to 15 thousand. So, went for an appeal to Supreme Court. The Supreme Court has held the law as it existed prior 2014 amendment gives no scope for any discretion. So (not clear) is apply discretion in matters like, is he rich or poor? Does he have capacity to pay? Rest on humanitarian considerations. We can reduce the penalty. So the Hon'ble Supreme Court said "No, you can't apply any extraneous consideration. Except what is given in 15(j). So, the law as of now is that for any offences committed between 2002 and 2014. The penalty given in the law at that

time will have to be imposed. Now, onwards 2014 onwards the minimum penalty concept has come in. So, this is a very recent and new development which has taken place. Now, again there was an amendment in 2014. First through an ordinance and then an amendment was passed in July 2014. Here the provocation for the amendment was Sharadha type of cases. All over the country especially in the eastern India we discovered that large number of people were raising money from unsuspecting investors. They are making all sorts of promises they are making in small towns and villages. Once the matter became very serious then everybody was losing the money. We discovered that something similar had happened in mid-90's if you remember there were plantation companies in many parts of the country.

**Participant:** Golden forest.

**Mr. U.K Sinha:** Yes, golden forest. So, in 1999 SEBI Act was amended to provide and insert a new section. Section 11(a) and that section provided for collective investment scheme. But that section had a definition what is called a collective investment scheme and also it has several exceptions. I have another slide on that. Coming back to this new 2014 amendment it was felt that there are multiple exceptions and multiple agencies so there should be a new definition. Here, it was provided for the first time that if an agency or a company is not registered with any financial sector and it has raised money up to 100 crores then there is a legal presumption that it is a CIS and there is a legal presumption that SEBI has the jurisdiction. So for 100 crores and above now there is a legal provision.

**Participant:**.....

**Mr. U.K Sinha:** In all these sessions we have to strike a balance somewhere. For example, you are giving a number of 10 crores. Somebody can argue why 10 crores? Why not 1 crore? So ..

**Participant:** ....

**Mr. U.K Sinha:** In the second part of the session. I will be dealing with these. I have slides just to however satisfy the query that you have raised. Our understanding is, government of India is that it is beyond the remit of and capacity of SEBI or even RBI to control small sums of money raised in the villages and small towns in the country and it should be the responsibility of the state governments. 21 state governments have come out with their own protection of interest of the act. 21 state governments have already passed. The constitutional validity of these acts have been tested in the supreme court and supreme court has held in the case of Tamil Nadu as well as Maharashtra. Odisha has recently have tightened their regulations. So our approach is , this is collective thinking of government of India , RBI and SEBI that for small sums of if somebody is raising it is not possible for government of India agency to do it and since there is an alternate legal remedy available which has been tested in this Hon'ble Supreme Court. I will deal that later in detail. Now,

what has happened is that when we file cases in 2014 amendment the special courts, we have now been able to get. Earlier, any normal sessions court say in Mumbai or in anywhere, the petitions or complaints filed by SEBI we have discussed and it used to take years infact I have examples where it is taken even more than 10 years. So, now a special courts have been created in Mumbai, two special courts have been created and they have started functioning and we have very very happy experience. Now, notices are being issued. So, something will happen now in the next few months. This is a very effective change that has happened. The second effective change that has happened is since we have imposed penalty. Let me also clarify that as the law provides that if we recover any penalty, that penalty is not saved in his revenue. It goes to government of India. It goes to the consolidated fund. So there is no conflict of interest that we want to improve our own (not clear).But we were finding it extremely difficult to recover the money. We are filing it with the district courts and naturally it took years and years to get.

**Participant:.....**

**Mr. U.K Sinha:** So what we have done we looked into recovery as land revenue and finally what we recommended to government and parliament and they have approved it. The recovery will be through the process followed by the Income Tax department. So, same provisions have been now been given. So I have now got officers who are recovery officers and they have given the procedure and the powers are similar to that given in Income Tax. In the short time, of about a year we have already recovered 30 crores. We have attached about 2000crores. So, it is working from a situation where we are completely helpless. Now, it is working. This means that we can impose penalty for an offender. But what about the money that he has collected. What about the unlawful enrichment he has got. This must be discoursed. We didn't have any specific power for that so this act amendment of 2014 also has given us power for discoursement. I have already talked about presumption of collective investment scheme if it is more than 100crores. Then the new power which has been given to us is the power to call for information from any person. If we look historically as I was talking about the power with regard to intermediaries. In 2001 we got power and intermediaries plus anybody dealing in the market. Now we have got power to call for information from any person and this is very significant I will give you an example, if we suspect that 3, 4 people sitting in various parts of the country have been doing market manipulation. They would claim that we don't know each other. It is only coincidence that he placed an order of company A, B, C for 1000 shares of 90 rupees selling it and exactly at the same second not any minute. Somebody sitting in Guwahati also placed an order buying the same quantity is a coincidence. We are finding it difficult to find it whether it is co-incidence or is it (..). So, now because of this we can now get what is called the call data records. So telephones companies have call data records. If they have spoken to each other 20 times in a day our case becomes very strong. So, now we can get that call data records. Still now we don't have power to intersect a call. I must inform you when this matter came up in our discussion with the government SEBI took a position that we don't want the power. We felt that it affects the privacy of a citizens in a very basic way and the securities market regulator should not have that power. So we have not won that power.

But call day records we are getting and that are helping us. Earlier there was no obligation on a police officer if you are issuing some amounts or if you are asking to be produced before us whether police officer would help us now that power has been given to us. Another amendment took place through the finance act that is the measure of market commission with SEBI. So that has taken place and 28th of September 2015 the two organisations have been merged. Other amendments I would like to talk about are very basic like 1990 amendment in securities contract regulations act. Under the Indian laws any contract for a future gets attracted as a wagering contract. So, this law provides if the law is happening on the stock exchanges then this is not a wagering contract. So the SCRA was amended to provide for derivative trading where we are talking of (..) on stock exchange that has been provided through this because this was a very important futures and options on the stock taken in a big way the second is in 2004 corporatisation of stock exchanges I would like to explain this two terms corporatisation is (..) earlier if you look at Kolkata stock exchange or any other regional stock exchange. What are the institutions? This we are like clubs there are associations of people who have come together brokers came together and then they form (..) and it became a club and it became an exchange. However there is a term in finance called novation. In our country or in any part of the world novation has been introduced. Novation means if you are selling on the stock exchange.

### **Participant:...**

**Mr. U.K Sinha:** When I said that stock exchange and not only in India even in Japan, in USA they were all like clubs. Like you are a member of club where all the members are managing their fears. So what is their, is what is happening in stock exchange. In a stock exchange somebody is trading. So there are 3 functions somebody is trading, somebody is managing, somebody is owning... In the old system, brokers they are doing all these. They were trading, they were managing, they owned. There was a huge conflict of interest. Since, the stock exchange has to guarantee you will kindly appreciate then stock exchange has to have certain rules about ... and those have to be followed very strictly and so a stock exchange also has a regulatory function. In fact, in our esteem authority the first level of regulation is not seen for trading purpose first level of regulation in the stock exchange. They have to be given certain regulatory functions. If they have a regulatory function and the same set of person who is trading is enlightened to beneficially. He will have the conflict of the interest. It actually happened in India in 2001. I will give you two examples. The president of the Bombay stock exchange he surveyed every exchange in surveillance room where he learned what is the price movement, is it going too far, Is there any law of consideration there were so many technical things which are being monitored. So the president of the Bombay stock exchange entered the stock exchange, surveillance room. Got some critical information and based on that information he started selling his own behalf. He made huge profit. So his role as a president of the exchange management was compromised by the traders. Similarly, in Kolkata stock exchange what has happened is that since they were managing everything so they had manipulated the computer system in exchange. In computer systems one of the ways through which the stock exchange guarantees the settlement is through the margining system. Today, if you have given the

shares under the state bank of India margin and the share price of the State Bank was also by 10% to 5%. Then he was short of the margin so tomorrow you should be allowed to fit unless you ... So the computer system has to show that this person is short of the margin. What the fellow did was he manipulated the computer system and the market requirement for more and more margins were thrown up in the system. It was found that there were multiple brokers who were short in the markets. So, settlement was not going to take place. It was a major disaster. So, finally SEBI and government of India did something which was not a very legal or appropriate way to do it. But keeping the larger interest of Indian market not failing they approved it. However the point that I try to emphasise is the trading managing and owning are three different functions. So ... I am coming to.. is that these 3 functions cannot be mutual. These functions must be separate same set of people cannot be doing all the three. You are a broker you can get a license for broking. You need owning the exchange or managing the exchange. So this was a very important change which happened in 2004 by an amendment after the Khaitan scam. I will try to hurry up now.

**Participant:** Mr. Chair Man I would like to share one view at this stage you need not answer it. The complexities of market you have fully explained but hearing you and hearing the SEBI Act particularly the amendments. One may get the feeling that this is a Caesar to Caesar situation. The investigator is SEBI, the evidence that SEBI collected therefore our legal system is adversarial. So even it almost appears to be inquisitorial kind of investigation and anything. So what is the safe guard because I understand the complexity. Normal courts not efficient enough to handle it. The abundance of evidence brought by SEBI, its investigation. If anyone needs a fair trial what would be your answer.

**Mr. U.K Sinha:** In the case of ...

**Prof. Baxi's:** ....

**Mr. U.K Sinha:** It will be very easy to answer professor Baxi's point. Our responsibility and duty to our novation is 100%. If there is any major market failure and then we will come to SEBI. We are responsible to ensure that there is a good order in the market. I will give you 100s of examples. Let me give you some examples we have now taken the responsibilities the commodities market. If you have read the newspapers in the last 8, 10 days we will find that in one commodity that is castor seeds. There were huge positions taken in one of the commodity exchanges. For example, the Delhi price limit was 8%. We reduced it to 4%. The opening interest that anybody can take that was very high and if there were 4 monthly contracts those contracts you could take up to 50% in one contract. We reduce it to 25%. So, basically the issue of novation is a very, very complex issue and people with tremendous background of mathematics, computers and finance. We have them as our advisors and by the way they are all Indian they all are working in Indian Institutions. Our risk management system which was designed in 2001 was designed by experts in India. We don't want to go to U.S and anywhere. There are professors in IIM's and in IIT's. With their help we have devised mercifully. It has improved in the test of time. So the margin requirements for

example what could be the margin. There are huge things in these subjects in itself there is an initial margin, extreme margin so all those things are there by and large we have been able to ensure that there is no segment failure and the margining system or we call the risk management system that works. Coming to the point raised by the honourable Justice I would like to say I drawn a quote from the famous supreme court order " It has said that SEBI by design has been given all the three ... It was against conventional wisdom. But we have been given. We are very unique in that respect. We have been given that power legislative, executive and judicial, Ranganayukulu will deal with it when he later talks in the next session. We have been given power it has been approvingly recognized by the Hon'ble Supreme Court. That this is the situation. So we don't have adversarial system. However you are right that what are the checks and balances SEBI can misuse it. In the 2nd part of my presentation I will cover what is the accountability of SEBI and how we do that bit that risk is there. I will be honest in admitting that with SEBI management is not very careful. These are subjective misuse. I will give you some examples of how we have awarded that misuse. We have dealt with this quasi-judicial powers are under section 11(b), 11(4), 11(d), decision making powers adjudication proceedings, prosecutions. One major change here as compared to other parts of the world, other laws within the country is that no other investigating agency can take investigation of matters concerning SEBI act violation. No court can take any cognizance of criminal violation of any SEBI Act provisions unless the complaint has been filed by SEBI. So this is by design provided. Structure and accountability of SEBI we have a 9 member board. Chairman is appointed by the government. Three whole time members are appointed by the government and these are four us are permanent senior team of SEBI. In our board there is one representative of ministry of Finance. The secretary department of Economic affairs is a member. Secretary, Ministry of Corporate Affairs is a member, one deputy governor of reserve bank. These three are ex-officio. There are two part time members which are again appointed by the government for example Dr Mohandas pi used to be our member, Dr, Mohan Gopal used to be our member, that name will resonate, he used to be our member. So we have normally we have got people of eminence we have the chairman and the whole time members we have executive members. We have 8 executive directors and then we have various departments and divisions important I would like to high light here are our integrated surveillance department, investigation department and enforcement department. These are three very important departments. Mr. Ranganayukulu heads the enforcement department. Accountability so far as our quasi-judicial function including investigation

## Session 7

Mr. U. K. Sinha: Let me answer it in the following ways, starting from 18th century, the Tulip mania in Holland and things like that, in 1929, 24th of October and 27th of October 1929 when the market crashed happened in the USA what led to, what led to it was people were issuing securities without disclosing the main parameters or the main strength of the company, they were showing it as a great scheme, they were also promising a certain amount of return, the people who were selling, the brokers and all, they were also promising something, the market went sky high and look at what happened. The impact of that particular crash was felt by the USA not alone but the whole of the world for the next 10 years if I can say so, it was not people say that by 34-35 things were in control, they were not in control. So I have been trying to give you the perspective we are not perfect we are not what we should be but I would like to kindly request you to appreciate in the larger context of where we are in India. I will give another recent example and this is much more severe and recent. Look at China, in China starting from 2013 end of 2013 to June of 2015, their market went up by 100%, the main index went up by 100% and everybody was very happy. How did the market go up because the Chinese authorities thought that their companies and most of the companies are State hold companies, they had huge amount of borrowing, so they were getting criticised for this, so they wanted that why not increase the equity side of it so that the net equity ratio becomes normal, so they actively encouraged people to invest in the market so in order to create the demand for the securities, what they did that they allowed the central bank that Reserve bank of ours to lend money into the market to buy security. This is unheard of. In India you will be happy to know that nobody can imagine even at the height, I have handled 2-3 crisis myself when I was working in the government, that India never central bank has given money for this purpose because central bank money is not meant for this purpose but in the Chinese system almost 200 billion dollars were given, not only that, besides what was given officially through, they created a public sector financial company which was capitalised by the Central bank which gave money to you and me and others to buy securities, not only that, there were some unauthorised Peer to peer platforms where unregulated unauthorised lending was done for bank share and since people were making money everybody was happy. In June 2015, the market crashed, the Chinese market crashed. After the market crashed look at the measures that they have taken, in India howsoever bad the system we have, we cannot even think of any of these things, they said no. Our official view about Shanghai composite index is 4500 how come it has become 3600 so mutual funds will not sell anything. So if you have invested in a mutual fund, mutual fund is supposed to work in the interest of investor of that fund and not in the interest of what the government says, so even if the price is going down, they were asked not to sell. Then they closed 50% of the market because they realised that these shares are going to go down substantially so no trading. Now if you are a retail investor you need money you can't sell you are stuck up, then they said if you are a promoter of a company or you are holding more than 5% in the company you cannot sell. These are extremely unusual unjustified if I can say so illegal decisions that they took and what happened in spite of these things they could not control the market. Then they said we ban the IPO because somehow they got this feeling that people are withdrawing money from the secondary market to

buy in the primary market so they banned, for 15 months they banned IPO. In India we may have a sub optimal system we cant imagine any of these things happening, let us appreciate the context and now they are in deep trouble, they had to devalue their currency also and when they devalued they said it is one off then they started interfering so all sorts of things happening there and now they have a very recent scam which is similar to our Sharda scam that is a number of companies worked as spongy companies and can you believe they have raised 200 million dollars from ordinary retail Chinese, can you imagine China with all its controls and all that there are now protests on the streets of China and in the social media there is huge amount of protest going on so if the capital market regulator or the Central Bank are not doing their work properly, it can create havoc with the economy. I would urge you to kindly appreciate that India is not that bad, we need to improve a lot but we are not that bad, at least here as an investor we know that our system is working.

Participant: in the context of the money circulation schemes, you said with regard to the..

Mr. Sinha: I am coming to the money circulation schemes, I have two slides on that..

Participant: in that context , you said in your presentation, that States have also raised a parallel or ... now more often unless we categorically State ... or is a State job, that this is limited to this extent and this is limited to this extent, the consequences or the jurisdictional issue of..

Mr. Sinha: that has been dealt with and I will..

Participant: it has been 4-5 years the conference board ...

Mr. Sinha: We will explain that, that has been dealt with, in the second part of my presentation I am talking..

Participant: is it similar to the section 60 and 62 of the CCA Act and the SEBI Act..

Mr. Sinha: which one

Participant: the ... clause, like in 60 and 60 of the Competition Commission Act and the SEBI Act

Mr. Sinha: With regard to?

Participant: with regard to non obstante clause

Mr. sinha: In which area?

Participant: ...

Mr. sinha: no its not there, no no

Participant: Sir 32- its says the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

MR. Sinha: it is non obstante but here it is not..

Participants: it is ...

Prof. Baxi: No no its not complicated, with great respect it is uncalled provision.

Participant: no sir, in fact human practice imply that unity ...

Prof. Baxi: one statute cannot suspend the entire legal system of India

Participant: but that's not the meaning what we have given to, we have explained in many times, the reports said that it is not the ... inconsistency is the one which is there, if something else is ...

Participant 2: I think professor this question which my beloved brother is.. this provision 60 62 or whatever over riding effect is less for the Act and more for the courts because this question of interpretation is coming so this is a window to us whoever debates how to interpret whichever is a rival provision, but possibly your mind is acting how far it affects the Act itself, its not less for the legislation but for the..

Prof Baxi: My objection is make the agency virtually the Supreme legislature of India, the supreme most legislature of India it applies to legislature, the executive, the entire row in one interpretation on the ... on the thunder interpretation, no body takes a note of it, it doesn't mean anything that's not the matter, but if you take it seriously, it begins to mean a lot and that's my difficulty.

Mr. Sinha: here I am talking of some major recent developments and I will just narrate them unless somebody has any question on any of them, the merger of FMC and SEBI has taken place. Corporate governance norms are another area where we are focusing a lot and I am happy to inform you that after the passage of the company Act, 2013 and the corporate governance regulations framed by SEBI, the world bank ranking of India used to be 49 from the top in 2012, 13 it improved to 34 and in 2014 we went up to number 8 and now in again in 2015 we are number 8, so in areas of shareholder protection, minority protection India's ranking has gone up substantially and it will be a matter of pride for all of you that we are even above the USA in this, USA is after us so we are in the top ten and we are number 8 in corporate governance and minority protection. We have discussed about our enforcement, I would like to take some time on consent mechanism, the third bullet, nationalization of consent mechanism. It is a established practice in security law administration that if the offences are not very serious, they can be consented and settlement can take place compounding in the criminal side so similarly here. Now unfortunately we had a system

where it was not designed that what can be settled what cannot be settled, following again the criminal law example, in criminal law you know what can be compounded what cannot be compounded, so we have borrowed the same concept, for example a rape or a murder cannot be compounded, similarly here we have said that matters like insider trading and market manipulation cannot be compounded but if somebody has failed in making a disclosure and he is late by 130 days, is it worth our while to start a whole investigation go through the process of adjudication, then he goes to SAT, then he goes to Supreme Court or can we jointly agree that it could be settled. So important point I am making is it used to be very very undefined it was introduced in 2007 so in 2012 we have come out with our new regulations on settlement where it is very clear from two points of view that what can be settled and what cannot be settled and in the same type of offence what would be the quantum of the settlement amount, earlier it was possible theoretically for the same offence some body could settle for 5 lakhs and somebody could settle for 5 crores or 50 lakhs, so that anomaly has been removed, it has given uniformity and people are now lawyers are now appreciating that now there is predictability whether to go for consent or not and it is helping us in a big way our number of cases. We have steps to improve disclosure on pricing that we have discussed earlier.

Participant: Before that ...

Mr. Sinha: Ya I am dealing with in the next slide, just 2-3 slides down I am dealing with that because some very interesting cases have come up in that, there is a Bombay High Court which I will like to talk about. Then we come to the other major developments, you remember that in Hyderabad we had a stock exchange, in Cochin we had a stock exchange, even my home state of Bihar we had the Magadh Stock exchange, so it used to be a matter of regional pride that my city must have a regional stock exchange, but with electronic trading there is no geographical advantage of having a stock exchange, anybody if you are sitting in Guwahati or sitting in Trivandrum you can trade in Bombay or whatever and these exchanges were in existence, no trading was taking place and there were sources of risk for us because trading in those places could lead to a lot of manipulation, so we have come out with an exit policy and we have closed many of these stock exchanges, out of 21 exchanges 17 have been closed and by the way people went to High Courts, they went to Allahabad High court, Bombay High Court, Delhi High Court they have all lost there, the High Courts have supported our thing that whatever we have designed as the exit parameters and process is quiet fair and we got the support. Another thing is that a stock exchange can be listed or not listed, so now we have provided that the stock exchange can be listed only precaution we have taken is that if you are an NSE you cannot get listed on NSE you must go to BSE, BSE cannot get listed on BSE they have to come to NSE for listing and things like that, self listing we are not allowing but other than that listing is allowed. As a developmental work we have come out with number of platforms for example small and medium enterprises, how can they raise money, start up companies we are hearing a lot about technological start ups, so how can we help them raise money, real state investment trust and infrastructure investment trust these are all measures which we took in the last three years and municipal bonds how you can issue municipal

bonds on stock exchange so these are only by way of narrating some of the developments and we have also provided for electronic IPO electronic KYC and electronic voting. Earlier a company having 5 lakh shares used to have its annual general meeting in hall which can accommodate 500 people and who would travel all the way to Mumbai to come there so now we have provided for electronic voting and that is helping a lot. Helping a lot in the sense that now contrary views are emerging people are opposing certain motives for example I can share it with you here that in case of Tata motors they had a proposal in the AGM that their CEO X amount of bonus, it was shut down because the company results were not commensurate with any such proposal that you should be given that so it was rejected. So shareholders are becoming active and we have been able to empower them through electronic voting. We have also opened local offices in 16 places, for example Cochin, Hyderabad, Chandigarh, Ranchi, Bhubneshwar we have opened our offices. These are helping in redressal of grievances number one and also in investor relocation, these two areas they are being very very helpful. In SEBI FMC merger I will skip because this is a new development, there wont be much of a question on this. Followed Market commission merger, commodities delivering market not of much relevance.

I talked to you about World bank ranking and how we are number one on Corporate Governance, what we have done is, earlier we used to have what is called the listing agreement, a company going for listing had to have an agreement with the stock exchange, now we have made it listing regulation and we have further tightened it to give an idea and it is also a settled principle also held by the honourable Supreme Court that if there are certain requirements under the Companies Act and SEBI is coming out with requirements which are more stringent over and above what the Companies Act is providing SEBI can provide more stringent guidelines for its own set of companies that is the listed companies, for example the Company Act provides that you can be an independent Director in 10 companies, we felt that the number of meetings take place every quarter, you cannot do justice of that company as an independent director if you are Director in more than 7 companies, so we did a study again wide consultation and all and we have done that. What is the role of an Independent director, who can be an independent director and we have even provided and I am happy to narrate it here, we have provided that there must be at least one women director in every board and those companies which have not followed it we have penalised them including public sector undertakings. We have lot of reference and pressure from government that exempt government companies we said no, so far as SEBI is concerned promoter is a promoter whether it is the government of India or whether it is a private person, in our eyes you are all similar we will have it like this. Another example of similar treatment I will give you, we have a concept called minimum public shareholding. There is a belief and there is a theory that if the shares offered to the public are very small in percentage then they are easy to manipulate, free floats should be high for example if 95% of shares are with me and only 5% are sharing then those can be manipulated easily but if large percentage of shares are selling and trading then the manipulation will be difficult, so SEBI rule is 25% of minimum public share should be there. Government of India came out with a regulation that ruled under SCRA that while it is alright for government company for other companies for government companies should be 10%. So we have

been able to persuade government that no this is not good, you should be treated like anybody else so government has also now agreed they have amended the rules that they will also have 25%. And then there are various other things on the Corporate governance part, basically I am saying two things we had a very serious issue and that will have relevance on the schemes of amalgamation also, we had number of instances in our hand where companies were involving, getting involved in what is called related party transaction, for example, where family member of the promoter was producing some component which this company was buying but at what price are you buying, is there a transparency in that, no, so in a way the revenue of this company is going into a private company which is related to you so we have this concept of related party transaction. There are many examples of related party transaction in fact foreign companies who are trading in India they also have been indulging in this and they can indulge by way of say the royalty that it is paid, I mean if I am looking at Pharma industry and the normal royalty is 2%- 3% and here is a company where the royalty paid to the foreign promoter is 8% or 9%, this has requires approval from minority shareholders, so now we have provided that in all matters called related party transactions, there should be approval of minority shareholders and we have brought this concept of majority of minority. So whatever are the minority shareholders they must hold a meeting , you cannot vote, you are a related party, only the minority shareholders will vote and the majority of minority should vote for it, so we have brought in that concept. We have said that the remuneration of the CEO and others that cannot be decided by the Chairman or the main Board, it has to be decided by a remuneration committee and the remuneration committee has to be headed by an independent director, it has to have majority of independent directors so if there are 3 directors two of them will have to be independent and it has to be chaired by the independent director, so audit committee, remuneration committee all these will have majority of independent directors and also headed by independent director, so these measures that we have taken on related party and other conflicts areas, that has been widely appreciated all over the world. And we also were very careful that we took corporate India into our confidence so we discussed with them, there were huge amount of push back but we at least had a dialogue with them, its not that it came as a surprise to them so in our consultation we discussed with them and then we have introduced it.

Participant: Not Audible

Mr. Sinha: You also want to raise some question Justice

Justice: No

Mr. Sinha: So let me respond to this, I hope in the example that you have given you will appreciate that instead of 75 SEBI had permitted these foreigners to have 90% and only 10% was given to public including mutual funds that was worst situation, 25 is better than 10 so that one improvement. Now coming to your worry about mutual funds I would like to inform you that two things have happened, SEBI right from 2009 issued a direction to mutual funds because it regulates mutual funds that they have to have a voting policy. All mutual funds must have a voting policy

which should be published on their website and they also must publish their voting track record on their website. If we talk in p

Participant: percentage terms if in 2010 or 12 hardly 5% of mutual funds were voting or only mutual funds were voting in only 5% of company resolutions that number has now gone to 50%. You might have seen in newspapers that in case of Maruti Suzuki the mutual funds all came together and seriously opposed it, not only that they forced a meeting with the management so they opposed it. So one thing is how to encourage the institutional shareholders to vote. Second development which has happened is what is called the proxy advisory firms. SEBI has encouraged the creation of proxy advisory firms like they are in existence in UK and the USA,]. So these proxy advisory firms are for every moment for every resolution they are publishing a view, if you are an institution you can buy it but normally they can provide their research report to any individual shareholders. So these two things are happening. They are opposing opposing and opposing. Thirdly, in the example that you have given that somebody is owning 75% and balance 25% is with mutual funds, suppose entire 25

Participant: Sir entire 25% mainly hardly 2-3% of the total of those people who are ... or who are leaving behind the ... kind of investors, ...

Mr. Sinha: Till 2013 we had a situation where there were companies where only 3% were free float, 97% and it was a PSU, so we have now made it 25% and that 25% is there for all sorts of companies. The your feelings appears to be that this is not really effective because mutual funds are owning a good portion of that, my argument would be

Participant: more often there is a serial pattern in which say security mutual funds or concerned with ... the management has a some kind of understanding.

Mr. Sinha: That cannot be done, let me explain that point. There cannot be an understanding between management and the domestic mutual funds, that would be illegal and if it is brought to our notice and proved it will invite very serious punishment. My point also is that mutual funds are supposed to be informed investors qualified institutions, they are supposed to know and assess the quality of a share much better than an ordinary retail person like me or Mr. Ranganayakulu so it is better if these shares are held by institutional investors rather than by small ones and in those companies where the free float is less, we keep them under our surveillance in a more aaa in a stronger method. Coming to mutual funds having some sight of a side agreement while that is not possible, one thing is possible that is there is an instrument called American Depository receipts and Global Depository Receipts, those are issued outside India. Suppose an ADR is issued in USA, then there is an custodian. Earlier there used to be a practice that the buyers of those ADRs used to have an agreement with the custodian that you will always vote with the management exactly the point that you are making, we have now stopped that also, that you cant do this. You

should be free to vote, it cannot happen that you undertake at the time of buying that we will vote with the management, so these are areas of improvement which we have undertaken.

Coming to insider trading, insider trading again we had earlier 97, we had the first regulation then later on we had another one and then finally in 2015 we have come out with third regulation. 2-3 important points and Mr. Ranganayakulu will deal with it in greater detail. We have expanded the definition of who is an insider so a connected person can also include a person who is in a fiduciary responsibility or a contractual responsibility with the management, for example you are an auditor, you are a lawyer a counsel of the company, you can also be an insider if you knew that the company is what you getting in some sort of an scheme of arrangement, you are aware of it so earlier you had a protection that you can say that I am not an insider so the expanded definition describes them also as an insider. Second is what is unpublished price incentive information so UPSI also we have expanded the definition and we have made it stronger and we have also said that the burden that whether you are an insider or not whether you are a keen connected person or not, that burden is on you, its not that SEBI has to prove it, if we hold after enquiry that you are an insider that burden is on you.

Now I come to the merger and amalgamation process and yes lets just do that. Collective investment schemes between this slide and the next slide, you will discover that there are 13 possible ways in which money can be collected. Chit funds under the chit fund Act, Cooperative societies and multistate cooperative societies, money collection schemes under multi level marketing MLM, then deposits under the state depositor protection Act, there are Nidhi Companies , deposits accepted by the companies under the companies Act, deposits under non banking finance companies, gold saving schemes by jewellers, contract of insurance ULIP, pension schemes insurance scheme EPF, new pension scheme, housing finance institutions and mutual funds, venture capital funds etc., so there are 13 possible ways in which money can be raised.

Participant: there is just one aspect, of course there is a company ...

Mr. Sinha: No please ask, i will be happy to answer it

Participant: the question is as far as the SEBI amendments are and the SEBI investigation is and the range of insider trading peer to peer, everything is based on certain formulas, formulas formula formula and formula, now if a person votes according to his conscience which may not fit into a SEBI formula would you call it an offensive, I may have my own reasons for voting according to my conscience and restrict myself to something which does not fall into a formula action subject to correction. How do you assess such a goal, would you say that he has fouled the proceeding or he may have his own reasons which may be thinking out the hat legal ... reasons, his own conscience rather than subscribe to your theory that this must be it.

Mr. Sinha: Justice what do you have in mind when you are talking of a formula, what is your formula

Justice: obvious reason there will actually case, a person may have his own reasons for not subscribiing to the kind of rules or whatever set value for this. Often there are certain pecuniary agreements, will against sight ...

Mr. Sinha: I think I must clarify that how you vote is not my concern, I cannot decide, it will be completely illegal completely unconstitutional for SEBI to say that you must vote in a particular manner. Since mutual funds are regulated by us we have asked them that you are also custodian of the interest of the investors in your mutual fund scheme so vote you must have a voting policy and you vote in their interest, but how they are voting, what they are voting we cannot decide, so we are not following any formula to decide who is voting in what manner, no regulator in the world can ask any institution or any retail to vote in a particular manner. Our purpose is served if we facilitate that more and more shareholders vote. Partcipation we are interested in, that is why we have said that electronic voting and there were lot of opposition on electronic voting, companies protested that no no how can we provide it, it is going to be very expensive, we said no you have to provide for it.

Participant: normally under the EMC guidelines, the mutual funds have been exposed to there is a separate Act governing, regulations governing.

Mr. Sinha: Yes Mutual fund regulations are there, mutual fund regulations are very clear, the fundamental principle of mutual fund regulation is that if you are running a mutual fund registered with SEBI you have to work in the interest of the investors and any action that you take including which scheme you invest and other things, we have got lot of guidelines, what percentage concentration risk company risk, all those things we provide but we cannot take a call on who should vote in what manner, our purpose is served, we are extremely happy if more and more shareholders vote that is our remit nothing beyond that.

Prof. Baxi: Sorry to interrupt

Mr. Sinha: No I am happy to be interrupted

Prof Baxi: Two general questions and then two questions have been bugging me throughout, otherwise excellent account of things we and I think SEBI is doing very good work, more and more I know about it now through your presentation the more impressed I am. But there are two things I wanted to learn, one is the power to issue directions design the issue of all regulations under section 60, has the SEBI received directions from Union of India which substantially interfere with its functioning as this seems from routing directions I am not concerned, policy directions has it received one, I don't know its not a question but a question. Secondly, are you at

all worried or are you subject to some regulatory capture, this is another theory regulators are, that is what do you do to hold yourself against their possible regulatory capture as it is culminated in general concept, what do you do?

Participant: where else ...

Mr. Sinha: SEBI Act, several times, not once but several times in the Supreme Court.

Participant: ...

Prof Baxi: the question is two fold one is question of directions under central government has power to issue directions UOI and there are two types of directions- routing directions which are trivial and less important and there are directions which interfere with the autonomy of the institution, one of the design issue in regulation is are these directions power to issue directions subject to certain guidelines, because autonomy of the institution regulatory institution is considered fundamental in regulation theory and the second question was about what is known in regulation theory by economists and others as regulatory capture where agency is liable to the ... some kind of take over by the very force its seeking to coercing or govern, so is there SEBI has

Participant: I will start with the notion that the institutions are acting unfair, therefore there are so many regulations.

Mr. Sinha: we have to prepared for that eventuality because if we start trusting everything for everybody and then we discover that something wrong has happened it will be a disaster so we have to be watchful and being watchful means that we are tracking each and every trade that is happening on a second by second basis we are tracking it, so I wont say that we believe that everybody is a crook but we have to prepare ourselves in a manner that not even a small crook succeeds. Now coming to Professor's point, he has raised two very important points. His first point can basically be defines as his questioning whether SEBI has independence or is it subject to guidelines and directions by the government. There is a section in SEBI Act and professor this section is there in all the Acts in RBI Act, IRDA act all the Acts. They have a situation that they can issue directions but I am happy to tell you that not a single direction has been issued since 1992 not a single.

Participant: ... which are accepted in very very rare cases ... you as a lawyer or as a sitting judge, without ... but at the same time we have cases where they were issued and courts have ... and it was challenged, they said its an enabling provision, there cannot be left with a vacuum in case in...

Mr. Sinha: You are right your worry is right and I will also add another dimension to it that when I had earlier said that there is an international organisation with security commissions, they standards and the International Monetary Funds, they also do a financial sectors study FSAP, they

have a financial sector assessment programme, there they have found that in one of the parameters where India needs to improve is this parameter. Why should the government have this power, however I am giving you the comfort that this power is there in almost all the Acts financial Act, number one, number two so far as SEBI is concerned it has never been used.

Participant:...

Mr. Sinha: so the professor raised this issue of independence of SEBI

Participant: even if it is beyond the policy SEBI is not bound by that

Mr. Sinha: Let me give you a concrete example

Participant: there are instances where private individuals have challenged it saying that the directions have been issued by the government in the way of policy they are initiating. It is not linking with policy framework and the person...

Mr. Sinha: let me give a concrete example, in 1992-93, government of India decided that the country has got policy of economic liberalization and foreign portfolio investor should be allowed to invest in the country, that was a policy decision taken by the government of India so SEBI had to come out with its own regulations so we have FPI regulations, policy was decided there, we cant question that why government of India did that. And so far as our independence is concerned, first important thing is that we are financially independent, we have never received a single paisa from the government of India, we had received a loan from them, we have returned that loan along with interest, we generate our own revenue, we are not dependent upon them and our board as I said we have representations from the government of India Reserve Bank and all that, so our board wherever there is a policy issue coming up, they can participate in it as a Board member and they can help us but once the policy is decided by SEBI the regulation is our and definitely in enforcement what line the investigation will take what punishment will be given they have no role, government of India will have no role. So we are substantially independent. Let me give an example of my counter part in the US. US SEC chairperson, her name is Mary Jo White under the Dort Frank Act, they have been asked to frame a number of new regulations and she was complaining to me in a private conversation that she doesn't have man power to draft those laws whereas this has been given to her in a certain time frame and the Senate and the Congress is not giving her the money required for this for hiring those people, so that is their level of independence or lack of independence. The second point professor you made is about regulatory capture and I must deal with it. I will I am cognizant of the fact that what I am going to say there is no regulatory capture in SEBI not only that it is just the opposite because while we consult people and when we consult people we do consult the industry but we also consult a small investor we also consult experts and jurists and investors associations and media and why I am making this statement is because when we came out with our corporate governance guidelines in 2013, a very

senior captain of the industry made a statement that SEBI is behaving like a dragon, he made a public statement. Another captain of the industry said that the way SEBI is going about it is impossible for us to function in India, we will fold our office in India and go outside India and work. So if this is any comfort for you, we cannot be captured, we are not captured and we will never be captured.

So Collective investment scheme, this is provided in section 11A where the problem comes and since many of these cases might have gone to individual High Courts, I would like to explain this, what is a collective investment scheme is defined in the Act and there are four components that there should be pooling of funds, multiple number of people must pool their funds for a particular purpose, the pooling is for any social purpose it is for profit it is for income it is for financial benefit and then you have no control as an investor in that fund and fourthly the person who is floating that scheme he is also running that scheme you have no control over it. In sharda and many other cases, there was a feeling in certain quarters that SEBI took time to decide but SEBI took time to decide because we have to apply this test, whether it is the meeting the test of four qualifications or not, if it doesnt meet this test, we cannot pass an order and remember in all these cases we are talking of passing an interim order stopping them from raising fresh money so our order is challengeable, we have to satisfy on record that we have applied our mind and all the four requirements are there. Not only that there are exceptions, section 11AA gives 8 exceptions there, if you are a chit fund, if you are a Nidhi company if you are NBFC if you are a Cooperative society you are not a CIS and it is in this background that because there were mushrooming of CIS activities that the 2014 amendment provided that come what may if you have raised 100 crores and you are not registered with any other agency then you are a CIS, so now there is a legal presumption at 100 crores, the question is what happens below 100 crores. I come to my next slide, features of the State Depositor Protection Act. State Depositor Protection Acts are very powerful Acts and the worry that there is a conflict between this Act and the other Act is not real because here the requirements are that they have been given power to even stop collection, the District Collectors or Additional Collector has been authorized, Superintendent of Police has been given certain powers, special courts has been provided in certain states for trying these offences and they have power for example, attachment of property, not only attachment of property from this scheme, if they have transferred this money to somewhere else and that person has bought some other property even that money can be attached, then arrest is possible under the State Act. If I have raised money from all of you and have transferred it to somebody else and that person has used that money to buy some property even that can be impounded, it is so powerful. It is so powerful.

Participant: when this power...

Mr. Sinha: It is called protection of interest, this is the state protection of depositors in securities that Act is there and this Act I am talking of the State Act I am not talking about the SEBI Act

Participant: ...

Mr. Sinha: I am not sure whether.. no you have to record the reason because your order can be challenged there is an appellate mechanism and I am not sure whether the word trust is written there but this provision is there. Now let me give you some concrete examples and that is where may be some of the honourable justices

Participant: You cannot use the word Trust because it made me ...subsequently there after..still we are...

Mr. Sinha: Let me give you some concrete example, if somebody is floating a scheme, what he does after he has... Its a State depositor Protection Act upheld by the Honorable Supreme Court but again we have a point of view in that.

Participant:...

Mr. Sinha: So can I give you some concrete examples to elucidate this point. Suppose I have floated a scheme and an order has been passed against me by SEBI or by the District Collector under the State Depositor Protection Act. What I do I form another company and transfer those assets to this company or go on collecting the money then I create a third entity, this is quiet rampant that an order is passed against one entity they go to create a second entity they create a third entity and things like that. So the question is What do we do, how do we stop it. I had personally meetings with 3-4 Chief Ministers and we have for example advised them that why cant they take action under section 188 of the IPC because it is conscious violation and defines of the order passed by a public authority, so they take action there. Also some of them have created a Cooperative society, some of them have created Multi state cooperative society and those are exempted so this is a matter which is still not over, more than 100 crores.. has been raised its a problem. So in order to solve this problem, we have also created a mechanism the last slide

Participant: ...

Mr. Sinha: and collective insurance scheme I can regulate.

Participant: ...

Mr. Sinha: even if it is less than 100 crores and the four requirements of CIS are met pooling of funds, fraud profit, not control, control by the promoter, if these four conditions are met I can still act, its not that I cannot act below 100 crores, but the four requirements of CIS have to be met. If it is more than 100 crores, no need to prove any of these four conditions are met, there is a legal presumption and I can act. Ok

Participant: that is the reason I was asking suppose if these 10 crores...

Mr. Sinha: Now we come to schemes of mergers and amalgamation and since it has something to do with our interaction with the High Courts I will like to deal with it. There was a provision that how that proposals for schemes of arrangement and all are produced before the High Courts. We discovered in large number of cases that Corporates were indulging in related party transactions, I will give you an example, there was a company in the chemicals business and that company, the promoter of that company had a private IT company. when we investigated that IT company had hardly any value but they decided that they will acquire that IT company at a very high valuation so naturally it was meant for benefit of that private individual who was the Promoter at the cost of his shareholders but our difficulty was that if the schemes had been already approved by the High Court what do we do, so we came out with a circular in February 2013 saying that before you approach the High Court you please approach us because once the scheme is approved by the High Court they have to go the stock exchanges for listing, the fresh company has to be listed. So we have told the Stock exchanges and the corporate that stock exchanges you go stock exchange will come to us we will offer our comments and we try to offer our comments in time and then you can go to the high Courts, high Court also has the advantage of getting the advice of SEBI and by and large I am finding that all the High Courts are finding it beneficial to them if they have an advice from SEBI in this matter but the case i have in mind is

Participant: How many cases really...

Mr Sinha: Many Many, we have. Negative in the sense we have given our comments that it is not in the interest of the investors, we have given our

Participant:...

Mr. Sinha: so after our circulars and we are bringing it to the notice of the High Courts, I remember a particular case in the Punjab and haryana High Court where the Court not only welcomed the SEBI circular or SEBI comment, they also sought some clarification from SEBI, this particular aspect of your comment is not clear on us, so we appeared there and clarified and later on that scheme was approved. The point I am trying make here is that you are right that it goes automatically, in one particular case we found that the scheme had been approved by the High Court and after the scheme was approved we received a complaint from number of investors saying that the shareholders of that company are going to suffer by 800 crores if this is not stopped. So we appointed a very reputed chartered accountant firm to look into this and the CA report said that yes the complainants are right, this company has tried to dupe the shareholders, it should not be allowed, now we had no remedy so we filed a petition before the High Court for review and our request was not accepted, on technicalities and in fact they held it that SEBI has no locus standi, the High Court held that SEBI has no Locus standi however now, after our circular whenever we are offering our comments I am finding that High Courts are welcoming it.

Participant: Provision is there in section 384(2) provides for ...

Mr. Sinha: Which High Court?

Participant: Bombay High Court

Mr. Sinha: So they said that you have no locus standi, so this is a matter where the legal position has to be very well understood. I can see that I am exceeding my time.

Participant:...

Mr. sinha: Now come to next one

Participant: ...

Mr.Sinha: Now this case that I am giving this case came up before the High Court before our circular was issued, so now that we have issued a circular asking the companies and the stock exchanges that any request comes for a scheme of arrangement, before you send your comments the exchange should send it to us, we will examine it and offer our comments and after that you produce that before the High Court. So the High Court should have benefit of our comments. I have made it mandatory.

Participant: therefore the awards High Courts allotted without any certificate those applications cannot be ...

Mr. Sinha: I dont know how to do it, I am only raising a matter of public importance because I cant dictate how the High Court rules will be amended I can dictate that

Participant:...

Participant2: You can file review petition

Mr. Sinha: we have done that

Participant 2: but failed?

Mr. Sinha: it is going on. Now the point is to sensitize you that there is some merit in getting an opinion from an agency like SEBI in the interest of the shareholders.

participant: there was an issue which ... what exactly is the review mechanism which you have so that we can understand not for the purpose of any ...

Mr. Sinha: Its a very important question, two-three scrutinise that we can do

Participant: ...

Mr. Sinha: Wherever required and if we have received any complaint or wherever required we can get a valuation done, this is within our rights we do that and in example that I gave you we had done that. More importantly, after our february 2013 circular number 1 and number 2 with our corporate governance guidelines you cannot come to the High Court unless you have got it to the Audit committee, your audit committee which us headed by independent person has applied its mind, then if it is having any related party transaction element and most of these bogus schemes of merger and amalgamation have an element of related party transaction then it has also to be approved by majority of the minority. So we look into these procedures, whether these things have been done or not. If these steps have not been followed then our comment would be that it should not be allowed and if all these has been done and we have reasons to believe that there are. we also look at for example if they are in violation of any of our regulations.

Participant: ....

Mr. Sinha: So stock exchange now has to send it to us.

Participant: just one second,...

Mr. Sinha: That is exactly what I am saying that now as per this circular, they cannot approach, if they approach the High Court they will be in violation of our regulations because they have to get approval of the audit committee which is headed by an independent director, number 1, number 2 if there is any element of related party transaction which I suspect will happen in most of the cases, then in that case they also have to have approval in general meeting of the majority of the minority. If these two things have happened then we have reasonable belief that things are in order, then we also look at whether this company is in any violation, serious violation, we will inform the High Court that look this

Participant: Are these parameters which you are saying are they ...

Mr. Sinha: yes yes now it is in our circular

Participant: ...

Mr. Sinha: section 11 of the SEBI Act is our dharma, that is our mantra that is the fountain head of all our powers

Participant: ...

Mr. sinha: Exactly so my whole purpose is to sensitize

Participant: Chairman and CEO...

Mr. Sinha: let me answer this. Our corporate governance regulations provide that there have to be at least 50% independent directors if the chairman and the CEO is the same person. If however the Chairman and the CEO are two different persons then even one third independent directors will be sufficing. We cannot provide, we would love to do that, we cannot provide that there has to be compulsorily an independent Chairman but at least we have said that there is some advantage in having an independent Chairman other than the CEO, then the percentage of independent directors that is incumbent upon you will be reduced from 50% to 33%. I think I have over shoot my time substantially, give me 5 more minutes

Participant: ...

Mr. Sinha: that employee should be a director?

participant: this concept is applicable in Germany

Mr. Sinha: This concept is available in India

Participant: Mr. Chairman there is only one comment to me the volume of questions show how successful the talk has been.

Mr. Sinha: Let me answer this, its not a requirement but in one particular case there is a requirement and that particular case is in case of public sector banks, government as the majority shareholder has mandated that one of the directors has to be an employee director, otherwise there is no legal requirement. Personally, I am not persuaded that this is a good idea because I have worked in the Boards of Public sector banks and I have found their contribution and in what way they try to look into the interest of certain sections of employees over the interest of the shareholders and the company, I am not persuaded that this is an idea which has to be done by law. Germany may have a different background and they have it. I think I am almost at the end. I can be here till about 4 o'clock. So here very quickly I want you to be reasonably proud about your market. We are the top ten countries in terms of market capitalization, our market capitalization is around 1.6-1.7 trillion dollars, our economy is about 2 trillion dollars, about 80-85% of the GDP in number of trades we are number 4 and quiet high, NSE ranks number one in the equity derivatives and currency futures, FII money and foreign portfolio money are coming in a big way, last year we have 45.7 billion of FII money in this country. Even this year when FIIs are withdrawing money from all over the world and taking it back to the USA our negative is much less than say country like Russia or Brazil and things like that. So we are doing better, we are very active in the global standard setting and the global standards guide us. FSAP is Financial Sector Assessment plan by IMF, we are fully and broadly compliant on 22 out of 28 principles and professor let me again repeat for your memory that one principle where we are not compliant is the principle of power to issue directions

by the government, so they have pointed it out that this should not have been there, and removal of Chairman and member. There is another provision in SEBI Act and also in RBI Act that government can remove the Chairman so these are one or two examples where we are not compliant and the financial market FMI principles, India ranks one out of 6 jurisdictions with highest rating in all the 8 parameters and lastly on corporate governance our ranking has gone up to number 8. So our market is not doing too badly given the global conditions and thank you very much in showing your interest.

## **Session 8 & 9**

Mr. Rangacharya: Respected Professor Upendra Baxi Sahab, our Chairman Shri. U K Sinha, Honourable Justices, it is a great privilege and honour for me to be here to interact with you. What I will be doing is that our Chairman had already given you a brief idea of SEBI and what it is doing from the policy angle and putting before your Lordships, the legal process that we undertake with regard to the framing of regulation and then some important Supreme Court judgement I wanted to place before you Lordships and in the next session I will be concentrating on the enforcement actions that SEBI takes to protect the interest of investors.

So ... has already told and as already mentioned by Supreme Court honourable Supreme Court in Clariant Case that SEBI is performing all the three functions, legislative, executive and judicial functions. So when we say legislative it is delegated legislation and then the second is executive function it has got to do with exercise of discretion and also investigation powers and the third one is quasi judicial powers when we take action against the people. Basically the section 30 of the SEBI Act, section 31 of the SCR , section 25 of the Depository Act confers power on SEBI to frame regulations and the process followed is like this. As Chairman said there are lots of advisory committees headed by very senior people, market experts and very prominent persons in the society, they contribute a lot to the policy inputs, for example in the field of the specific regulations which I will be talking in this session, insider trading, fraudulent and unfair trade practices, take over regulations, these are the three regulations which cover large number of investigation and enforcement actions, for example the FUTP Prohibition of fraudulent and unfair trade practices regulation. It was in fact weighted by the draft regulation was weighted by legal advisory committee which was headed by the former Chief Justice of India M. N. Venkatachalliah, he was the advisory committee Chairman at that time. Then the insider trading regulation was product of the committee headed by Justice N. K Sodhi and then the take over regulation the Committee Chairman was Achyutan, he was the first presiding officer of securities appellate tribunal. So you first inputs from the advisory committees and then there is a public consultation in which the SEBI releases the consult paper and sometimes releases the draft regulation also. Then there is a detailed deliberation at the Board after internal examination by the draft. Then notification in the Gazette and Chairman had already told that before 95 approval from the government was required and now no longer government ids required so independently the SEBI takes a view on the subordinate legislation. Then it is laid before the both houses of the Parliament and at least 30 days it has to

laid in one session or two sessions and of course the Parliament has got the power to modify the regulations but there are no instances of modifying the regulations but some of the regulations were examined by the subordinate committee on legislation. Then the regulations of SEBI are we have framed several regulations around 44 regulations we have framed since 1992 on various aspects of the market intermediaries and on the conduct of the persons who also sit with the Capital markets. So these 44 regulations I have put in 5 different streams, the first stream of regulations deals with registration and deregistration of the market intermediaries, basically when we say market intermediaries we have brokers, stock brokers, merchant bankers, portfolio managers, debenture trustees, so there are large number of intermediaries who associate with the market so they are the intermediaries between the issuer company and the investor. Then the second set of regulations are dealing with the funds like collective investment, mutual funds, venture capital funds and there are portfolio managers also, so these people basically deal with the funds, these regulations lay down the principles of investment restrictions then how decisions have to be taken, what are the code of conducts etc, these regulations deal with that. Then prohibition of certain conducts in the market like fraudulent and unfair trade practices then second is insider trading. The fourth stream of regulations is substantial acquisition of shares and take over and then there are buying back of securities then listing of securities and de listing of securities. Then the last one this is very crucial because in the disclosure based regime, disclosure is the essence of the market conduct, so we have initially DIP guidelines it is called Disclosure on Investor protection guideline that has been subsequently made as a regulation as a corporate issuance and disclosure regulations. So then I come to the executive functions, as I said, basically there are two aspects, one is we exercise administrative discretion, whenever a person applies for some relaxation for example we exercise discretion, then the second area is when we grant registration we have to follow some procedure if we don't want to grant registration. Generally we grant registration, there are certain requirements that are laid down in the law itself. These are basically a person should have a network then there must be some track record then adequate infrastructure must be there and the persons who operate in that entity must have at least basic knowledge of the securities market, the key persons should also be fit and proper persons, when we say fit and proper persons they must be of honesty, integrity these kind of aspects we look at the key managerial persons. And then suppose if SEBI is not accepting the applications and the SEBI wants to reject the application for registration then we need to follow the procedures, the regulations itself laid down the procedure, it said opportunity of being heard is to be given, so what we do is we communicate to the party the reasons why we propose to reject the application and then he has been given an opportunity of hearing, he files his objection or whatever submissions he has and then the final decision is then a final decision is taken with regard to granting or non granting registration, if we are not granting registration we communicate with the reasons why we are not granting the registration. Similarly in cases where some discretion is to be exercised in grant of relaxations and all that, there also the reasons are communicated so that in both cases there is an appellate mechanism they can go to Securities appellate Tribunal. SEBI has also in the recent past has reduced the discretion to a greater extent or either documented that where discretion is to be

exercised, how it is to be exercised and most of the parameters have been laid down so that there is limited scope for the abuse of discretion. So next important function in the executive function is investigation and inquiry. So this power is given in section 11C of the SEBI Act, section 11C gives power to investigate.

Participant: persons are fit and proper, what do u mean by fit and proper?

Mr. Ranganayakulu: They are fit and proper to operate in the market, fit and proper means there are no convictions, absence of no disciplinary actions, they are honest, their integrity is not questionable, these kind of stuff, financial integrity and honesty of job. So section 11C of the SEBI act gives the power the investigate any matter, so the first step is if we feel that the trading in the market is going in such a way that there is something wrong, some violation of the regulations is happening then the competent authority issues an order in writing appointing an officer below the rank of a division chief that is DGM level senior officer, he has been appointed as the investigation authority. Then he derives all the powers, whatever is given the section 11C, so he has the power to summon persons and documents also, when he summons the persons he can record the statements on oath, he can also call data records CDRs we call telephone call records, then the section also provides punishments if person fails to produce documents appear before the authority, then there is an imprisonment up to one year and a penalty also is leviable upto 1 crore, then there is a search and seizure if we find that there is a problem in getting the documents or he is not cooperating or there is a likelihood of destroying the evidence, then we go to the Magistrate and we get the orders for search and seizures. Then the investigation officer after the investigation is completed, he submits a very detailed report and his basic objective is to find the facts, so its purely administrative, he collects the evidence, he records the statement and based on the evidence he collected he submits a detailed report and then the report is discussed by the internal committee that is having 5 people 3 from the operational side and two from the legal stream so they are basically independent they are not involved with the investigation so this committee get into the evidence recorded during the investigation and then they will recommend whether any action is to be taken, any enforcement action is to be taken, they will make their recommendations to the whole time members who are competent to finally decide what enforcement action is to be taken or otherwise they may direct the investigation is not properly done, you can look into various aspects again, they may remit it back to the investigation authority also. Once the WTM, whole time member approves the actions then the file is transferred to the enforcement department. Sir recently SEBI appointed an international consultant to study the practices elsewhere in the world and a decision was taken that after the enforcement actions are approved by the whole time member the file is completely transferred to the enforcement department. enforcement department is a separate department they will take further steps and the enforcement department basically consists of officers from the legal stream so they will be prosecuting further.

Then the quasi judicial process, in quasi judicial process, both adjudicating officers and whole time members they conduct the quasi judicial proceedings, so they conduct under 11B then there

is procedure under chapter 6A for imposition of the monetary penalty so in both cases WTM and AOs conduct the adjudication. One of the major safeguards that has been provided is that a person who is administratively concerned with the matter he will not act as an AO. So AO is always independent from the subject matter so if he is an investigation authority he will not be acting as an AO so AO is basically an independent person. Then enforcement department independent of investigation that I have already told. Then we have also laid down rules for the purpose of adjudication, central government has framed the rules and for the purpose of inquiry against the market intermediaries SEBI had framed the inquiry regulation and basically both the regulations provide for compliance to natural justice because it's a quasi-judicial process opportunity of hearing inspection, various aspects are to be taken care of and then in these proceedings normally parties either they themselves appear or through authorised representatives or advocates. So now I will just dwell upon some of the key regulations, take over regulation, fraudulent and unfair trade practices and then the other one, insider trading regulation in detail. I will just inform your Lordships the various important provisions in these Acts in these regulations.

Take Over regulations- so the objective of Take over regulation is to provide transparency and equality of opportunity to all the shareholders. The concept is that suppose the management is actually selling out their stake and they are getting out of the company then they have to give exit opportunities to other shareholders that is the concept. So here as per the new take over code Achhyutan Committee had recommended the new take over code in 2011 and before that there was an old code that was working since 1997. There are certain trigger points for takeover codes, the first trigger is 25%, if anybody acquires above 25% of shares in a listed company then they have to give a public announcement to acquire shares, minimum number of shares. Then in every year 5% every financial year 5% creeping acquisition is also allowed if a person who is already above 25% he can acquire 5% in every financial year upto 75%, 75% because 25% minimum public shareholding has to be maintained. That is why up to 75% they can go. And if suppose in a take over offer they cross beyond 75% then there is a time limit of one year, they have to come back they have to divest and come back and maintain the minimum public shareholding of 25%. Similarly, there is a provision for change in control also so change in control means without even acquisition a person may take the control of the company through agreement or by acquisition also he can change the control of the company, even then open offer has to be given by the person who takes control of the company, if there is any change in the control of the company, open offer has to be given. Then there are certain exemptions, one of the exemptions is Sick industrial company's Act, the companies falling under SICA, then there are arrangements under the companies Act and Company Code it is exempted. Then there are succession, inheritance, then corporate debt restructuring schemes of the Reserve Bank of India also is exempted. Then inter se transfer among the promoters and if anything is not covered then they can come through the panel, there is a panel route, the panel is headed by an external expert and they will recommend to SEBI and they will in deserving case the SEBI also passes a speaking order after giving hearing granting exemption. Sir then when they have to give an open offer they have to give minimum 26% shares, they have to give an offer to acquire 26% shares and then there is a formula for offer price also. The price has to be

determined based on two basic principles- one is the negotiated price, if suppose I have acquired, I am a promoter I acquired at 100 rs from the other fellow then that is one price. The second price is previous 26 weeks average price they take in the market if it is frequently traded and if it is not frequently traded there is a formula provided for that. So based on these two, the minimum has to be worked out and that minimum offer price has to be given to the shareholder. Then they have to appoint Merchant banker who will do the due diligence, a square account has to be opened with the minimum amount has to be brought into the square account before they start the tender process. Then they have to file the offer document with SEBI, that will be weighted by SEBI because all disclosures have to be made in that offer document and that offer is given to all the public shareholders. Then once the offer is given there is no withdrawal only in few cases of instances of ... is permitted. One is if the person is a if the acquirer is a person and he dies that is one situation, second situation is where some government approvals have to come in and then government approvals are not forthcoming are rejected, then that is also provided for. In addition there is one more such other circumstance where it cannot be fulfilled, the offer obligation cannot be fulfilled then the Board may consider and pass a speaking order. Then the other component of this take over code is the disclosures. So the Promoters and the persons who cast 5% every shareholder who touch 5% they have to file initial disclosure to the stock exchange, then above 5% every 2% they acquire they have to file. Then at every level it is there for example at 24% they have to file. So we get the information how the transactions are flowing into the listed company, so the investor will have a opportunity to know that if somebody is taking over the company.

So some of the judgments of the Supreme Court I want to cite, this is the first judgment Clariant International Limited and another v. SEBI, this is decided by the Supreme Court. The issue here was not about the trigger because the trigger was accepted by the acquirer, the issue mainly was if suppose there is a delay in offer, then the first question is who is eligible for the interest and if any dividend is paid during this period whether that is to be adjusted, these are the basic questions actually. SAT said the persons who are the shareholders at the time when the code was triggered for example the code was triggered two years back and on that day there are some shareholders, later on some shareholders have sold off the shares in the market so therefore those shareholders who have sold subsequently are eligible to tender and get the interest that is the first question. SO SAT said they have to pay the interest to the original shareholders only other shareholders are not entitled. The Supreme Court agreed on this but on the second issue of the interest, whether interest is payable and what rate the SAT has workload based on some deposits of the banks at that particular point of time and they said 15% because the SEBI Act only provides that SEBI can grant interest but interest rate is not decided it only says that as per the prevailing rates in the banks. SO they have taken some formula and fixed at 15%, SAT 15% has agreed. Then Supreme Court differed with this. They said 15% is excessive, they worked out based on some formula they have said that the interest rates are falling therefore 10% is the most appropriate way to give and 10% they have granted. The Third Important question about the dividends are, where the dividends if somebody has received whether it is to be adjusted. So Supreme Court said that it has to be adjusted otherwise he is getting the double benefit because one side he is getting interest on the other side

he is also getting the dividends are, so Supreme Court said the dividend has to be adjusted. The next important case on the take over is the ...Co. Ltd, this has happened in the case of Ranbaxy. Ranbaxy has acquired a company then subsequently the Ranbaxy promoters sold off this company to the Daisy Japanese company so there was a complaint saying that the first offer was given by the promoters when they have acquired the other company and that was verbal and later on the Daisy also has to give an open offer on the main company target company Ranbaxy and then there is a subsidiary and that also they have to give. The principle is that you give open offer to the main company and after three months of the consumption of the original one subsidiary shareholders of the subsidiary company to be given the open offer. So here the question arose whether with regard to the decision on pricing one of the parameters says that the pricing should be the negotiated price or the price paid by any person acting in concert. So the question was the complainant says that the earlier they have paid 160 rs when the Ranbaxy bought the other company so that price should be given because when they have acquired that subsidiary they became persons acting in concert so they linked to that and say that Daisy has to take that into account. The Honorable Supreme Court held that the person acting in concert is acquisition specific so every acquisition we have to see whether they are acting in concert because there is a commonality of object which is to be proved. SO there may be PAC today but in the past there may not be PAC so they held that in the past transactions though holding company and subsidiary were deemed PACs but it can't be held for this transaction because Daisy and these people were not acting in concert.

Then prohibition of Fraudulent and unfair trade practices regulations, these are the regulations which we frequently use for detecting the fraud in the stock market, manipulation of the price, volumes, then disclosing wrong information to the market and then inflating the price. Basically these are the components which these regulations talk about. Misrepresentation of a material fact is a fraud, false information to market, misleading appearance of securities. no change of beneficial ownership, finding funding manipulative types, no intention to perform if they have given a buy back offer without intention to perform means buy back is given they have to buy the shares, suppose they give I will buy 100 shares but they buy only 1 share so if we are able to establish that there was no intention to perform but they gave the announcement which has affect on the price and the market. Then introducing false case, so there was one case in the past where the brokers have introduced clients without proper KYC Know Your Client at that time the KYC was not very properly done. So they introduced the client, they executed trades and they disappeared and they have done from different cities, normally what happens is that the trade is executed by an order through phone also, that time they have all given through phones, they introduced the clients in the name of some X client, around 60 clients they have introduced when the trading settlement come they failed to honour this margins and take delivery. SO there was a serious problem, then the NSE BSE they have to take a decision whether these fraudulent trades can be settled. They actually used one of the drastic powers in the by laws of the stock exchange to annul the trades. They have annulled these trades as fraudulent trade and then they went to the Andhra Pradesh High Court and the Andhra Pradesh High Court said that in the facts and circumstances of the case the annulment of trade was justified, otherwise normally annulment of trade doesn't happen. So there

is another aspect Chairman in the you have already mentioned in the front running. Then there is circular trading, synchronized trading. In synchronized trading what happens is that two people at the same time, same price, same quantity, they give the order. It get matches. In normally what happens is in liquid scriptures it will be difficult but in liquid scripts it will match, exactly both will match and this what they do is they repeatedly enter into these kinds of transactions and take the price up. So when compared to the last trading price, previous trade price everyday they will add up and then go on go on increasing that will create a false appearance of trading on the stock market. In circular trading what happens is I sell to B, B sells to C , C sells to D all are group, these are all circular group one to one one to one it will go and come back again. There is no transfer of beneficial ownership. they do only for the purpose of inflating the price. This is one of the tools of manipulation. And SAT has also held that if suppose the broker also is involved, he is also liable. What happens is the two clients give the orders from two different terminals and two different brokers are involved. Now always brokers say that I am not aware of what these two clients are playing so the moment they pick up the telephone and tell me to execute and handle shares or buy I execute I dont know what they are doing. So both of them they are telling their respective brokers we execute at this price time and this so that it will match but we found extra evidence during investigation how the brokers were actually doing we got some extra evidence and we proved that brokers are also equally involved or otherwise we can even demonstrate that why are they executing transactions in particularly these scripts so we see the behaviour of the client also wherever client is trading in other scripts or only in this script, so the broker also is having some obligation under the broker regulation to conduct due diligence because he is also having an obligation to maintain the fairness of the market. So this is one case which I have put in. This is a case of a company which do business in theatres, they have inflated the accounts basically what they have done is that they said there are 500 or more theatres they are operating that also through lease but actually investigation team found that only 200 plus theatres there is an agreement and there is no agreement with regard to 300. All these 300 theatres which are fictitious actually nothing is there but they are showing some receivables in the accounts, so basically they manipulated the accounts and all these manipulated accounts were disclosed to the stock exchange and based on this people trade. So the price there is a variation because of this false things. Then one of the director he was punished. Actually SEBI has taken action against the company, directors and several other people but one of the directors who has been punished with penalty and debarment he went to SAT, SAT has upheld. Then this matter went to honourable Supreme Court and Supreme Court has while dismissing the appeal they have made an observation that this is very important. The Honourable Court said message should go that our country will not tolerate market abuse and that we are governed by the Rule of Law, Fraud, Deceit, artificiality SEBI should ensure have no place in the securities market of this country and market security is our motto. Print and electronic media have also has solemn duty not to mislead the public, these are the observations of the honourable Supreme Court in that matter.

So then prohibition of insider trading regulations- now in these regulations, the first thing is who is insider? Insider is either connected to the company or by virtue of fiduciary relationship directors

are contractual if suppose somebody is having contractual relationship with the company he is also covered. In addition to these people even outsiders who possess our access to the unpublished price incentive information becomes insiders. But the burden of proof is on us for the outsiders, but insider the burden of proof is on the person who has traded on the basis of unpublished price incentive information. So under these regulations, the first thing is insider, second is unpublished price incentive information. This is the material information if published in the stock exchange will alter the price of the security, that is the principle. So, there are certain things which are deemed to be price sensitive like half mark financial results, dividends, change in capital structure, mergers and acquisition, change in KMPs, material events under the listing agreement, these are deemed to be price sensitive information. There can be any other information which may materially affect if published in the stock exchange. Then the regulations also bar communication procurement of UPSI so person also is not allowed to procure or communicate the price sensitive information except for due diligence. Suppose if merchant banker has been appointed he has to conduct due diligence for an acquirer international acquirer or somebody then he will be accessing the material information. That is exempted provided that he cannot misuse he cannot trade and there are certain other safeguards also if they have been allowed access to the unpublished price sensitive information. Then there are certain defences also provided that half market inter se transfer. Under the take over code promoters are allowed to transfer off the flow not through the extreme it is out of the flow inter se transfer among the promoters and both will have information same information is there. So this is one exemption. this is only defence its not exempted, they can prove that this is an inter se transfer and we have not committed any insider trading. Then similarly person in position and person trading decision different. In these broking entities what happens is that there are some people who execute the trade, there are some people who take the decisions, so if that is established that the person who is taking trading decision and the person who is actually executing at the terminal are different then there is a defence. Then similarly SEBI also has come out with a trading plan, promoters were pleading that every time we will be possessing unpublished price sensitive information so we cant pledge we cant even trade in shares so they want some technique through which they can trade. So this is the way they can trade trading plan they can upfront come out with a trading plan that after six months I will be trading with the securities. This is based on the no insider information is available at that time when I prepare the trading plan but if some future insider information comes, there is no problem because i have already disclosed to the stock exchange through a trading plan that I am going to sell or buy at that point of time and once the trading plan is given it is not revocable. So these are all the various defences that the court provides for. And the trading definition also it includes buy, sell, dealing in securities, even pledge also. But through a guidance we have clarified in the case of pledge if it is a genuine pledge, money is required for saving the company they need to borrow money from the bank inevitably they have to pledge their shares, so that they can prove that it is a reasonable thing and if they demonstrate that for genuine necessities of the company the shares were pledged there is no problem so you can escape from the insider trading.

Then Disclosures- every person who acquires shares above 10 lacs in a quarter, he has to disclose. Then there are internal codes for the disclosure and conduct by the companies, companies have to frame internal code of conduct and fair process of disclosures so they have to appoint a complaints officer who has to ensure that these codes are strictly complied with. This is applicable to even law firms also, even others chartered accountants suppose they are dealing with due diligence of the companies, they possess the information therefore they should also place in put in place a code. Then there is a concept of window closure and prior approval. Window closure means whenever there is a sensitive information for example financial accounts are being compiled at that period of time there is a sensitive information, so they close the window, when the window is closed all the authorized persons of that company designated persons they designate based on the functions and their role in the company. There are certain persons like directors key managerial persons, they are barred from executing any trade during that trading window closure, so if the trading window is closed they cannot execute any trade, after the opening of the trading window they can execute and when the trading window is not in place even then the designated persons have to take prior approval from the complaints officer and if prior approval is taken within 6 months they cannot have a contraposition, if I sell I cannot buy if I buy I cannot sell within 6 months. This is just a safeguard provided so that transaction is bonafide. So this is one of the cases in insider trading case. What happened in this was that Y was a non executive independent director of a company A and A has 100% subsidy of B and B is having 100% of a company which is in partnership. Now this C company is investing in a big way in company D and this was funded by company A so this independent director who was privy to all these information and this is not in public disclosure so he through his wife he traded and she got a profit of around 30 lacs then SEBI has taken action against these people, they have been imposed penalty and then it went to SAT and SAT has upheld the order and currently the matter is pending in the Supreme Court. There is another important case, this was actually very old case.

Participant: Matter in the Supreme Court has a question of law, what a question of law means..

Mr. Ranganayakulu: question of law what they are trying to do is that whether the evidence shown by SEBI is adequate, they are trying to do like this only.

Participant: ...

Mr. Ranganayakulu: No no no no sir

Participant: ...

Mr. Ranganayakulu: There is no second appeal sir, first appeal to SAT it was there before 2002 and no sir its an appeal but on issue of law only.

Participant: ...

Mr. Ranganayakulu: No before 2002 in fact may be 3 appeals were there. First to SAT, SAT to High Court was also there, then High Court to Supreme Court sir, so in High Court both facts and law were there, only law is before the Supreme Court. That High Court jurisdiction had been taken away.

Participant: ...

Mr. Ranganayakulu: So this is also an interesting case of initial days of our insider trading regulations, this is Rakesh Agarwal was the MD of the ABS industries and BER had taken over the control of the ABS in October 1996. What happened was there were negotiations among them and one of the conditions were that BER will only come if they are issued that they will get 51% of the shares, that is what they say they contend. Then he doesn't have that much quantity of share so he had to arrange. What he has done is he gave money to his brother in law and brother-in-law has bought the shares, all this is proved, factually there was no problem and SEBI told them that you disgorge the illegal profit and then disciplinary actions prosecution and other proceedings to be taken up. So he appealed to SAT, in SAT what happened was whether he was an insider is an insider it retained, whether there is an unpublished price sensitive information that was also no dispute, then whether you have paid it that was also no dispute then he got profit also, the question was that he says that I have done for a good cause to ensure that take over will go through that was the reason. So SAT said and then SAT also held that since there is no mens rea it was a good cause they have enumerated. Next this went in appeal, we went in appeal to Supreme Court then our consent

Participant: ...

Mr. Ranganayakulu: Sir when the appeal was pending before the honourable Supreme Court SEBI came out with consent settlement regulations guidelines in 2007 so under that it was settled. Consent is exactly 34 lacs which is derived benefit has to be given to the investor protection fund, then 4 lacs is payable towards the penalty, penalty was already adjudicated by the adjudicating officer penalty has to be paid, then third is that he has to give 4 lacs for compounding the criminal prosecution and in addition some 10 or 12 lacs it was quantified sir, the legal expenses towards litigation and all SEBI incurred that has also been agreed to be given.

Participant: What was the requisition price in this case?

Mr. Ranganayakulu: Requisition price sir I don't remember Sir exactly, I don't remember. Sir one more thing is before 2002 amendment sir so that that time the maximum penalty was 5 lacs, so after that penalties were increased so that was one of the reason.

Prof. Baxi: was this equated or not equated by the Supreme Court?

Mr. Ranganayakuu: its a consent, its like a compounding sir.

Participant: the Supreme Court it says, once you both are compromising...

Mr. Ranganayakulu: It was a compoundable offence, all our offences were compoundable because the law says that only punishable with imprisonment then it is not but all our offences are punishable with imprisonment or both.

Participant: ...

Prof. Baxi: Penalty ... and has been filed in the tribunal and Supreme Court agreed to your consent. I am asking you a simple question or exact question probably, if SLP has held been of guilty how dare you accept the consent settlement? How does SEBI have what I mean you are a public interest agency how can you settle the not ...

Mr. Sinha: This is a very old case and at that time their law was different and now the law is entirely different. Today an insider trading case cannot be consented so what Mr. Ranganayakulu is saying that we went to the Supreme Court and the party felt that they dont have a strong case, they may have to suffer a penalty, the difference between an actual penalty and consent is that you dont admit guilt you pay the money but there is no admission of guilt so your records are clean and what SEBI did the amount that they did everything that they could have imposed as the penalty, they got everything to the consent mechanism at that time.

Prof. BAXi: but SEBI as a ... I dont know prolonged the argument but the ... can SEBI be aware in of unjust enrichment?

Mr. Ranganayakulu: because as I had explained, this enrichment is not for SEBI this goes to the Consolidated fund of India however I am fundamentally in agreement with your doubt and that is why when we changed the regulation in 2012 we said that certain cases like insider trading cannot be consented, so now that situation will not arise. This time it was new, in 2007 for the first time we implemented the concept of consent.

Participant: ...

Mr. Ranganayakulu: we filed an appeal disputing that observation of SAT.

Particiapnt: ...

Mr. Ranganayakulu: in a way you are right but let me again repeat that at that stage we were sure that we have a strong case and we went there. perhaps this we have also that they they are going to loose so they came for a compromise and that compromise is so far as the monetary amount is

concerned there was no compromise it was exactly on the lines that we could have gone including the cost but..

Prof. baxi: ...

Mr. Ranganayakulu: they disposed it off on the consent term.

Participant: ...

Mr. Ranganayakulu: Let me explain what is, this cannot happen now, now

Prof. Baxi: They have the power to do complete justice, it does not say completely injustice. 142 is for complete justice, understand how far you can go I have questions like your questions but that we will discuss when the Lordships arrive. But in this case its not so much SEBI, where does the Supreme Court get power to punish me for a crime which I have not committed or to award me damages even assuming a consent in this case as it consented.

Mr. Ranganayakulu: What if the party the aggrieved wants it by peace?

Prof. Baxi: Supreme Court the highest court will lend. I am not guilty I have been not found guilty by the SIT, SEBI it was ... and I agreed to..

Mr. Sinha: Then why did you agree for consent? If you are the aggrieved party you have won in SAT then you should not have agreed to consent you should have fought in the Supreme Court.

Prof.Baxi: I am bamboozled by the SEBI program

Mr. Sinha: Then you are liable to your share, I mean what can SEBI do about it.

Mr. Ranganayakulu: Sir in all likely hood, he could have lost in the Supreme Court, see the reason why he was acquitted is not very strong that it could have been contested in the Court, that is why he wants to buy peace he said whatever you have imposed I will give it up.

Participant: I have an answer to the professor why did Supreme Court do it the answer according very simple answer even at the end of the day judges have to show a disposal rate.

Prof. Baxi: is 142 a power also to do public injustice, its a power to do complete justice but does the power to do complete justice include the power to do complete injustice.

Mr. Ranganayakulu: Not justice include injustice, injustice include justice.

Mr. Sinha: we have realised there are problems in ... but now we have rectified it.

Mr. Ranganayakulu: Next is collective investment schemes which Chairman had already informed in the morning session. I will just read some of these. There are 4 elements which have to be proved as CIS then there is deemed CIs, then Exceptions are there, then there is one ore thing that I want to bring to the notice that there is a 1978 Act, Price chits banning Act. See most of these schemes are designed in such a way that they want to you know come out of every regulatory framework that is why this amendment in 2014 has happened, deemed friction has been introduced above 100 crores deemed to be CIS because there is a large public interest in that but if it falls under that Price Chits Banning Act, its more or less like a money circulation scheme, what they do is A raises

Participant: many parties are going for applying people are .. they are covered under that?

Mr. Ranganayakulu: Yes

Participant: I think No. Technically...

Mr. Sinha: there are two separate Acts one is the Chit Fund Act, chit fund Act the central regulator is Reserve Bank of India but actual operations and control are with the State government and the State government can register and regulate the chit funds. In the southern states it is quiet prevalent and its a big industry its a legitimate industry, in fact when Sharda scam happened and national media and Parliament debate started talking against chit funds some states protested that chit fund is not banned, why are you criticising the chit fund act. There is another Act called Price Chit Fund and Money Circulation banning Act which is actually a spongy scheme that Act was banned in 1978. Unfortunately while it was banned in 1978 till 2014 rules were not framed. So the government of India was supposed to frame the rules, rules had not been framed so the model rules were framed in 2014 and my information is now almost all the states have framed the rules.

Participant: Hire Purchase Act..

Mr. Sinha: So now the rules have been framed so may be in some of the High Courts you may come across cases and you have to take in view whether it is covered under the Price Chit Funds and Money Circulation banning Act 1978 and in Karnataka, Andhra perhaps Tamil Nadu also there are cases of multi level marketing companies so all those come under those price chit funds and money circulation banning Act.

Mr. Ranganayakulu: Agri gold is one example sir recently they have taken under that Act, Andhra Pradesh High Court has appointed a committee also. Then sir we have regulations also, collective investment scheme regulations, these were notified in 1999, unfortunately only one company has been registered with us and other companies two or three provisional registrations they have taken but they failed to comply with the conditions and then the provisional registration lapsed. The requirements under our regulation is number one it has to be organised in the form of a trust, then there is a requirement of credit rating, then independent directors so the conditions are very

stringent and it is required in public interest because they are handling the public money. Then the other area is DPI Deemed Public Issues, this is 67 of the Companies Act, so the Companies Act 67 that proviso says that if offer is made to more than 50 people then it is public offer, it is a deemed public offer. So the first thing is that they have given the preamble of this section 67(1) that when you construe a particular thing is a public offer they give when you offer to the public or section of the public then they go down and say domestic is exempted then if it is given to internal people rights issue etc they are all exempted but this proviso says that if it is offered to more than 50 people then all that is gone so it is deemed public issue. In this one there are three cases, actually first I will tell there are two CIS cases and one DPI case. The CIS cases this PGF and PACL sir both are actually same group companies, these are recent orders. There was a contest in both the cases saying that this actually a land transactions and central government has no power to frame regulations so the constitutional vires of our regulations have been challenged saying that this doesnt pertain to central government area and ultimately it was held to be a CIS by the honourable Supreme Court in this PGF matter and in the other matter PACL what happened was SEBI directed them to file and they challenged it before the honourable Rajasthan High Court. Rajasthan High Court took a view that these are not CIS, SEBI has no role in framing the regulations because its ultra vires. Then that also has gone to the Supreme Court, both the cases were settled recently and then the final orders have been passed by SEBI directing them to refund the money to the investors.

Now the latest development is that in both the cases Supreme Court honourable Supreme Court has appointed committees, one committee, both the committees are headed by former justices of honorable Supreme Court. Lodha ex Chief Justice Lodha was appointed for this PACL and Justice Vikramaditya Sen was appointed, so they will now supervise the collection of the money recovery of the money identify that and they will on behalf of the Supreme Court they will identify the assets, take control of it, dispose it off and pay it off to them.

Participants: ...

Mr. Ranganayakulu: last week, however in PACL case, I will like to highlight one particular point that SEBI has passed the order way back in 2003. When SEBI passed the order in 2003, the amount raised by them was 3000 crores and SEBI passed the order in 2003. The High Court Rajasthan stayed it, we went to the Supreme Court but we didnt get any immediate relief, final disposal took place after 10 years and in these ten years 2003-2013, 3000 became 50000 crore.

Participant: So 50000 crores is ...

Mr. Ranganayakulu: How do I say, I dont know but my guess is no.

Participant: We have almost...

Mr. Sinha: some of the states in USA have got it, they confer the right to the citizens , the ...

Mr. Ranganayakulu: CBI also has

Mr. Sinha: so CBI is also in the picture but the point I was trying to make that..

Participant: That's the reason we asked ...

Mr. Sinha: Bigger than that. Sharda is how much, sharda is 2000 crores, Sahara is 24000 crore, this is 50000 crores and I am saying it because may be in your day to day work the sensitivity will perhaps be helpful. that one step and the fellow went on merrily raising money for next 10 years, 3000 became 50000 who is going to recover 50000 it will take another 20 years, fact of the matter is it will take another 20 years.

Participant: Sir we as public servants can do ...

Mr. Ranganayakulu: Now you talk of Deemed prosecution and Sahara.

Mr. Sinha: No no no there are various stages, in 2013, the Supreme Court held that it is actually a CIS threby SEBI has its jurisdiction so we started formal proceeding against them after that order which took another 9 months to one year, then we passed the order and we prohibited them from raising any further money we also started adjudication proceeding and we have imposed a penalty of 7600 crores, all that we have done. Meanwhile Supreme Court has also asked CBI to look into this matter, CBI has arrested that person his name is Bhango he has been arrested and now CBI has also claimed that they have identified some of the properties so they have identified. So now in order to identify all the properties and to give it back to the investors a committee under Justice Lodha had been appointed by the Supreme Court.

Participant: Now what the Supreme Court has ...

Mr. I have my serious doubt like you I have my serious doubt because, wait a minute, in PGFL, what has happened, in PGFL, the matter is very old and the Supreme Court appointed a Committee under a retired judge it went on for again almost 10 years and after the ten years that particular person who was appointed Golden Forest, he said that I am too old I cant do it, appoint somebody else, so after 10 years he said sorry I am not in a position to do it and he became old.

Prof. Baxi: He became old in order to realise he was old he became old.

Participant: This is a much bigger task for me, so I cant handle so it can be detracted from the amount, so you can recover from them...

Prof. Baxi: No body can meet Justice Liberahan's standards of commission of inquiry, Liberahan said on the demolition of Babri Masjid for 17 years and then he gave the report and this is the second case that after 10 years so its obviously time is money and SEBI's method of conversion time into money is the market rate so ... the Supreme Court as ...

Mr. Sinha: I am raising this point for your kind consideration because SEBI has faced a situation in Sharda matter for example where PILs were filed saying that SEBI did not take a decision in 14 months, if they had taken a decision, they took all the 14 months to establish that Sharda was a CIS if they had decided early, lesser number of people would have suffered so there was a PIL filed that let there be a CBI inquiry against SEBI officials and RBI Officials, so I am seeking your indulgence that look into the larger background, we have to establish that it is a CIS it is not registered with us, 4 components are met, there is no evidence, no paper so we have to send our people get inquiry filed inquiry and even that and we have also to meet all the requirements of natural justice that means giving an opportunity of hearing and all that. If after that we have taken 14 months compare it with what happened in PACL , so kindly I am seeking your indulgence that in future if you have anything kindly keep this as.. thats all I am saying.

Participant: Sir what is the mode of adjudication ...in other countries.

Mr. Sinha: That's a very good question. In other countries the securities market regulator like SEBI doesn't have anything to do with it. So it is the state governments, the prosecutors in the state government they take it, the provincial governments takes it up, the security market regulator has nothing to do with it. As early as 1998, when the first plantation scam took place in the country, there was a demand or that let SEBI handle it, SEBI protested that look we are not competent to deal with it we don't have the organisational structure but it was given to us and so now we are

Participant:...

Mr. Sinha: No that was in 1995-96. Just to satisfy what you are saying, we have passed orders in 250 cases, no regulator anywhere in the world has passed so many orders and we passed it in two and a half years and this involves so much of litigation at various fora you cant even imagine but we have passed it, 250 cases we have passed orders. So we are not shying away from the responsibility that has been constitutionally and legally given to us, I am only making a point about other countries when a question was asked about other countries.

Participant: The reason is the same function now there is entrusted with with the state prosecutors. There are cases where after tern years charge sheet is not filed and ...

Mr. Ranganayakulu: They will say that this is not a collective investment scheme, they prima facie satisfied that its a land transaction.

Mr. Sinha: what justice was saying that its a land matter its a land matter

Participant: and Mr. Chairaman there is one aspect of the matter

Mr. Ranganayakulu: that's what exactly Supreme Court said that pith and substance its nothing but a collective investment

Participant: There is one aspect of the matter first there is Calcutta High Court public interest litigation which told that SEBI is taking 14 months. You see our experience says some of the PILs are concerned, they are not driven by the merit of the they are lawyer driven they are small screen in which there is a discussion where honorable goswami will ask grilling questions so there is a background to these PILs which are unrelated to the procedure. No body can prevent from so you the very fact Calcutta is, these were in the news papers throughout and Calcutta the Bar is extremely politically sensitive so the question is these PILs have a background, I may share that with you.

Mr. Sinha: I know that all I am saying is your indulgence when people say that SEBI had delayed something and hang them then please have a look at it I mean are we doing any good job or bad job or is there any intention behind what we have failed to do in your appreciation that's all I am saying.

Mr. Ranaganayakulu: This was what the Supreme Court said sir. It was held that since investor protection was the pith and substance behind enacting section 11A of SEBI Act, incidental encroachment upon sale and purchase of land in state list does not delude the Parliament's power to make law in this regard therefore section 11A was held to be constitutionally valid, further it was held that the nature of activity of the PGF limited under the guise of sale and ... agricultural bond did not fall under the definition of..and the show cause was challenged not the order, before the honourable High court what was challenged was show cause notice.

Participant: If you pass an order..

Mr. Ranganayakulu: We have given... no at that time also only a show cause was issued and the

Participant: ... moral of the story is that SEBI should be having competent lawyers ...

When you apply for civil cases then you will have to notify a GPs government pleader for civil cases, a separate notifications are required.

Mr. Sinha: because a special PP notification has happened now.

Participant: that is under CrPC.

Mr. Sinha: ha that is for trial, the criminal trial.

Participant: for civil matter you will have to under CPC, they are government of pleaders.

Mr. ranganayakulu: No sir our Act has been amended to say that our advocates will be deemed public prosecutors for conducting trial in the special courts.

Mr. sinha: no no he is talking about civil matters.

Mr. Ranaganayakulu: for civil matters we have a panel of advocates sir we appoint senior..

Mr. Sinha: no no Justice is suggesting cant we had declared them as general .. Government pleaders Gp as Gp

Mr. ranaganayakulu: Yes this has now been thought of..

Participant: ...

Mr. ranganayakulu: SO this is the Sahara case where they have raised 24000 crores in the name of OFCD optionally fully convertible debentures and without filing any offer document with SEBI so directly 673 ... has been hit, more than 50 people offer they have to file offer document with SEBI and follow all the public listing norms, it has to be listed on the stock exchanges also, they have not followed, then an order was passed by SEBI that went to SAT, SAT upheld then went to SC, SC also upheld the order but they have modified the directions of SEBI by directing that you give all the documents to SEBI, SEBI will verify and they have also appointed ex former judge of the honourable SC to monitor the whole process, Justice B. N. Agarwal.

Justice: ...

Mr. Sinha: actually this judgement if you find time by J. Radhakrishnan and J. Kehar I strongly recommend that this should be read, it is a very good written it also makes some very interesting reading, some humorous reading at imparts for example, this ma claimed that all these people actually exist and we have done our due diligence and they are actually our depositors and all that is the judgement has said we find there are 255 Kalavati devis in the list given by them, there were 255 Kalavati devi and the address given for example in one case was Kalavati devi sant kabir nagar U.P. so they said that how can you have an address like Kalavati devi sant kabir nagar husband's name, son's name, father's name, gali number, house number, nothing is given so they have commented on this and held that this is all fraudulent.

Participant: ...

Mr. Sinha: which is not our remit, it is not SEBI's remit it goes to another agency.

Mr. Ranganayakulu: so the honorable Court has directed that you remit 24000 crores with SEBI and also remit deposit all the documents investor application and refund vouchers. So in a very short time of just 15-20 days we had to receive the documents, of course after some extension around 127 trucks of papers have come, 3.3 crore of applications and 2.2 crore vouchers. We have never seen such a big documentation even in a biggest public issue.

Mr. Sinha: but we were able to handle it we created that capacity within a week we created that capacity and we were able to handle it.

Participant: ...

Mr. Sinha: Yes I do I do I do because the story I heard was that more than 2000 photocopiers and computers were installed in certain places around Lucknow and that is how they created this, more than 2000.

Mr. Ranganayakulu: They took 2-3 months actually initial 15 days they couldn't meet but we were able to handle it and lucky to have a very good infrastructure also in Bombay Stock holding corporations godowns were there, very state of the art godowns actually.

Mr. Sinha: Another interesting thing I would like to tell you that senior counsel from the other side our side had made a point that this instrument first sentence OFCD is actually Optionally Fully Convertible Debenture so our side was it was made a point that look if there are 3 crore investors and all Kalavati devis and the type, do they understand what is an OFCD so this question was raised to a very eminent counsel from the other side, so the judge raised this question, if you think it was a genuine transaction, can you tell me what is an OFCD and that counsel did not know what is an OFCD, a senior counsel could not explain what is an OFCD so the SC said if you cannot explain what is an OFCD do you expect Kalavati Devis to know what is an OFCD.

Mr. Ranganayakulu: then the next biggest task was to scan all the documents 5.2 crore documents and also create a data entry. Why data entry is to be created is because they have completely mixed up the applications and the vouchers, so one to one match is impossible its a big puzzle actually if one application A, his refund voucher is to be matched, its impossible out of 127 trucks of loads of this thing there is no inventory also, so because of that we have to employ our own 700 data entry operators in 3 shifts. It has been done in 6-7 months, data entry has been done, application by application, application by application, then simultaneously we have also advertised people whose refund is pending can apply to SEBI, so we received only around 10000 applications and whatever we found genuine we have.

Mr. Sinha: 3 crore on affidavit they have said that we have collected money from 3 crore and supposedly only 10000 have claimed and we have advertised at least 7-8 times in around 100 newspapers but only 10000 have come forward.

Participant:...

Mr. Sinha: That's why I said please go and read that judgement, the judgement so very comprehensive very well written judgement. It says that if after inquiry SEBI finds that the genuine investors are not there this money could go to the consolidated fund of India so the fiscal deficit of this country can be solved.

Participant: ...

Prof. Baxi: I always ask difficult questions but topics I know particular answer, but I do not think a piece of money which is speculative can ever go into consolidated fund of this India. Consolidated fund of India is a sacred trust, its not a account bearing ...idea of ...

Participant: where do you keep this money in the end ultimately this money has to be issued somewhere.

Prof. Baxi: yes yes the court has passed the atlas cycle in Legal aid consumer cases..atlas cycle had thousands of .. they didn't get the promised cycle, they make them some...they said put all the money to legal aid.

Participant: in various cases legal aid and also services authority, they are all ...

Prof. Baxi: This is not a question, our country is wonderful and we should all be proud of it, I myself think ...

Participant: ...

Prof. Baxi: market abuse ...and he deals with it and he wants them to be punished and a question is where the money will go, the unjust enrichment as one aspect. On jails it is clearly within the jurisdiction of the judges of the high court because ... is supposed to know whom he has locked up, he is supposed to have a there is a system of administrative judge who goes from high court to where he has theoretically go with it. So there is a responsibility that ...I cannot be locked up its against article 21 on a mere suspicion or legation and locked up and my trial ... out of the question, this is not the civilized system so here the exact question of system, you participate in a system in which citizens of India are disposable and that is not all.

Participant: ...

Prof. Baxi: but how often, kindly look how often can i come to the High Court, I cannot I don't live

Participant: ...

Prof. Baxi: we are all human beings including those who are jailed without trial.

Mr. Ranganayakulu: there are few other important decisions of the honorable SC I just want to mention quickly. Sriram mutual funds case where the broker has exceeded his limit of trading with the associate broker SEBI has imposed penalty and SAT said that it was not intentional there was no mens rea therefore you cant impose penalty, we appeal to the honorable SC, honorable SC held that mens rea is not ingredient of civil obligation, it is a statutory violation mens rea need not to be proved. Then the second case is Kandalaonkar case where BSE has declared a member as a defaulter because he could not pay up the obligations and he has some deposits and those deposits were attached by the income tax department. Honorable High Court has upheld that attachment but it went up to the SC and the honorable SC said that the BSE has a lien which is a statutory lien under the Securities Contract Act in favour of the stock exchange therefore that is not amenable for the attachment. The next case is Ajay Agarwal, this is very interesting case where before 1995 there was case where some misstatements were made in the prospectus and SEBI took action. SEBI initiated action under 1995 amendment, S.11B was inserted in 1995 as per which SEBI has got right to initiate action and pass remedial directions. The question was whether that can be applied retrospectively, the honorable court said that it is procedural therefore it can be invoked even for the offences committed before 1995. And the next case is S. Kumar's nation wide limited and another. I will give only two cases I couldnt get immediately. So in this matter a preferential allotment was made but it is not in compliance with SEBI preferential allotment guidelines and they sought for relaxation from SEBI, SEBI declined and then they went to SAT, SAT has granted the relaxation. Then SEBI challenged this as being the original power of SEBI, SAT has no power to grant relaxation because SAT can only modify the orders, set aside the order so SC agreed with SEBI's reasoning and they said that SAT cannot exercise such a power which is originally given to SEBI. Then the next is BSE brokers Forum, this is very important judgement. SEBI has got its own funds, the fund basically comes form raising fee from the market intermediaries, so here brokers were involved so we take some fee from the brokers, that was taken based on the turnover of the exchange volumes. So they challenged, they say that if you charge on the basis of turnover it is not a fee because there is no quid pro quo and this is amounting to a taxation. SO it went to the SC, SC held that they said broker fee is a combination of regulatory cum registration fee hence quid pro quo is not relevant. Then Pan Asia the next case is also very very important here GDRs have been issued outside the country so they pleaded first of all that these are all issued outside the country and the people who contributed are subscribed outside the country so SEBI has no jurisdiction to take action and SAT has also held by majority that SEBI has no jurisdiction in these matters. We went to the SC and SC said that first thing is that GDRs are securities within the meaning of the SCRA Act because rights and interests in securities are also securities the underlying is Indian security so therefore they have held it is a security and they have also held that though everything has happened outside but they introduced the doctrine of impact affect thing so they said that manipulations happens to the listed countries in India and underlying share is in India that is why they have held that.

Then Saikala associates, the important question in this matter was whether honorable SAT exercising power on rule 21 of SAT procedure can convert the suspension of certification. Certificate of registration into a monetary penalty. Rule 21 gives the power to the tribunal to pass any orders in the interest of justice so under that they have converted the suspension of registration into a monetary penalty. SEBI challenged this by saying that there cannot be a conversion of one stream into another stream. Then Supreme Court also agreed that SAT has no power to convert suspension into a monetary penalty. Then the next judgement already Chairman had mentioned about the interpretation of minimum penalties.

Some key statistics I have put here sir about the SEBI's. I put here some interesting statistics here sir.

Participant: All of you are very young

Mr. Ranganayakulu: So this all enforcement actions by SEBI. Basically there are 4 streams of enforcement criminal prosecution we file before the special courts, second is inquiry, it is used for suspension or cancellation of registration certificates of the registered intermediaries and the third one is adjudication for imposition of monetary penalties and 4th one is directions under section 11, 11B, 11D of the SEBI Act, I have detailed out what are the directions which we can pass in the next slides.

Then criminal prosecution- any contravention of any provision of the Act, rule or regulation or non compliance of summons is a criminal prosecution case, offence is punishable with imprisonment up to 10 years and 25 crores fine or both and failure to comply with adjudication officer orders is punishable with the same penalty. Then non compliance of summons issued by the investigation authority is punishable with imprisonment up to one year or fine up to one crore or both and sessions court only may try the offences. Then there is one power in the SEBI Act which was not actually used, there is an immunity power so suppose if somebody cooperates with the investigation authority and gives important information he can be probably given a lenient but it has never been used and no party has also come forward like that but this power is given to the central government on the recommendation of SEBI. Then these are the various directions that we passed section 11, 11B and 11D directions not to buy sell or deal in securities, seize and desist from conduct violation then suspend trading in securities, disgorgement of ill gotten gain, then restrain persons from accessing securities market, suspend any office where of the stock exchange are self regulatory organisations, not to dispose or alienate any asset on the investigation, impound and retain proceeds of securities. These are the various directions which SEBI passes under 11.

Mr. Sinha: here we can pass these directions even without conducting any investigation, pending an investigation we can pass this and as I was saying earlier if this was introduced primarily in 2002 amendment and ... in 2014. Because if you find that somebody is doing some offence which is going to have some serious impact on the market and we have to stop him tomorrow we can do

that. So that power was given only in 2002. So these are the most powerful sections or powerful things which have been given to SEBI.

Mr. Ranganayakulu: So whenever such an ex parte order is passed without affording hearing, normally the authority grants hearing at the earliest opportunity see that whether that order can be continued or revoked pending further inquiry or investigation. Then adjudication proceeding these are the provisions, minimum penalty

Participant: what are the kinds of responsibility which you normally..

Mr. Ranganayakulu: no suppose in surveillance we detect some serious manipulation is happening with the , AI these can be passed ex parte also.

Mr. Sinha: you can pass them even after hearing them but even ex parte we can ... if we feel, we have to justify why an ex parte order is being passed but we can pass and issue such directions.

Participants: ...

Mr. ranganayakulu: No disgorgment is never done sir at the interim stage. Next is adjudication and these are the penalties and these are the penalties. In 2014 amendment chairman had already told that minimum penalty has been now prescribed, earlier there was no minimum penalty for each violation. Maximum penalty is one lac per day in the case of information to be furnished, everyday it is calculated and three times the value gained or 25 crore whichever is higher. Then section 15J prescribes certain parameters so the adjudication officer has to take into account these factors while calculating the quantum of monetary penalty. Then the source of detection of violations, how do we detect the violation, generally we detect most of the violations through our surveillance system, they generate alerts and those alerts are examined and if necessary they convert into a formal investigation, or a preliminary investigation. The difference between preliminary and formal is that we dont issue the order under section 11C so for preliminary examination what they do is they get the information from the stock exchanges, stock exchanges also have a surveillance system, they get the trading data the banking details and then preliminary examination is made and if we feel that formal investigation is required that requires an order from the competent authority so that persons can be called and record statements etc. IA has to be appointed, inspection officer also has to be appointed. Then media report also sometimes they pickup some suspicion and all that they are examined, then inspection routine, surprise or there may be special investigation if there is some complaint and then investigation inquiry so all these modes of things which give us some clue about something wrong for initiating actions. So these are the various areas of enforcement, public issue related manipulations like misstatements in the prospectus, grey market operations, grey market operations means before listing some grey market operations they do and then after listing they sell it, and irregularities in issue process, then post listing market manipulation like price reading and circular trading then fraudulent and unfair trade practices, breach of code of

conduct by registered intermediaries. every registered intermediary regulation requires some kind of code of conduct that has to be followed, then insider trading, then take overs and acquisitions beyond threshold, violation of investment norms by registered funds and violation of disclosure norms. In the morning Chairman was mentioning about one IPO case, in that case actually it was a very interesting case, they have opened fictitious DMAT accounts. In IPO if a person has to make application he should have a DMAT account and that person also have to submit some documents for KYC. What they have done is they have first obtained fraudulent certificates from the banks saying that they have a bank account. Then they opened a fictitious DMAT accounts and then they have applied. The whole idea is to corner the shares because shares are allotted on proportionate basis so they want to corner the shares. Then they have also used in the process actually they required some photographs etc, they have even downloaded from the Shadi.com, this was found during investigation that they have used even photos. There is one more instance where there is some exhibition going on then there was a free photo, so those free photos have also been used. This is how they have designed to use open 50000+ DMAT accounts. These were all when we were arguing before SAT we found out these documents. But now it cant happen, there is a very strong KYC requirement and the person cannot open a fictitious DMAT account. All steps have been taken now, it is impossible to happen that kind of a situation today. Then process of enforcement, just I am putting down here the process which we followed so that your lordships may see it is consistent with natural justice and legal principles. So the first stage is examination of investigation inspection reports, then we find a prima facie case, then approval of the case by competent authority, file transferred to enforcement, then issue on service of show cause notice, the show cause notice is actually prepared by the legal officers and the enforcement department, then inspection of document, then we give the inspection to the party for checking the original documents which we have collected during the investigation, then examination of the reply of the notice, then the case filed is put up to the competent authority for a hearing and then after hearing competent authority passes a speaking order, then if agreed they would go to the SAT, and then from SAT to the SC on issues of law. EX parte proceedings first they invoke section 11(4) and 11B to pass an ex parte then post decisional hearing is given speaking order then the investigation will become completed, after completing the investigation the regular show cause notice is issued and then the matter flows into the same mode of hearing and then speaking order and the matter finally is concluded. Then I will speak about the settlement orders consent orders this was introduced in 2007 through a circular based on the practices in US SEC. US SEC 90% of the matters they settle, they settle with amount, they have to pay up a huge amount plus there may be consent bars also voluntary undertakings that I will not be accessing the market voluntarily, that kind of voluntary bars are also taken. So on the same lines we have introduced in 2007, because of the pendency also, one of the reasons was that we have to explore the way to dispose lot of pendency and very old matters are there and we are facing some problem before SAT also in proving the cases there are weak evidences etc, so that was the reason why we came out with this consent circular. As per the consent circular all the civil matters can be settled through a consent order, this was in 2007, subsequently we made changes, and we have changed this circular in 2012.

There was a criticism that there is no consistency in arriving at the amounts, same particular facts situation one person has taken some 10 lac and another person is 15-20 lacs, this is one point and the other point is that you are settling all serious manipulation cases and insider trading regulation cases also, so there was a criticism. So in 2012, the original circular of 2007 has been modified to exclude certain serious offences, insider trading, front running, then serious fraudulent and unfair trade practice which in the opinion of the Board is having a market wide impact integrity of the market that is also excluded. Then repeated settlement also if a person takes one consent order he will not be allowed to take repeatedly consent settlement. So there is a bar. They have to file application in prescribed form with certain affidavits and undertaking then the matter is examined by the internal committee, internal committee is headed by a senior officer at the level of chief general manager and then it is placed before high powered advisory committee which is headed by an ex judge of the high court with other three members from the market. Currently Justice Jhunjhunwala, ex judge of the Bombay High Court is the Chairman of this HPAC. So we take to the HPAC and then HPAC will look at it whether it is consentable or not. Is it okay in public interest and Oaky in the interest of the investors, they will give their recommendations then it goes to the panel of two members, two whole time members who will finally approve on pass the order. If suppose the matter is pending before

Mr. Sinha: I would like to add here and we have made this point earlier also that SEBI has tried through this mechanism to remove any impression that SEBI is acting with lot of discretion and arbitrariness. So we tried to remove our discretion, that is why we have come out with a regulation saying what can be consented what cant be consented and even the amount of settlement, it can be calculated in a mathematical formula which is there in our regulation its part of our regulation. SO there cannot be wide variations because there are parameters like are you a repetitive offender or are you the first time offender, did you come initially at the time of committing the offences and did you come after we have gone to SAT and things like that. So based on those parameters certain mathematical weights have been given so uniformity is there, discretion is minimized.

Participant: ...

Mr. Ranganayakulu: and only 30% of the orders are settled actually, 70% is rejected. And the consent order can also be available to matters which are pending in appeal before SAT or even further before the honorable SC.

Participant: the cases pertaining to SEBI, how many cases are pending in the various high courts of the country.?

Mr. Ranganayakulu: I am giving that sir, all slides are there statistics slides are there. Then he has to pay the money, the there are consent bars also, sometimes if we feel that its a very serious issue, we tell them that we undergo 5 years debarment voluntarily. They agree sir, they agree for going voluntary debarment plus we also impose certain compliance requirements like you appoint a

compliance officer or you appoint an auditor and get audit and all these things and then take remedial steps for restoration of what has happened. The Compounding of appeals, this is provided in the SEBI act so this happens before the special court and once the application is filed, it comes to us and we examine the application and we have to take a stand, we file a reply. Normally in serious matters of public importance we oppose like Ketan Parekh, Harshad Mehta related cases, we normally take the objection.

Participant: Is there is any method of referring the . . . matters where the offence is compoundable to refer the Lok Adalat.

Mr. Ranganayakulu: Now actually the high Court has suggested that it can be referred to the Lok Adalat. We have two sets of cases sir, one is the original offence of manipulation etc, second is person fails to pay up the money imposed by the adjudicating officer so in those cases we are positively agreeing because they are ready to pay up the amount with interest and also compounding charges, so there is no problem.

Participant: ...

Mr. Sinha: the cases pending are very high, number of cases pending are very high so this suggestion has come from the High Court that why don't you refer it to Lok Adalat because in any case, certain principles will be there that the amount of compounding will be decided, he will pay for it, he will pay for the legal charges and all based on this we are inclined to consider it.

Participant: ...

Prof. Baxi: I ... Lok Adalat at Rangpore with Justice Bhagwati and Justice Desai did not even know about it was in Ahmedabad and then they heard of program , Bhagwati did come to Rangpore and then he developed Lok Adalat with Krishna Iyer in report but that's not the point but Parlok Adalat y important category in India.

Participant: Lok Adalat Parlok Adalat no appeal...

Mr. Baxi: Adalat, Lok Adalat, Parlok Adalat we move and some of my cases will be decided ordinary citizen cases are not decided by you, not by Lok Adalat but by Parlok Adalat. Three courts of India..

Participant: Things will automatically get settled by effect of Lok Adalats,

Prof. Baxi: You have to change the quotation number ...

Mr. Ranganayakulu: Sir I am just giving the statistics for , this is only on the surveillance actions, courts there is separately there is a slide sir, this is about our surveillance action so scripts shifted

to trade for trade. Whenever volatility is there they shifted to trade for trade that means there will be no netting and similarly price ban will be imposed. Then these are the preliminary investigations taken up 1378, rumours verified 378 number of interim order only 12 orders were passed in the 12 years but total entities involved in that persons 465 then investigations taken up 70 completed 120 that includes spill over from the previous year pendency, then warnings issued deficiency letters 274 and 233. These are soft actions. Actually the consultant who has been appointed by SEBI has recommended that more and more soft actions also to be invoked in case of enforcement actions because there will be no focus otherwise, you will be taking every violation of law enforcement action then it is a huge burden and some of them may fail also. So they have suggested that soft action also to be taken particularly first time offenders.

Mr. Sinha: I would like to add here, if you look at the interim orders passed, there are only 12, so I must admit that in the early part of SEBI we were not very careful and we used to pass interim orders more frequently than is perhaps justified in a judicious manner. Now we have become very careful and we pass it in very very important cases where there is a need to protect and I would like to give you one example. In these 12 cases there are two cases of what is called avoidance of long term capital gains. Our surveillance actions through an information that while the market in this period has gone up by 50%, these companies have gone up by more than 500% or more than 1000% so based on this input from our surveillance we did some filtering and we then identified about 6070 companies which we felt that their price is not justified by their business. We looked into their turn over their profit, their annual statement, their order book, then we went into their bank accounts that what sort of transactions have happened, who has traded who is the broker who is the trader who is the client, then we found that there is a big gang around this and their idea was to avoid paying long term capital gains. In India the current income tax laws provides that if you are trading on the stock exchange and you have held those shares for one year then there is long terms capital gains tax is zero. We found in this cases that we have detected, the total attempt to bypass payment of long term capital gains tax was 15000 crores, just imagine 15000 crores was the attempt and we have taken actions against 100s of such companies. It is very simple it will take one minute to say. I am an offender I am a manipulator, there are some companies which are k-listed 20-30 years back hardly any trading hardly any genuine activity going there, if he is having some black money I will ask him that okay come to me give me that black money I will issue some preference shares for about 9 months no trading will take place because 12 months he is away, when we are 9 months 10 months away, then I start some trading through all of us who are part of this gang and we start trading and trading volume is not very high but prices are high so 10rs share will go to 30rs then 50 rs then 100 rs 200rs, once that happens by the time 12 months are over. When 12 months are over this person will sell his shares and some unsuspecting people will be holding the shares which are worthless and that is how it operates and I as the manipulator or operator I get a fee normal fee is around 5-6% all in black so so much much of black money has been converted to white money because we have not paid any long term capital gains tax. But we are not here to protect avoidance of tax we are here to protect interest of the investors and we

found, although the main intention is to avoid paying tax the innocent investor is getting affected and so we have acted.

Participant: But the officer who is buying is also to show..

Mr. Sinha: Yeah so he is all of them are paying some amount of fee to make black money white, they are buying it and they are being paid something in cash. I place orders worth one lac rupees which will come down to may be 50000rs so I will get 50000 balance plus 5000 fees all that will be paid in cash, so that transaction happens but the main thing is that an innocent investor who is finally buying the shares he is holding the PV and the intention was to avoid paying tax.

Prof. Baxi: why does this subject of enforcement...bring your attention to a very good article in your materials 157 Shruti Jane some girl has called Indian Securities market a critical review of its major development and look at page 168, the conclusions of the author obviously economist are very complimentary to SEBI based on what they but the report says at page 168 top and I quote him SEBI has been less effective in prosecutions and penalising annulled market participant for non compliance. Now this less effectiveness refers to any judgment so obviously..the judicial judgements which have taken lot of time or which ...So I knew my purpose is to draw attention to a very nice article by Sabrinathan which you may read at pleasure in the light of what is said here.

Mr. Ranganayakulu: sir the data which has been given there is about prosecution, its a correct data there are 1350 matters prosecution matters are pending before the criminal courts for the last 15 years. Yes because of the overload, that is why this 2014 amendment creating special courts. Now special courts have been created in Bombay and most of the matters are concentrated in Bombay. Now the judge is very active, only SEBI matters it is taking up and everyday he is listing the matters and it is also a fact that last ten years there were warrants issued, they were not executed, the police also is also not very serious and sometimes they ask us to submit the warrants, nothing has happened. Only this month, just two months back, the judge has taken over special courts and he issued 270 warrants and he told police, if you dont serve this you will be called, commissioner will be called, so now they serve, everybody is running now.

Mr. Baxi: do you expect the pendency to come down, the court will be flooded by this, 30050 matters.

Mr. Ranganayakulu: even Bombay, itself around 750-800 are there so within two years it will be finished. We are expecting that within two years it could be finished because there are two courts. On that also there is a policy sir because SEBI has been given powers to take multiple enforcement actions so same set of act violation leads to four actions, suspension, monetary penalty, prosecution, 11B directions also. So we have put in place a policy through a circular saying that multiple enforcement action should not be taken up in every matter. So we have to look at the gravity of the matter and accordingly we have to take multiple action otherwise only one action to

impose monetary penalty and suppose 2-3 times he has been imposed and still he is not changing then a serious action will be taken under 11B, there is a policy. And these are the actions sir, last year 2014-15 section 11B 11 cases initiated 1808 and disposed is 670, inquiry cases 23 and disposed 11, adjudication 1951 and 1211 were disposed, then prosecution 67 and 11, last year it includes previous years also, so I have not given the total pendency these are what we have done in the last year sir and we have also increased because of the pendency increasing every year by year. We have also put full time adjudicating officers, the strength has been increased, now eight fulltime adjudication officers have been put in place, so in the coming years, within one or two years we will be able to clear the backlog.

Prof. Baxi: Is the data in your website?

Mr. ARnganayakulu: yes sir, in the annual report it is there, in every annual report we published what is the pendency and this is data on CIS and DPI ...Deemed public issues 118 orders were passed and then consent on compounding number of access settled 41 and rejected 59, this is last year figure cumulative total from 2007 onwards 1338 applications were settled, 1807 applications were rejected. Compounding one case and rejected is 14, then cumulative is 56 and 36 rejected, then settlement charges we have collected 358 lacs current year and cumulative is 229 crores has been collected through this settlement and 1.43 crores for the compounding charges, then recovery, this is one of the areas where we have really shown excellent progress because this was given only in 2014 over the years there were 700 matters where penalty was imposed but we could not recover because we don't have the mechanism, the SEBI act says that if somebody doesn't pay up then we file the prosecution before the criminal court and they are all pending, so beyond that we can't do anything. Now 2014 recovery powers have been given on the lines of the income tax act and we have appointed our own officers as the recovery officers and this is the achievement sir, number of cases completed 129 cumulative 127 for two years and the amount recovered is total 27 crores, last year 19 crores and the recoveries that we get issued 540 cumulative 604 and number of attachments 1680 cumulative 1927 amount covered 481 crores, cumulative 2056 crores. These amount also huge because of the collective investment schemes, in this matter only one MP has greenery is 1500 crore in this 2056 crores so there we have lot of problems of getting assets, then attaching the amount recovering is a big challenge. Then on litigation, this is what Lordship was asking, number of court cases pending, total 1041, SC filed 53 disposed 54 that is last year's figure and current pendency is 224 and then HC filed 163 disposed 84 pending is 559 including 13 statutory appeals pending in honourable Bombay high court. Only Bombay and these 559 cases also in the High Courts most of them actually are not agony stars we are just impleaded any many of them may not be really serious cases only few matters might be there. Sir other forums 49 and disposed 31 pending is 258, in other forums actually bulk of cases are consumer matters actually they have no jurisdiction on SEBI but yet people implead us and file and notices come to us, we developed a standard reply yes and we are treating that way also, it goes to our scores and our OAE investor grievances cell they also take up with the company that is done. The other lot is BIFR cases, so in BIFR cases also they send a notice to us for our comments so we normally give

our inputs to the BIFR, these are all for the revival of the company. Then SAT 520 and appeals disposed 2last year, total pending as of mow is 3..

Participant: what is the composition of SAT? is it held by retied HC

Mr. Ranganayakulu: Retired HC judge sir with 7 years experience, earlier it was CJ actually, Justice Sodhu was former CJ of Karnataka HC, Kerela also, last he was in Karnataka, may be retired from kerela but he was Karnataka

Participant: ...

Mr. Ranganayakulu: so one presiding officer and two other members, they are basically revenue service or ex banker, those kind of people are taken. And success rate in litigation Lordship, this is the success rate actually we succeeded in getting powerful orders in 90% of the matters, so our success arte in civil matters is 90%, criminal matters, now they are coming up so we have to see, because there they may be a set back because we have to give evidence to the guilt, the mens rea has to be proved so it is not that easy as in civil matters. And civil also we had a problem initially, some 5 years 6 years back, the result was not very good so we have learned lessons from our mistakes and all that, lot of quality improvement has taken place and last two years above 90% 94 93

Prof. Baxi: I am convinced that you are the new government of India

Mr. ranganayakulu: Sir we have put in place all procedures, well documented sir, inspection, inquiry caste examination, then quantum of penalty, review of AO orders, timelines. We have done all the documentations required so that offices will strictly follow. Then another slide sir this is alos important because we are active members of the ISCO, under the ISCO banner there is a multi lateral and bilateral agreement.

Participant: What is the full form of ISCO

Mr. Ranganayakulu: International Organisation for Securities Commissions. There are so many countries around 130

Participant: ...

Mr. ARnganayakulu: Under the aegis of ISCO there is a multilateral agreement and there are also bilateral agreement with various other countries. This is really helpful because nowadays it is crasp orders violations are crasp order and we require a lot of cooperation and assistance from the other jurisdictions. Through these memorandums we exchange information, to them and we also seek information from them. This is really helpful.

Participant:...

Mr. Ranganayakulu: Biggest number is in legal sir, 102 yes sir, 102 legal officers are there, most of them 60-65 people are taken from the national law schools, the top 5 national law schools, its a good team, we have

Participation: do they get good remuneration?

Mr. Ranganayakulu: yes sir, comparatively very good and working conditions are very nice so people also stay with SEBI there is no retention problem. Starting around a lakh 1.2, they are grade A officers, starting is grade A officers, so he will be getting around 1.1- 1.2 gross. there are a lot of incentives the working culture also is different.

Prof. Baxi: by the way, give my regards to the Chairperson, but Chairperson did not I did not make my question very clear. the question is about a regulatory take over I think literature expression regulatory take over does not refer to what he had ...

## **Session 10**

very good morning to all of you good morning we have to begin our session so we have today with us honble justice ak goel judge supreme court of India who will begin the session and then the first technical session followed by Mr. somasekharan and other justices will join us later part of the day thank you so much sir thank you thank you dr baxi my colleagues we have been debating these various issues on this very important subject of the role of courts and regulators and various important subjects you have discussed with very eminent speakers including prof baxi I think his name is mentioned in more than 2 3 sessions and this session the title is regulation of corporate governance what I would make it clear I am not an expert in the subject but with my common sense or with little knowledge I will try to initiate the discussion then I will leave it to my panelist who is an expert and then we can have a discussion this subject corporate governance has become important with the growing role of the corporate sector as against individual business men or enterprises there is a dominant role of the corporate sector in the economy it may be in the manufacturing sector it may be in the distribution sector or it may be in the service sector health insurance telecom electricity transport hotel food housing any sector you find a big role of the corporate sector big corporate houses are now taking over the work which was perhaps earlier done by individuals Indian economy is growing in a big way and one of the parameters of the growth of the economy is the stock exchanges but now there is also a concern you have big hospital with all facilities but who has access to it you have other sectors say medical colleges but who have access to it we try always to measure things in terms of our constitutional goals where are we going then we determine what do we do what check we put on the system that is going on I found in one of the judgements of supreme court also and otherwise people talking that we are growing in terms of fdi foreign direct investment but are we growing in terms of hdi human

development index there was recently also survey putting India at perhaps number 134 or something in the world countries in terms of hdi so fdi and hdi must coincide for the happiness of the people any amount of fdi if it doesn't result in corresponding happiness of the people which is a main goal of economic development then things will not be desirable so the need for regulation to uphold the constitutional values to achieve the constitutional values before constitution was enacted we go back to the freedom struggle shahid bhagat Singh threw the bomb in the assembly and he was asked to explain in the criminal trial why you did it so he said there is a very unjust social order I want to bring revolution I want to create awareness and why I want to bring revolution is the person who is constructing houses and buildings for others can never construct a house for himself the person who is providing the export quality textiles cannot weave a cloth to himself this unjust social order must change that is the objective of my revolution that is the objective of why I threw a bomb to make people know that we are being exploited by the foreign ruler then when we enacted the constitution dr ambedkar in closing ceremony his famous speech he said there are gross disparities in terms of financial wealth or distribution of resources in the country are limited to few hands and unless we bring about equality reasonable equality perhaps it will be difficult for us to retain the freedom or to have a just social order so this is what dr ambedkar said we have constitutional provisions article 38 39 and if we go to the past in our culture we have 4 important values dharam arth kam moksh the mahabharat time there was a debate which is important whether arth kaam are material values and dharam and moksh are non-material values which are important and the debate was guided by the wise people that all are equally important material as well as non-material value but material values should be achieved or should be controlled by the non-material values that is done that will lead to happiness in Sikhism we have two concepts....ok .. Is material values.. is non material values spiritual values so in gita also we have to control your mind mann with your wisdom buddhi and your wisdom by your spirit atma and atma to be regulated by paratma that is the philosophy in gita ultimately all this material wealth has to be regulated and controlled if it is not the ultimate goal of sarva jan .. sarv jan sukhayat all should be happy will be difficult to achieve now you when we started after independence we tried to have regulation of land land ceiling taking over the surplus land and giving it to those who don't have land landless people then we tried to go in the direction of socialism as we understood it we have bank nationalization as we were saying that those private banks or private sector is ... you can't leave the things to the market you have to regulate it so we had bank nationalization other nationalization of different sectors more and more and more government involvement in the economy and perhaps something are achieved but not all was to the satisfaction of the people after the developments in the world about Russia disintegration there was a thinking our foreign reserves came down to very undesirable level and we have in 1991 we have adopted a different set of policies which is called lpg liberalization privatization globalization. and this is was the strength of our economic policies real strength of our economic policies instead of nationalization we were going for disinvestment instead of social control or control of imports we were going for direct investment even in government sector then we were going for ppp models private public partnership models we have constructed roads other network

in the process the question what is the .. what has happened we have had so many scams we have had extreme environment degradation we are getting a situation where goods and services to which common man should have access common man is being deprived of access to goods and services on equal footing we have guaranteed right of equality but on equal footing we are not able to guarantee access of essential goods and service we had the problem of coal allocation blocks where it was done on a discretionary basis the government distribution of state largesse in a big way because state maximum power is concentrated or focused in the government and how the government power is exercised all biggest power is with the government either in terms of regulation or in terms of resources we are daily faced with litigation in that aspect the 2g scam it may be coal scam it may be corporate scams and in new company act we have a provision for serious fraud investigation why serious fraud investigation because serious fraud are happening in the corporate world now individual is committing a fraud or committing a wrong alright get hold of him punish him come on put him behind the bars corporate criminal liability itself has been a subject how far you can punish when do you punish in terms of money limited liability you have you will be surprised to know we have so many I think more than 50% registered incorporated companies are defunct companies somebody told me about 90% I don't know the .. only figures it could well be so why we have now toll bridges we have now every time we go with the vehicle perhaps you are having all official vehicles without feeling but if you go in a private vehicle every time you are stop it and pay for the use of the road and the collection goes on and on and on we don't know how much more than the cost which is incurred so because the private sector as it is is profit driven and corporate social responsibility sorry to say maybe very good term but very difficult to enforce and by their own initiative I don't think we have much in corporate social responsibility much been done by the corporate sector the mission of corporate sector basically is not to serve people mission is to earn more and more so we had interesting judgment in tax law by justice chinappa reddy in 1985 86 like double the tax planning and tax avoidance we are entitled to regulate your affairs in the best possible way and to pay minimum tax no problem no problem with that but then are you manipulating the things then who will check now we had no regulators and interestingly by coming across these cases in discharge of my judicial work and I am more and more surprised to find how the things are happening I will give you some of the instances I am not going to discuss those matters but I am only mentioning just for instance how the things are moving it is beyond my imagination that how such things are happening the interesting point I would make before I go to that about these regulatory authorities see we have this trai telecom regulatory yes whatever trai and then after we realized we can't telecom policies we can't leave it to any institute like that we set up tdsat and then after tdsat appeal directly to supreme court ok similarly we have electricity commission so that it can balance the right of the consumers and right of the electricity companies they can get their fair profit so private sector profit driven sector it must have to maintain efficiency or incentive it must give sufficient profit that they did not their should be an independent committee .. independent commission is set up but then you are not satisfied with the independent commission you have now electricity appellate authority headed by a supreme court judge the tariff matter goes there supreme court judge is not expert there is a

commission of experts then we have judicial appellate authority then appeal directly to supreme court similarly we have other regulatory commissions but what is happening is that there is hardly electricity supply or not sure whether it has become available if it has become available has it become accessible to common man perhaps the thefts of electricity may have decreased. all these essential services but there are many serious problems in the working of these regulatory commissions we are considering corporate governance corporate governance has many regulators ALL THESE regulators have in different subjects there are so many regulators basically regulating the interest of the consumer on one hand and the interest of the service provider on the other hand in tdsat the surprising thing which came to my notice is all disputes of cable operators cable service providers and consumers are exclude from the jurisdiction of the courts only tdsat appellate tribunal has the jurisdiction to decide the dispute supposing in Kerala there is a cable operator and cable service consumer he has a dispute he has to go all the way to Delhi and only before the regulator he has to .. the dispute and has to have it adjudicated it may be a dispute of 10 thousand rupees or 20 thousand rupees it is not possible for him he is even denied access to justice I was shocked last year I went to the program of the tdsat which was meant for creating awareness and one gentleman stood up when the conference like this was going on I have no forum to go and I am going to commit suicide just now and he committed suicide in front of us Amritsar Amritsar see there is perhaps lack of application of mind on various things when we are excluding I was suggesting at that time the civil court jurisdiction under section 9 is always there unless there is an equally effective mechanism that is what in dhulabhai supreme court said in 1968 so even if there is exclusion of jurisdiction the civil court jurisdiction still remains unless the defendant establishes that here is an equally effective mechanism available in absence of a remedy civil court remedy under section 9 cpc always remains so then I found sebi very recently I was dealing with 2 3 cases only last week we were dealing with a case where the company collected 49 thousand crore very huge amount 49 thousand crore from people throughout India and people say we do not know where the money has gone please refund our money they approached sebi sebi passed an order registered fir against all the directors put them behind the bars seize all property deposit this amount with sebi 49thousand crore and the company said we don't have we don't have this money where has the money gone they said we have purchased land for 11 thousand crore 22 thousand as per our record we have already returned and the remaining amount we have spent on development of land and when the development is finished when it is fully developed we will give you the plots ok this was the stand which was not accepted so sebi passed the order appellate tribunal also approved that order then it came to the supreme court of course we passed the order at least whatever is available let is first be sold and proportionately be given to the people rest we will see later but then we find who will do it powers are conferred on the regulator in a big way but where is the resources or manpower available with them selling land spread out throughout India is it possible for sebi we asked them what manpower you have I check the sebi act section 4 chairman recommended by the government can be removed any time no qualification is prescribe 2 members who should be officers of reserve bank and then 2 3 others members then some staff available with them what is their capacity to oversee the things ultimately what we do

on ad hoc basis we find some retired supreme court judge to oversee and he will have authority to engage such experts advisors or people as are necessary to carry out this mission I met one roc person registrar of companies and asked him how are you managing this as a regulator he said we are doing nothing why you are not doing anything he said my total staff is 32 which caters to Delhi and Haryana and the job which I am expected to do is 2 persons he says I have put for incorporation of companies which is a type of entry into the register with this is name of the company company applies in the format this our name this our objective this is our activities and this is our capital and then it is registered after it is registered the company is registered they are required to have they are required to file their profit and loss balance sheet they are required to have at least one extra ordinary general meeting in a year then they are required to transact some business but what is happening is then out of 32 he says some people will remain in courts only we are a party formal or informal we have to remain in court winding up or other proceedings amalgamation merger demerger acquisitions so then we receive the profit and loss account and annual reports of the companies which we receive online in a digital but there is nobody to read that ok then we are required to investigate frauds or noncompliance of the statutory provisions of the act for which there is no mechanism available this is the state of affairs he says if we want to investigate inspect that is the most difficult task because we say we will go we will inspect then left and right we will be made accountable not only by court proceedings but by x y z people will ask us what business you have how you have gone there with whose permission you have gone there so that task they find it very difficult so that we of course if we send a notice we receive complaints we send notice to the people what are you doing what is your response that is the only role we play and with that certain Things get done certain things get done but then we have no mechanism to check the functioning of defunct you know those who who know some tax law I don't know much but little I know this short term capital gains my lord is here dealing with advanced rulings so the short term capital gains is if you make a profit in the sale of shares within 2 years that short term capital gains is exempt from tax alright 1 year whatever is the definition I am not so much conversant but I was dealing with an appeal in the high court where the case was the gentle man had invested in shares 5000 rupees and the very next day he sold the shares for 5 crore ok then he has filed a nil return saying I am not liable to pay tax it is a short term capital gain I had 5 crore and I invested in my business shop assessment officer accepted this and made a assessment under section 263 of the income tax act the commissioner exercised suo motu regional power and directed that it is not in the interest of revenue and erroneous order you investigate from which country the shares were purchased to which to whom the shares were sold whether the transaction is through the banking channel or it is in cash the transaction was in cash 5 crore was received in cash so this against that he filed a writ petition it came before me in the high court so this is the state of affairs in the corporate world you have granted so much benefit to encourage the which is perhaps necessary for the economic growth but we regulatory mechanism is hardly enough more and more regulation is perhaps necessary but the present mechanism is hardly sufficient then we have I think the income from shares is exempt dividends dividends are exempt from income tax we had a case 2 3 days back I am referring to practical case so that it is

easier to understand for me also to understand the gentleman sold 1 crore 30 lakh shares all duplicate all fake and acquired 650 crores by sale of duplicate shares which was beyond the subscribed capital or allotted capital and it was done not by a 3rd person but by the directors of the company how it came to be known is the value of the shares was 250 rupees suddenly next day it went to 6500 rupees same share and after 2-3 days it came to 130 rupees with so much of fluctuation the market regulator came into the picture and asked them what are the transactions which have taken place verified through the share brokers what has happened and they learnt that 1 crore 30 lakh shares have been sold which are fake because otherwise of increasing the share capital you have to take permission for the increase so to overcome that sell in the market then they said you deposit this 650 crore and withdraw from the market this 1 crore 30 lakh shares which you sold you purchase it back and 30 crore further direction you deposit this was the order of SEBI the appellate tribunal very interesting and very clever order was secured by the experts we have the greatest brains available also to secure illegality so the order was in order to identify where 1 crore 30 lakh shares have gone this will first be determined by SEBI and then the order will be implemented so this was a small modification whether with this very small modification but the effect was that the order can't be carried out but 30 crore was upheld that was independent now against that appeal was filed in supreme court under section 15 Z of the SEBI act which is only question of law substantial question of law perhaps so appeal is admitted nobody implemented any part of the order after 10 years the appeal came up for hearing you know the quantum of work at the court so we asked what happened to 30 crore about which there is no dispute that 650 crore one can understand for withdrawing the shares one can understand now we do not have any money the company is closed we can't pay anything why appeal should be heard you pay at least 30 crore which is final no appeal you pay 30 crore we will hear but the point which I am making is this regulatory mechanism needs a serious review first of all first problem which I am finding is how to get people who can provide leadership in these regulatory bodies the people should be competent in those particular fields and they should have integrity unless you have people who have integrity competence and talent to understand those issues which are very technical issues the things will remain in as they are then we don't touch them then we provide appellate tribunals which are manned by judges judges who may sometimes not have that much background they may decide legal issues but they can't decide tariff what is the cost of electricity generation what is the cost at which it should be made available this is a technical question subject it may not be for retired judges it may not be a subject in which they may contribute in the manner in which people expect them then provide appeal to supreme court which makes things unworkable supreme court can't deal with these routine things as a constitutional court supreme court is basically concerned about the disputes sometimes between citizen and citizen but mainly between the functioning exercising judicial power over the state enforcing the fundamental rights so these matters where appeal is now provided to supreme court as a routine the advocate stands up and says this is a statutory appeal just admit it don't apply your mind it is a statutory appeal as a matter of course if you apply your mind there is an order of the commissioner running into 2000 pages order of the appellate authority running into 800 pages with so many formulas with so many it is not possible

rarely once in a while you are able to decide one case and you have to decide the argument will go on for months then it will be at the cost of other litigation so this broadly I find that is the need to consider the role of regulators in that appointment of regulators is the first thing then statutory mechanism and effective and prompt monitoring and then finalizing the things in a time bound manner making a provision alright this statutory appeal will be decided in 3 months will not help unless it is reasonable possible to do it and unless there are people to do I think this is all I could think about the subject at the moment if you have any questions I am going to .. but before that I will request my friend to say whatever he wants to .

good morning everyone it is always a pleasure to come back to Bhopal its the third time in less than 6 months and its good to see some familiar faces also I am really grateful to you sir for your opening remarks because pretty much my very first slide where I was setting out some context is broadly been covered if I could summarize it in to 2 or 3 large aspects I think 1 fundamental element that comes out is that state capacity is really lacking in discharging a lot of what our legislation seeks to doing that I just have a few some of this I had presented last month and those slides I think are available on the nja website so I request those of you who were not there to also access those 2 presentation I had made last month but I will broadly speak about corporate governance in the context of the wider social reality but the governance deficit is a society wide phenomenon it is not just in parliament and not just in state capacity its a societal problem and that is reflected in the corporate sector as well the lack of leadership that justice goel speaks about in regulatory agencies which have in some sense become mini states they write law they administer law they also do quasi-judicial adjudication of the law so this same leadership vacuum you will find in the corporate sector but what is our social approach to solving these problems we believe in legislating value we feel that show me a problem I will write you a law writing a law will solve all the social ill rather than focus on capacity building there is an excessive reliance on legislative disincentive as a social for example if you criminalize a wrong social good will emerge from it the empirical reality will show otherwise so you take an example if you take a nirbhaya sort of situation or the satyam reaction the new companies act is called the satyam act in corporate circles every wrong that was found in the worst fraud is addressed by making a law for all of society and then does it really achieve the objective that came out very starkly in justice goel's presentation at the end of the day is the objective met the social objective is not met we have one other problem in regulating corporate governance practices which have emerged as best practices across the globe by reason of tort law a company makes a bad decision a board does a bad decision shareholders sue the company saying you should have done better based on that lot of practices have emerged across the globe as to how governance of corporate should be done what do we do we pick those up and put it into the law for example globally boards do self-appraisal they appraise themselves and say have we .. our mandate to the e shareholders to the the stakeholders what have we done we have written a law saying boards shall conduct self-appraisal so everyone whether they like the value of appraisal or not does it and the results are everyone is 4.5 out 5 and do we reach the objective of better governance the answer is no that is another contextual element criminalizing undesirable conduct the criminal consequences of breaching business law is just been bumped up

so enormously and yet it is not used because regulators are to then go to the criminal court stand in non-air-conditioned rooms convince an independent third party judge and secure a conviction the same legislation are conferred on the regulators enormous powers section 11 b of the sebi act is a classic example and the constitutional validity of these is really under cloud and I will talk a bit about it in subsequent slides so sitting in your office room ex parte without conducting trial without having to satisfy a judge you can inflict far more injury than a jail term of 6 months or 1 year can every inflict why would you ever go to a criminal court you would only use it as raghuram rajan rbi governor the wide spread belief is you only pick up the weak who can't fight back for enforcement the bid baddies don't get picked up because you can anyway use your other powers without having to go to a criminal court then there is also we talked about state capacity we have also talked about the criminalizing there is a regulatory race in corporate governance there is a complete competition between sebi and the company affairs ministry and each one tries to do better than the other the consequence is the ease of doing business for example why is India third from the bottom in terms of legal elements of ease of doing business these are some of the reasons in every scam leads to a clamour for greater powers justice goel spoke about the rate of scam related litigations coming up every time there is a scam propelled by the media the regulator clamour for even more powers it is not as if there is a lack of power but it is more about the capacity to enforce and use existing powers so generic powers continue to get continue to inflict serious injury then of course the final element is that writs are always filed by somebody who has serious trouble with the law welcome justice lalit good morning sir in the january session one of the judges said it and I was very grateful to him I was walking on eggshells on how to raise this issue and he said every writ is filed by somebody who is in deep trouble with the state so we are always thinking that are we helping a crook by using the law and therefore writs don't effectively it's not an adequate check and balance and the quality of the law you can say it is good law bad law try your best to say the constitutional validity so that is not by itself a check and balance on how laws are made how laws are made needs to be dealt with a very different yardstick fsirc has spoken about prepare draft law engage with society ask for consultation we saw a bit of it in the anna hazare movement but every single law should actually go through asking society what sort of consequences this draft law can have is also with that context I just thought we will dive deep into the issue of corporate governance or regulating governance by and large is law has taken the approach of getting into board composition what a board should look like who should sit on board what sort of tenure so the board composition again varies between listed companies and unlisted companies securities regulation lies in parallel as you saw a while ago and I will elaborate there is virtually a competition between the securities regulation act and the companies act as to which regulator has thought through a better regulation to make life more transparent and clean in board composition of listed companies intensely regulated one third of the board has to comprise independent directors section 149 of the new law defines who is an independent director it takes into it takes criterias such as proximity of connection with the promoter proximity of engagement with the employee with the company in the recent past value of pecuniary benefits earned from the company in the past etc this whole list of who can't be independent so one third

of the board has to comprise independent directors independent directors at max can have a 5 year term and 2 successive terms after that there has to be a cool off period for 3 years we have had people serving as independent directors for decades and the proximity is so intense the independence does get impeded so there is a regulatory intervention in this regard in terms of a cool off so there is also a requirement ..... this is the question how independent is the independent director which is this issue is required to be addressed first sir again this is a classic example of legislating virtue we have somehow the whole the whole point of having a board what is the role of a board superintendence direction and control the direction part that is why they are called director that is the most important part where strategic direction guidance to how a business should be run to think of a company's business future for the next 5 year 10 year time frame that is the point in having the strategic leadership at the board level but over time the character has changed from being a strategic guide to the conduct of business to being a policeman responsible for compliance with law the change of the instrumentality of the board as a policeman for compliance with law is one of the legislative policy choices which have gone wrong but it has getting deeper and deeper there so which leads to the question you are raising how independent is the independent director its a box to check you will find candidates who will meet all those criteria you put them in who is going to appoint them the shareholders are they bestowed with wisdom of running the business which makes them gives insights into discovering frauds the answer is no as a director you may attend 4 meetings a year at best 8 meetings a year 12 meetings a year independent director can play key role in the audit of the entire company if this is the view that the independent directors are really independent then everything is possible sir I am not sure everything can be possible sir there is legislative criteria laid down as what would qualify to be an independent director sebi has tried to do this through the listing agreement we will see that in the very next slide I take your point that the solution is not effective and you are a little more optimistic you feel that if they truly play their role social good will be achieved but what their role should be varies from being a strategic guide to being a compliance policeman and the compliance policeman's role can't be played for example can a chief justice of a high court get to know exactly all that is going on in that large establishment all the time it can't at the end of the day there is a administrative role there is a operation role and sitting at the board one cant ensure that everything about the company is run well but that is the expectation that is come to laid at the doorsteps of the board members and that is a problem area there is one other element that has been brought in under the new law at least one director has to be resident in India the previous year he should have spent 180 days in India this is not a law that was in force earlier before the 20 13 law also the social justice interventions are mixed up in corporate law for example at least one woman director in such companies as may be prescribed so sebi says im going to say that all listed companies should have one woman director who ends up being that woman director the wife of the promoter typically so do you achieve social good the answer is no reliance brought Mrs. ambani on board in other companies you brought Mrs. promoter on board so do you really achieve the social good no you check the box so therefore it begs the question is legislative answer the real answer or is capacity building the real answer at least 2 3rds of the directors have to retire by rotation every

year there is also a contest of election to directorship that is permitted now these are excellent provisions for representing society empowerment but may not necessarily work in a corporate system because at the end of the day which shareholder really is not sure you get notices of AGMs or EGMs and what you do with it in my experience most people straight away throw it in the wastepaper basket nobody really exercises that postal ballot or that e-voting and whether there is an overstatement of the democratic tool of voting in the corporate side rather than looking at can we look at capacity the board members should have let's look at bank nationalization act sir you referred to it in your opening remark it was written in the era in 1969 era certain social evils of that time were addressed so who can sit on the bank board a person who has experience of accounting a person who has knowledge of economics and they picked up a few agriculture there was an agriculture society so necessarily had to have an agriculturist on a bank board today company law has gone light years ahead of that law today banking is driven by technology information technology drives banking you charge your credit card in one second you get an SMS saying your card has been charged is any related expertise mandated to form a part of capacity in a bank the answer is no so laws don't keep pace with the social requirement that why the deep intervention into composition which is moved at a point in time when the law got written can be fundamentally flawed because it doesn't keep pace with the rest of the growth in society as to what the rest of board should be or there are certain other company law provisions I thought we should talk about not more than 20 directorships we had we have some directors who are professionally directors they are directors in so many companies that you wonder can you at all do justice by being on the board that leads to the other question how independent are you how many companies can you truly say ... mixture of friends and relatives that is true this creates the problem and then the public company directorships therefore the new law says should not exceed 10 you can be more than 10 public limited companies as a director there is one section 166 I would urge each of you to read it offline it is the most motherhood provision I have ever seen in a provision of law which can also be penal it says things like the director should promote the benefits of the members of the company as a whole it should protect the interests of the company and employee shareholders people at large and environment protection and that is one objective which got picked up and placed in 166 now if you are a mining company you necessarily would have to displace some villages or a securities company you may end up having conflicts with the interests of your customers how do you counter balance those the provision make a very generic catch all statement so you will ensure that the interests of all these segments are addressed so we have again gone down the path of writing a provision of law which will somehow get us social good then there are mandatory committees for listed companies this overlaps the securities regulation and I will talk about it in the securities regulation then there is a very effective intervention that has been brought about which is regulation of related party contract you need to take shareholder approval with the majority of the minority if the related party contract is outside the clause and not an arm's length basis and it has been made the duty of the audit committee to put its hand up and say we hereby certify this is in the ordinary course and on arm's length basis that is one area of enormous leakage and abuse of position in private sector companies that has been plugged in the new law then the

securities regulation you have detailed sections from the securities regulator in this course so I am not going to dwell too much about the anomalies and issues around securities law but to only focus on the corporate governance element there is listing agreement which every listed company needed to sign with the stock exchange that is the fundamental tool of regulating board composition and governance that is now been elevated to listing regulations it is now subordinate legislation tabled in parliament for 30 days etc so it has now taken the character of law this also deals with composition of the board and what sort of composition should be at least half the board should be non-executive if the chairman of the board is executive or non-executive promoter one half of the board should be independent so again we have said independent directors should be the solution to how badly companies are governed now the consequence also is that this sits in parallel with company law so the stringency which has been brought into company law in terms of board positions would apply to all these independent directors as well so the new company law provisions which are saying it will be valid defense to say that as a independent director using board processes what went wrong was outside your knowledge but that will remain a mixed question of fact and law trial will have to be conducted to determine whether board processes were adequate and whether they applied enough of your mind whether you asked adequate questions one of the jokes we have when we come to nja is that the level of participation from the bench I have of course always found active participation in my session but there is always a comment from judges who participate saying when there is a chair of the session the quality of question asking is at a variance when there is no chair in a session so likewise in a board governance what questions get asked what sort of comments board members make what sort of prising open of things do they do to get things out is a social reality which can't be legislated again by board evaluation process one of the factors of the board evaluation is what sort of questions get asked. so every day the draft minutes come he says please record I asked this question and this answer was given and you know it becomes check the box record that question got asked by me rather than did the right questions get asked so therefore legislating governance is always area its as problematic as administering the constitution which legislates how the nation should be governed therefore legislating how a company should be governed the solution can't always be a regulatory solution it has to partake capacity building and the same lack of leadership that justice goel mentioned is a societal reality across the corporate sector as well then the 3 committees the audit committee the remuneration committee and the risk management committee are mandatory in terms of the securities regulation the audit committee has to be financially literate the capacity to read numbers and understand now most of us in the room as lawyers we readily profess to being financially literate we say numbers will enthuse us the law enthuses us but if you are in the audit committee you have to have a sense of both the regulatory environment we are a highly regulated economy therefore no matter which industry you are in chances there are very detailed regulations governing that industry there is hardly an industry which is not deeply regulated in this country and therefore to be aware of that law applicable law and the regulation and to be equally aware of the financial regulation implication and what numbers mean is what is required to be on the audit committee there is also a remuneration committee which looks at who can be nominated to the

board board says who shall be the appointee again the same issues that we talk about the collegium versus njac is a reality in the corporate sector who gets nominated to be that independent director it is a collegium which is a nomination committee of the board which is a subcommittee of the board so you self-select you get together as a subcommittee of the board and you say who should be replacing our friend who is leaving us after 10 years and therefore you pick it up and therefore these are the same problems that you will see across society and that is true for corporate governance as well indeed there is a provision saying any shareholder can nominate himself and try and contest for election it is impossible if shares are 1 % or 2% in fact it inflicts a cost on the company for which there is no commensurate benefit and therefore we have to embrace the fact that you have to self-select there is a collegium called the nomination committee and the collegium has to pick who will replace those among them who will retire the risk management committee is also comprised of external who is the collegium in that there is a provision they have to non-executive members they can't be a executive member of the board at least 3 member committee and 50% OF THAT has to be independent and there is a general rule saying you have to round of so if it is a 3 member committee 2 half to be independent the 3rd even if non independent cannot be executive it will be a non-employee director this will be the guys who will pick up who will replace retiring directors who are put up for voting into office but the independent director has already been defined yes that is qualitative criteria so the existing independent directors who sit on the board from among them this is a subcommittee the nomination committee is a subcommittee of the board who have nothing to do with the company they are directors of the company so I used the word collegium they are serving members of the board they are from there is a nomination committee with the sole statutory role of self-selecting persons in office Mr. somasekharan just a small query honble justice goel mentioned there is government or the legislative body as a super company that has access to resources I actually couldn't hear you justice goel in his opening observations remarked that a legislative body or administrative body has to ensure that there is access to natural resources to all now you mentioned that there are too much of regulation will not help the problem but capacity building will now my just a thought in my mind that as far as the government or legislative body is concerned as a super company which is in charge of natural resources all that it can do as a non-expert is to make some protocol arrangements like have a non-executive director have a independent director etc. after that cant the companies exercising this protocol arrangement build up capacity themselves what more you can put the ball further in government's court or legislative's court that you would also like to build how do we build capacity after this you admittedly it's a non-expert I hear you we have a multi-tiered justice goel mentioned multi-tiered protocol arrangement the best we can do to make the corporate sector wiser about its social responsibilities the rest of the I will answer that I will attempt to answer I think it is a very interesting dynamic and this is a classic policy choice problem does your access to service for example let's take access let's say airport a company runs an airport you have to ensure that the airport treats all airlines and all passengers equitably of course somebody brings larger passenger load larger business can be given a discount etc but by and large an equitable universal common user access how do you achieve this you achieve it through regulating that

activity of how the airport is run so the airport regulatory body will deal with how that should be done what can be the job of the board of a company to think through that it is in the larger social good that we should give common user uniform access to all in the absence of a regulation so the regulatory perspective has to be by the sectoral regulator the board of a company without in the absence of the sectoral norm can be expected to serve society unfortunately this airport thing which Sundaresan spoke just now the common experience is that the company GMR or GVK GMR is running Delhi airport GVK is running Mumbai airport there is another company running Hyderabad airport you all know that this is under the Airport Economic Regulatory Authority there is an authority the authority is only for deciding the rates and tariff of the economy the airport services and non-airport services it has no control over the company serially AAI that Airport Authority of India does not have control on the company company all-powerful so much so the company has a truck with the I will say strictly within the 4 corners of the walls it had the reach with the central government central government allowed the company under the OMDA its called the operation and management OMDA or SSA it was the sole responsibility of the company to raise the liquidity within 1 year they throw their arms in the air and say sir we can't do it go to the central government central government is legally convinced oh yes yes yes they its is their genuine difficulty they can't raise the finance then what do we do then the central government allows development fees of the airport to be paid by the passengers and how much is that fee its something in the range of 4000 crores in one year it is still going on its a biggest fraud on the why should a poor passenger like I pay for the development of the airport which is the sole duty of that company which company has no control yes please such anecdotal evidence you will find across sectors you will find similar anecdotal evidence in electricity .....we do not know when he... true... but the real question still becomes is it failure of the regulatory policy of the sector or is it a corporate governance failure of the company running the service that is that policy choice formulation remains I completely justice Sirpurkar input and it is an anecdote true of every sector sir.. take telecom you take GSM versus wireless an local loop the competition law also I am going to speak on eh competition law I don't know what Mr. Chawla has spoken to you I don't know but competition act is the biggest fiasco because competition commission has remained a haven for the Delhi lawyers that s about all im going to speak on it why don't we take a view on this regulation is a .. which is punctured by the state executive power and the corporate power and as far as citizens are concerned it is a conflict it is a constitutional trick of governance if you take that view then regulation is the problem regulatory capacity is not the problem regulation itself is a problem and we go back to the old .. economy days we go to the planning commission for example this is actually a global problem it is not again unique to us in India the regulatory capture of a regulator sec we think sitting in India the us sec is the best capital markets regulator but you ask the American society they say it is completely captive to wall street so the regulatory capture or as justice Sirpurkar says about changing the rules to suit the service provider and you wake up in the morning and you say I have to make a new regulatory intervention the regulator worries about who is going to get affected by it why about regulation why about this state and the corporate sector defrauding Indians ordinary Indians that is another look why we have capacity building regulation less more just with the

perspectives sir the exact perspectives which has brought us here I am not really on a quarrel of which angle to approach it from we are really analyzing whether the formulation we have today whether we like it or not sir tribunals are the order of the day show me a problem I will write you a law equally people are saying show me a market I will create you a regulator show me a regulator I will create you a tribunal and as justice goel rightly said the ultimate constitutional court of the law of the land is a court of appeal directly from the tribunal. I will give you a I will give you a tribunal I will give you a tribunal one minute I will give you a tribunal but I will not give any infrastructure to the tribunal which goes to state capacity issue but we if we don't build capacity building an institution without the capacity is of no use that is the first im making you don't regulate you seem to regulate that's right .... you see only immediate problem I think we should be fair to Mr. sundaresan I didn't write these laws.... I think we should be fair to Mr. sundaresan this are all the questions which the government representatives who should be answering not Mr. sundaresan or ourselves he is not here to answer the question he is there to provoke the questions he is not the one who has legislated thanks one important aspect we can take from this what justice goel its not the question of capacity building in with respect to one sector probably it is the citizenry probably the trust deficit in the ground level and also the integrity factor which you spoke of and the commitment factor and that is where we find lack of the resource in every small place be it be in the sorry to say that in the recruitment of judges right from the lower judiciary to the higher judiciary the integrity factor and the commitment factor which is required to be there in the citizen and also commitment as a citizen that's where you find everything percolating to the every he says now there is capacity building required in the corporate sector with regard to the management with regard wit persons who will be able to man the sudden adoption of various things which are there from abroad which we are doing and the speed which we are required to catch up there is also time lag it takes time the process the its a probably the matter which concerns so far as regulators are concerned the experience which justice goel said with the electricity related regulation unfortunately there is a 5 judgment of the supreme court it .. ptc case the supreme court it is a super regulator and nobody can have an over say and whatever they say they are experts and the repeated words of the supreme court are the ones which are the basis of many of the maladies today because by the time the matter gets decided in the supreme court the issue which has arisen in one court sir about 10 15 years backIn between as you have listened Now listen now that you have disturb the hornets' nest under section 57 of the competition act there is a appeal directly to the supreme court each and every order of mine which was not liked by the bar when directly to the Delhi High Court 226 we have power on the 226 so what there is an appeal 226 and interfere so much so to the extent that justice sirpurkar will not actually who is the charge under the airport economic authority act this also was done with the soul Idea 2 avoid the judgement from the bench that is from the I could not write till the time I retired my colleague Mr. Rahul Sarin he was continuing for more than 3 years he has on background interfere fine unless the whole thing you can't Digress authority the authority is only a sitting Supreme Court judge not even the chief justice who has to be chairman one judgement from me an order from me and it goes to the

Delhi High Court 226 time has come now when the real scope of 226 has to be and the understood by the judges otherwise something revolutionary I will use the 226 and I will be a shining name in the newspapers the mid I am sorry no no no I'm terribly sorry excited me because ..... I only say that governance because of subsidiary of listed companies in regulated and you can see that in this slides and I want to go through each one of them I will also basically talk of one other element Adam some sense we have overtaken the slides the slide has been overtaken by the discussion we have already had but essentially multiple sorry you had a go ahead please go ahead and try to be brief yes I will just wrap up whatever I'm things important you want to say see in the Banking Law whats the board should discuss was sought to be regulated so whenever the regulator felt the RBI felt certain decisions should be taken at the board level it has issued circular saying these decisions should be taken at the board level for nationalised bank the ministry of finance wrote lots of circular saying one what the board should do what it has leads to the boat started doing only those things which no required to do and when we did and analysis of this in the report of corporate governance in the banking sector we found that the board hardly spends anytime on inter play Technologies how to disruptive how technology is going to change banking house new regulations which would return on banks 2 act like Bank as comparators to bank so the boards lost sight of the real gold they were supposed to play and there for micro regulating what the board should do tends to make the boards the only what they are asked to do and infinite Lee it has been demonstrated in the Committee report it is something that I want to see offline already spoken about this directive responsibility statement about directors having to ensure that board processors for adequate to pick the mistakes that could have happened n complying with all applicable law how exactly to do it demonstrate in a given case any prosecution or any difference that systems working or systems work efficient we will have to wait and see the trial actually takes place will happen 20 years down the line but we will not know now actually because the way company law is drafted is saying the boat shall ensure compliance with all applicable law a breach of other law could not indirectly become a breach of company law and we are seeing that already in the securities and that is where I want to leave the presentation as a lady of constitutional conflict that will emerge the futuristic litigation that in this space is about these issues we have already seen in Sahara the two legislations ring at ministers by 1 body set the administrator company law and SEBI Act now where are provisions on government the listing regulations are issued under 2 regulations the scra the securties contract regulation act and the sebi act both legislations have identical powers creating offences and describing punishments in the same regulator prosecutes the same action for violation of 2 legislations the question that emerges is would both penalties be applicable or would one action enforced by one authority can it be ... it is not .. but it is a different element of dual action and we already have a negative precedent the prevention of money laundering act is an interesting law where sectoral regulators are required to write the law governing their sector I am not sure if the bar council has been brought in but even advocates are supposed to there is draft law I think it is pending so each sectoral regulator prescribes what its community should do when it reports a suspicious

transaction so in sebi wrote a circular about what securities market regulator should do in the last para it wrote this circular was issued under section 11 of the sebi act and therefore a violation of pmla was punished under the sebi act and the tribunal said yes it is allowed so and the pmla has its own separate law it has its own separate enforcement agencies its own appellate tribunal and the act says the role of sebi officers is to assist authorities under pmla to enforce pmla so we are going to have this multiple track enforcement proceedings which will lead to confusing questions in future im not going to dwell on these slides they will be available in a nut shell it covers what we were sitting to discuss today thank you sir ....okay we will go for a tea break and can we have a big round of applause for honble justice ak goel and Mr. somasekaran because justice ak goel would be leaving us so we will just have big round of applause thank you sir

## Session 11

a very happy good morning to all now we are going to witness a battle between the courts because the subject is courts versus the regulators it has been constant debate as to whether who is powerful courts or the regulators maybe in theory the courts are powerful but in practice the regulators are im sure professor upendra baxi who has almost reached the position of a bhimshmaarchya in law will enlighten us with his delightful address thank you thank you very much justice sirpurkar and justice lalit and my dear friends justices and friends I want to say very shortly very briefly and I am very glad for the challenge and the association justice lalit and the speech by justice goel and my mind goes back to what I said before some of you were even born in 1974 in Delhi justice goel said that there are 2 kinds of fci and fdi I ... icrs Indian council of social research and the chairperson was an economic advisor to the prime minister Mr. chakraverti a very serious man a very nice man good friend of mine..and I raised my little finger and said I have a question to ask and then .. new international economic policy ... just like what justice goel said I said there are two gnps one gnp rises the other gnp also rises so I asked what is gnp I said gnp 1 is gross national product gnp 2 is gross national poverty and he said this very nice how have you formulated it I said it is baxi economics and then he felt I was pulling his leg but I was before it was established 1947 it is the constitutional duty to develop scientific temper to develop clinical reform to develop a spirit of inquiry to develop excellence in all walks of life individual and collective to renounce practices that are derogatory to women to .. with the environment and all have compassion with all living beings article 51 a of the constitution and as distinguished citizens and citizens who are article 51 a applies to all citizens as well as .. citizens you take an oath under the 3rd schedule we don't take oaths as citizens as judges you cant do judges administered oath now there is distinction between swearing at the constitution and swearing the constitution I think the other type swears at much reluctant they are in office they take an oath the swear at the constitution the justices take the constitution more seriously as they should they do so under 3rd schedule so I very much like what justice goel said in my terms it is gnp 1 and gnp 2 in english terms it is sar and I think as you go along ...excepting he is a sitting judge and ... that is a different matter that makes the world go round there are some like judges and there should be somebodies infact it balances this up so it is very nice to hear him ..... tax evasion and tax planning and he.... and said there is no such thing in the constitution as tax planning all tax planning is a bit too far because he was a socialist judge and ... justice chinnappa was very reticent person and he never spoke in the first person and in his book... in the supreme court you must look at it if you havent looked at it and chinnappa looks at the judgment in third person one judge of the supreme court said it is I said it in in para of the case ..so he even went as far as in sampat lal .. that there is a fundamental right to speedy trial but it is not a fundamental right for smuggler and black.. and .. I read an article in the .. saying supreme court has I agree with them people say a fundamental right is right only for some citizens and not .. chinappa never forgave me for that he disagreed with me he didn't like me to write the article . and all that is in my introduction to chinappa reddy's book summit and shallows of the supreme court it is a very nice book and I commend every one to look at his lordship's books what I want to say is different and somasekharan spoke about corporate social responsibility I will only say as

I was saying to him in tea time that all that company law division has to do is to make this duties under article 51a binding the directors don't need corporate social responsibility which is a euphemism or what I call corporate neanderthalism it is a euphemism that they can do what they want short of killing the ... which also they do in India but one should not do that there is no such thing as csr I have working as I shared with you the Bhopal gas tragedy this is my 31st year and I know what union carbide what ... of union carbide mean by csr .. it is a different matter but by and large csr is media strategy for corporations it is not seriously meant to bind them I ... it is in my books and blog ... Bhopal....as you like now I want to say 3 4 things then I will stop one is that before regulatory institutions like we studied came about there were administrative tribunals and they were there for 30 years .. high courts administrative tribunals tribunals under representation of peoples act for election disputes and then they became they were the regulators before the so-called regulators of the late 20th century and in fact if you look at the development of the animal known as Indian administrative law it happened in the course of tribunal era in the first 20 years supreme court developed rules of natural justice or delegated legislation or executive rule making ... chemicals all the wonderful cases Minerva mills post decisional hearing .. and all that the seeds have been sown with an unintended consequence of the license ... the state they had become a finance capitalist indira gandhis bank nationalization and ... this is the time we saw the Indian state emerging as a finance capitalist now we see a different character of Indian state of late the Indian state has entered a regulatory capitalism phase not state capitalism .. provide all the credit all the finances to the private sector it is now regulating the private sector Indian state capitalist state the law remains the same because the judges are not concerned with the character of the state directly but those who are studying the courts know like me or teaching them know that no longer there is mixed economy ... some friends like myself call it the mixed up economy the mixed economy or mixed up economy and the regulatory economy what is the difference what is the difference between the mixed economy and the regulatory the difference .. the difference is upper middle class the world has changed what is the constitutional difference the constitution defines development for you information in part 4 what development means the constitution has only one sentence part 4 can be summed up in one sentence the state should develop the economy in a way that is disproportionately beneficial to the masses of impoverished people that is what our constitution says now I ask you how come under article 31 is the directive principles the resources of the state should be so distributed as to further common good and common ... or something .. how come article 39 meant one thing in the early economic regime bank nationalization regime .. and the court said that 31 is served by this economic and how come the same article continues as it is you must develop economic resources so as to .. serve the common good how come it survived the liberalised economy and the same.... either one is right or the other is right how can both be right but is economics not unconstitutional but a constitutional ... is constitutional article 39 lays down the theory of constitutional economics all of part 4 that is the theory of constitutional economics constitutional economics says you must do everything to disproportionately benefit the impoverished while we are disproportionately benefitting the they who have the rich the same constitution how can it be what is the third schedule oath you have taken and the meaning of the

oath... one of my friends justice khehar writes a lot about 3rd schedule oath njac case and sahara case and refuses to recuse himself and we will come to that what happened to article theory of article 39 is a very important story that we are doing to learn to tell I will not go into the regulation and talk much about that yesterday we had a very nice alice in wonderland trip to sebi chairman was here and the chairman said everything was nice I was very happy and I complemented him I feel sebi is the government of India more better than the government of India and he was very happy felt he was in corporate banking it was a sincere compliment the government executive India is 75 of the constitution and regulators are not called the government of India because the power stays in the constitution again so either it is the extension of the constitution or going above the constitution so that is period let us not talk about all that we as citizens don't know we don't know who is governing us that is the problem and in theory the constitution governs us but what is the constitution it is settled by article part 4 ... the judges the prime minister Mr. manmohan Singh and now Mr. modi it governs we go to article 4 it is governed by .. constitutionalism you don't call it Indian constitutionalism there is no problem because Indian constitutionalism in part 4 a fundamental duties preamble now the government issues the advertisement taking out the words socialist and secular from the preamble and what is relevant that they justify saying that it is the original constitution which constitution have you sworn to uphold in the third schedule that is why I know nobody has sworn to uphold the original constitution because the oath in the third schedule says the constitution as by law established and what is that law law every word in the constitution is required to be to be read I must be an old style person but the ... person makes sense every word matters in law and by way means by amendment of the constitution is also law and therefore kesavananda bharti and all that so we do not know as citizens by whom we are governed by corporation or by the government of India under article 75 by judiciary or by what we do not know how regulators governed and justice khehar in subrata roy sahara case on page paragraph 13 I will refer to it later refers to minister of corporate affairs on sebi yesterday we had the chairman Mr. Chawla Mr. sinha he said ... he said there is no interference by the minister which one is .... which one who is governing us we don't know justice khehar seems to know but justice khehar seems to know that corporate affairs the ministry is regulating the regulator the regulator tells us in broad daylight before us yesterday that sebi is governing justice sirpurkar says something else ... who is telling... but he says the high courts are governing us I do not know who is governing us that is big issue but I will now come to now my time starts I have just warmed up two parts one to regulate effectively .. the meaning of regulation we must have I believe a theory of regulation not just cases not just corporate scams that happened here and there but what do we mean when we say regulate why this why the courts are burdened for 25 years of regulating the economy in the state everything through natural justice through administrative law high courts and supreme court we changed the system and placed a regulator what does regulation mean so I ....1984 he said I said Mr. merck we are all.....the only question is whether we are conscious of the theory or not conscious of the theory it is good to be conscious about this theory we have and it is good to be .. of the theory we have ..so I asked the question where does the idea of regulating the economy come from does it come from constitution or does it come from constitution interpretation or how

is constitution different from constitution interpretation is the constitution what the judges say it is that is one way of looking at it or is the constitution what the judges ought to say it is that is another theory what the judges say or who is what they say but what the judges ought to regard as constitution the Indian supreme court has answered this question in four ways .. now and I this is my second point the Indian supreme court answers it in my terms by 1 word ....it is called the word is demosprudence demosprudence my computer spells it demos ... I am talking about demosprudence demosprudence is making a remaking people taking the name of the people demos the people but demosprudence is different from the two things we one is called legisprudence legisprudence is the wisdom of legislature to which justice goel referred and justice sirpurkar referred we do not study we are centered that we wont study legisprudence is there something called the theory of legislation is there something called legislative rationality which comes up regularly in the question of reasonableness under maneka how can legislation be arbitrary a collective body how can it be arbitrary a single person can be arbitrary can collective bodies be arbitrary the individual arbitrariness is different from collective arbitrariness ... so legisprudence we don't study in India except what people study what are written on bentham and the theory of legislation it has culled so many editions and I cant keep count of it ... I have done the Bentham translation it is still being taught and studied but what impact I do not know some kind of study master of law and legisprudence means to be taken seriously not for the .. to pull down the courts but to understand what legislature is doing what is its underlying theory for example.. Indian legislation and very few people know about it just give you one example ... he said environment protection act officers who are on statutory duty to bring the act can be held liable by the courts under section 35 or something of the environment protection act by one stroke of legislative pen the Indian parliament changed the model of legislation by making the bureaucracy in charge of legislation who is criminally responsible for failing to do their statutory duty that is a change in legislative theory India knows but we don't know they are made the second box is jurisprudence and the third box is demosprudence jurisprudence we think we know the principles of equity we think we know they are made by judges so for first 25 years the supreme court .. jurisprudence earlier there existed the supreme court now there exists 2 bench judges Shruti jane gave us some months ago a reading material in which she had an article which said supreme court has not sat as 5 judge bench for last 15 years excepting in 10% cases the supreme court has become an assembly of individual judge from... court 5 judge bench 7 judge bench only in 2 cases situations the full court sat in the history of the supreme court and both were property cases golaknath 11 judges kesvananda bharti 13 judges so both were article 31 cases it has never sat as full for personal liberty cases for single personal liberty case it is 5 judge bench 7 judge bench 2 judge bench even capital punishment ... I have suggested a number of times ....but they never listen I have said the supreme court has hold through certain capital punishment cases and should award capital punishment by unanimity then only is capital punishment justified here 2 judges 3 judges benches sit and award capital punishment and ... people execute it I say yes it is constitutionally provided ipc constitutionally valid but cant if you can sit for property cases in large benches in full court cant you sit in matters relating to life and death why cant you because the corporate law somehow

caters to industrialism the chief justice of India should set up a full court it takes only half a day for judges to decide... and in...case cross border terrorism case it took what ...to follow the ... inthe review petition right or wrong but why not the full court so if jurisprudence that is called the past practice accumulated wisdom of the courts then we move to demosprudence demosprudence is 6 things demosprudence is not possible if you follow jurisprudence jurisprudence is based on stare decisis or law of binding precedents but you have public interest litigation what I call social action litigation sal sal is not possible if you follow precedent curative jurisdiction is not possible if you follow precedent so 85 83 81 onwards the growth of sal indicates that a new jurisprudence .. which I call demosprudence in which the following are 1 they are judicially invented basic human rights judiciary creates new human rights sometimes to the point of including .. by constituent assembly makers what right to speedy trial in a criminal case right to speedy trial was considered by the constituent assembly and rejected it was incorporated in the human rights by justice antulay so judicial invention of new rights judiciary invents new jurisdictions as ... jurisdiction I call it and judges love the expression epistolary jurisdiction.. he wrote as a teacher I coined a nice word and they liked it the lordship liked it and epistolary jurisdiction and curative petition is an invention 142 of course in 142 there is a question where the constitution says power to do complete justice or power to do complete injustice I will not enter into that that article is not my topic third is it has created new enforcement structures but what are the new enforcement structures first is nationalization of sal sheela barse casemy good friend justice venkatachaliah sheela barse poor journalist coming from Bombay to the supreme court every time at her own expense every time they .. every time the matter was postponed 12 times she was a good friend of mine a very good friend of mine and she said to me .. I told the chief justice I cannot keep coming do something she is a journalist she cannot and venkatachaliah said maam we will do something we will transfer this case to national legal services authority you can go so nalsa has taken over this case .. and similarly ... to high court the petition is filed in the supreme court it is sent to high court if supreme court I am filing in the supreme court supreme court says go to Delhi high court and always the Delhi high court considers all aspects of the matter and ... Delhi high court considers and the judgment is ... my friend justice mukhopadhyay said in a 2 judge bench in koushals case where is the question of .. coming into the picture in ... litigation in the past .. you could have decided one way or the other and the matter the matter is now pending I will not speak about it he actually admitted koushal curative .. moved ... national human right institutions national human rights commission or human rights commission or you can give to the poor magistrate the agra case the district magistrate is still reporting every month it is my case lotika sarkar has died ...judges asked me baxi how long you will keep on coming before us in agra home cases ... I said ... 100 women....how long will you keep on coming I said my response is simple my lord till this .....I will come before you and my children will come before you ... that is different matter ... nhrc the poor district court he is bound by the ..... in the home ... jurisdiction...next policy which binds is until parliament passes the law in vishaka .. he invents a new law which is not there it prescribes procedure it is like a legislation ... and on the 15th birthday of this legislation and parliament passes sexual harassment law in 2013 till then the supreme court made law saying justice .. in previous

year in stanford company and workers 1960 ... contract labour law .....how it is regulated and how it will be prohibited the supreme court makes law and supreme court even makes ... water linkage black money ganges cleaning of ganges you name it and you have it it also I forgot to mention sit is a good enforcement mechanism it did not exist previously in the law it cant exist supreme court finds new ways and means saying it is basic structure and essential features kesavananda it finds new ways finally what I say is this is the heart of demosprudence in demosprudence judges emerge as core governors of the nation they emerge as core governor with the executive and the legislature and you cant ... understand what judges do unless you get the concept of .. from the westerners they exercising demosprudential leadership in interpreting the constitution this is the njac case latest and I come to the hardway judge last point hard way judge the judges in an era of demosprudence he came out a judge by the old standards judging the judges is a serious business and I spent all my life doing that and I am still not satisfied .. good judge but im still...and I don't believe in the barkha dutts jurisprudence or arnab goswami jurisprudence which sensationalise what judges have done judges may like it but I don't like it they don't understand the law they don't understand the court yet they sensationalise what the courts have done in the 9 o clock news subrata roy im talking ... iam not interested in that the ....should never become the proletariat media should expand and expose they should never govern the nation media is not there to govern us courts are to govern us not media because my liberties are at stake I don't ask the media to govern me just as you don't expect a professor to govern you we don't govern you we just tell you what the law is as teachers I think so how to evaluate the new judicial role of core governing the nations I will just take one.. with your permission it is subjudice .. it is constitutional matter subjudice so I have taken justice goel's permission to slightly discuss the... case that subrata roy sahara case para 4 justice khehar says the following ..... he says Preservation of market integrity is extremely important for economic growth of this country and for national interest. Maintaining investors' confidence requires market integrity and control of market abuse. Market abuse is a serious financial crime which undermines the very financial structure of this country and will make imbalance in wealth between haves and have nots now study this statement of justice khehar I agree with him study it carefully what he says he says market integrity is a constitutional value where do the judges get from that this idea come from .. directive principles not from fundamental duties where do they get it from the laws says so you are bound market integrity means control of market abuse market abuse is a financial crime look at the logic of the and it addresses the .... therefore it is about article 39 that is what it said haves and have nots its a common word so market integrity is common to common detriment in article 39 I believe his lordship or the court should have said so there is wisdom in remembering directive principles ... why go simply by logic of sebi or Mr. jaitley or anyone ... you by the constitution or article 39 says the common good and what was the market abuse committed by him or saharalarge sums of money several thousand crores in para 12 of the judgment next slide please para 12 of the judgment the from exceeding Rs 3000 crores from "petty peasants, laborers, cobblers, blacksmiths, woodcutters and other such like artisans so sahara is supposed to have defrauded these people small investors by a special financial instrument called ofcd and they had collected in cash finally subrata roy should be punished but

the interesting thing about subrata roy sahara is not only market abuse there is market abuse the issue is the contempt power and there .. difficulty with the court ... you send me to tihar jail and 3 others barring the woman director and I am thank ful to justice radhakrishnan for pointing out the judgment I had not read it I owe it to radhakrishnan and I told him I am glad ...radhakrishnan at least the court.....but he pointed out this decision and the decision is really for the way in which justice khehar reads down the foundation of non recusal by judges he appears in njac cases also he said we shall not recuse and .. show financial competing financial interest duty under third schedule so in the khehar regime no judge can ever recuse himself or herself .... sahara judgment by justice khehar and said ... justice khehar sentenced this gentleman and 3 other in 2014 for contempt he is still in jail for contempt and the petition was again by jethmalani and rajeev dhawan and others against this decision and justice khehar said he will stay in jail he and 3 other directors until he has submitted to the court 15 thousand crores so much so when my mother was about to die and I was in tihar jail and I moved the supreme court the supreme court held that I should meet my dying mother for 1 hour only and I should go back to tihar and by the time I went to see my mother she had expired I was back in jail I could not light the funeral pyre for my mother im saying this is all history there is a recent decision by justices of the supreme court continuing his jail sentence of contempt I am saying imagine we are in 2025 or 2030 or take a pick which ever and I have not paid what the supreme court thinks is due I have not paid the contempt imagine the power of contempt jurisprudence infinite in point of time its question of great magnitude article 21 there is no bar to the power and there is no... whose contempt power means to punish me probably sorry for interruption yes I am finished probably we are slightly deviating from the topic today this are definitely a subject for subject of high debatable we all like to participate in that because of the paucity of time and also the core issue being court and regulators probably I think we have this discussions some other time we can have a discussion my point is the reason why I say is that because this is not about the courts and regulators which is really current and every one of us is really facing that situation both on account of the nclt judgment and the latest judgment in the income tax with regard to sitting of the tax tribunals the larger question is you gave me more rights to expand the jurisdiction you means the citizens you gave me rights under the constitution by interpretation you said article 21 is the soul of the constitution so you are doing demsprudence I am the people now you are saying to me wheni decide a matter as I like human rights because we have economics .... where the courts say that the courts say that article 21 doesn't exist for economic offenders that I will accept but the court has not said it the courts ..... that is the .... justice chinappa was entirely right in champakam .. he said in smugglers economic offenders scamsters have no right to free trial ... it is a clear cut decision of the supreme court ... criticized the jurisprudence ... let the courts say it let justice khehar say it the demsprudence that his rights are only existing they are not universal they exist for lower middle classes and lower lower middle classes and those at the bottom it is their rights other people will fend for themselves they don't need rights constitutional rights who needs constitutional rights let the court say it I have no difficulty I have difficulty with and let me conclude I have difficulty with demsprudence which says I shall decide what I like and that is demsprudence is there a distinction how does

social responsible criticism src begin in this it begins by drawing a line between judicial despotism and demosprudence it begins by drawing a line between .. creating judicial discussion and disrupting judicial discussion great American thinker .. held called this jurisanating and juris pathic to destroy it is pathic when you create it is ... exercise so im all for the ... im not for jurispathic demosprudence where it is the pathologyjudicial power not doing something good with it now of course I must say that what is creative the ... the children ... schoolhuman rights is to provoke discussionit does not follow maneka it doesn't follow reasonableness it is arbitrarybut some arbitrariness is good creativeautonomous.....demonstrate it I art of src lies in demonstrating the ... demosprudence from jurisprathic demosrpudence....thank you but I must say that ihave justice khehar ... this one this is very interesting nugget of demosprudence because how ... chief ... what is the ...he sentenced .. justice chandrachud which I am not sure old judgment ... against me that a judicial decision should not be read like a statute I had said in my mathew justice mathew book I had said that because of article 141 a judicial decision should be read like a statute every comma full stop matters because what the lordship decides is binding law under 141 and I quote ... difference in interpretation of statute and judicial decisions they both become law and chandrachud was going against him and infact was mentioning to me he said it is mistake so what previously decided... im sorry they must decide according to judicial discipline and harmonous theory sacrosanctapplication the oath any that is justified used to justify contempt power contempt power needs no justification but there is a constitutional justification for that ... in courts most of the time instead of saying ... things in the way it ought to be he says it is the constitutional justification of ... this is ...anywayi agree with justice kodandarao what we have gone from the subject court versus regulators to court versus instead we are commenting on court versus regulators we are on the contempt power more contempt power may be there may not be there and it is different subject to be what we expected from professor baxi was what is the what is the power of the courts vis a vis the regulators or what can the regulators do vis a vis the courts whether the courts affect the regulators the courts have a tendency to affect the regulators the courts have readiness to affect or to control the regulators whether the court do control the regulators and whether there is a need to control the regulators because at times the regulators take the judicial role also in case in the competition law cases in ... case where it was challenged where this competition commission of India you are manning all these persons without any judicial background and what should be done in that thought it came by way of order that won this case pk balasubramaniam wrote that in order to give the judicial colour to this regulator as you all know the competition law affects the market it is one of the largest regulators of the market withthe concepts of abuse of market because of your ... as because the concepts of anti competition agreements and so on and so forth section 3 4 5 6 and also the .. between the two corporates in so far as the merging is concerned a very large section of the corporate area corporate world is governed by the cci therefore justice justice pk balasubramaniam wrote that what you shoulddo now one you should create and appellate tribunal to give it a color of legality the colour of law 2 you should split the corporate cci that is the competition commission of India into 2 bodies one regulatory body 2 the judicial body why because if any company is any concern is convicted under section 27 for a anti-competitive practice

anti-competitive agreement and anti-competitive action or is guilty of abuse of its dominance in the market. In the case I wrote the judgment in the case then what is the extent of punishment well they will calculate your 3 years turnover average it and the punishment could be 10% upto 10% of the turnover mind you not the profit such and yet we don't have the judicial character to CCI what the government of India did was in 2007 they brought an amendment to the act and said that well we want to in the statement of object and reasons we want to remove this judicial role of the CCI then they realized the mistake and then they withdrew the amendment introduced another law written in only sparing those words that we want to they just deleted those words it was a cosmetic change what happened then thereafter followed the amendments wherein the hearings before the commission turned into the meetings they deleted sections 23 24 unfortunately nobody challenged those amendments unfortunately the concerns which were expressed by Justice P.K. Balasubramanian in 200 act came true with the result I should not say this I wish I could speak in presence of Mr. Ashok Chawla that it was argued before me as an appellate authority that sir 7 members are there and a senior advocate is arguing a very serious point and one member receives a call goes out receives his call on the cell phone another member goes out and has a puff of cigarette and most disturbing is that the judgments are not written by the members judgments are drafted outsourced I don't know whether LinkedIn is the social media for professionals there are offers saying we draft order in this scenario a body which controls a major portion see upto now competition law is a child of MRTP old MRTP act in good old days when I was in law practice and so was Justice Lalit we used to come to the Delhi to instruct our supreme court friends who were the advocate on record that you have to draft no he is not available he is in MRTP MRTP was the easiest way to save the court fee and to have a dispute decided by a judge so it was considered he would know more about it MRTP was a haven for the Delhi lawyers so is the competition commission of India a haven for the Delhi lawyers so is the appellate tribunal haven for the Delhi lawyers Justice Lalit as he then has appeared before me when I was doing that job but see the difficulty is the power of the chairman of the commission to create benches and to sit in Bombay Hyderabad Nagpur Calcutta Chennai no there will be no nothing all 7 will be sitting together and will be signing on the drafted judgments what is happening in corporate world we expected that Professor Baxi to comment on this kind of corporate governance first what is corporate what is governance are we commenting on the infrastructure structure of the companies and seeing as to whether how those companies are being governed or are we considering here or are we actually sitting here and spending our precious hours to see as to how the companies are governing our daily life the you and I Mr. Baxi very simple .. original job .. there is a lot to be talked about those so called voices tribunals as Justice Sirpurkar rightly said I only wish were that in my notes but the lack of time I was interested in what will happen to regulation in the light of democracy that is what will happen to decisions made by regulators in the supreme court in the new supreme court practising a new curative petition social justice litigation which is a matter which is going to unfold over time because you cannot exact adjudicate leadership of the nation over a nation democracy without exacting some control over corporation sooner or later when .. curative petitions or be it social justice bench or some other ways solve the difficulties the judicial dictum that

they be jailed with due deference to the regulator is going to be eroded you will see justice sirpurkar a very very new trend in the supreme court of the future which will take account of anxieties that you have expressed about deference judicial doctrine of deference to the experts which is current.. and next to demosprudence takes in demosprudence is you can serve the people only when you control the corporations that is the only way you can serve the people better by curbing the state that is the tribunal natural justice jurisprudence demosprudence will change the way in which deference is accorded to regulators in the future. fine I don't know what was expressed by Mr. ashok Chawla since you have heard him did he say that the cci had a judicial role too they are all experts as professor baxi expresses yes they are all experts in the markets they know the markets well they know how what is the competition law right from 1893 america yes shermans act they all know it my question is Mr. Chawla ever accepted the role of ccias also as an adjudicator or he concentrated only on being regulator does he not have a role under the act of the adjudicator and what are those amendments I said to this in the bar to the leading lawyers what were you doing when sections 23 and 25 of the competitionact were directed to be deleted and when actually under section 15 there was when there is a conflict of opinion amongst the 7 the chairman will have a casting vote 2 .. to the chairmanis it it actually totally counterproductive and its abhorrent to the established principles of jurisprudence that one person should have 2 judgments .... as you are rightly speaking of the segregation between the regulatory functions is different from the adjudicatory process absolutely right you are absolutely right bu when on an international conference of brics the chairman cci says openly in the presence of the chairman appellate tribunal that we are experts and we have only regulatory role what happens is it not then the domination of the regulator over the legal principles the problem is that the entire thing is created by the supreme court in the judgments the unfortunate part of it is that balasubramaniam comment that you create an appellate tribunal yes we did create the law created but the second important question that it should have the 2 bodies one regulatory one adjudicatory that was ignored totally and nobody saw it nobody saw it not even I have a comment against the academicians like professor baxi why was it not seen why was it not seen by the law professors why was it not pointed out yes I agree some of these comments about the subrata case but then why was it not done in respect of when the whole market the market is not for the corporates the market is not for the professors the market is not for the lawyers the market is for the common man professor baxi used to eb it is supposed to be used to be yes supposed to be also yes I said competition for the sake of whom competition only for the sake of competition or comeptition only for the sake of common mani said in those legislation by the european union by the america by france australia italy south africa they were not acting under the Indian constitution whereas our legislation competition act 2007 2002 which was implemented from 2009 20th of may is under the eyes of the constitution and therefore you cant adhere yourself to the principles competition only for the sake of competition competition only for the sake of market if there is competition it is supposed to be that common man who is going to be benefitted if he got somethings in say 100 rupees because of the competition he will get that thing for 10 rupees and it was under the direct right of the Indian constitution that the act was enacted which was not the case with American act

not the case with any French act english act or anything but when it was not commented upon probably the lawyers probably the legislators probably those who taught law understood law were not enthusiastic enough so far as this important question is concerned I agree with you I agree with you 100% I think one little point of difference between us is this ..put is that right to free competition is I have always told my classes here and at warwick is closely analyzed not for the people if it is for the people right to free competition is the right of the market to exploit other including consumers there is no limits to such exploitation that is right to competition right to free competition is the lawful right to harm others the lawful right free competition means a legal lawful right to harm others this I demonstrate by a number of examples one example we use ... you are more handsome and more eligible than the I am you take all my client away I ultimately wind up my shop go into .. I cannot feed my wife and children this is free competition you have done me no harm you have only done me lawful harm so free competition is right to do a moral wrong its always the case that is how capitalism is built up so in the service of right to do a moral wrong the regulatory institutions earlier it was a administrative wrong but it is a operating under the maxim of lawful right ot harm the others and that is law is based on the right to commit a lawful harm all of tort law union carbide did nothing wrong to carbide victims it will be his business and the ... union carbide has said I am a noble corporation doing good business but people like professor baxi started ... he has made his career fighting this noble corporation its there in the affidavit while writing books and holding seminars on Bhopal some corporation any corporation is a managing committee for doing lawful harm to others so evry free competition only theology of market fundamentalism and we all ... 12 30 we are ending our session any comments instantaneous comments no he has some other things to do .... law of precedents yes yes yes yes yes the comments can be in the form of questions also there is one point questions can be in form of comments also there is one aspect there is one aspect I would like to put to professor professor that is as a theory that free competition is meant to as a we go by the theory but then what we find that the favourite whipping boy is becoming judges in courts when the task of the judges in the courts is to balance this and the question is the ultimate endeavor of the courts and judges whatever is the theory of as professor propounds is the harm to the right to or any other counter theory for that matter but then even the role of regulators in courts the burden on courts itself so we have we have also ... produced by the constitution and by the ... the laws as they are given to us judge made law is not a very progressive theory in India not very happily accepted so this aspect of the matter is the courts poor fellow that we are we become the favorite whipping boy of the right up to the supreme court imagine the load of the supreme court professor not for me whipping boy you are the saviours of the you govern the im saying.... that is what demosprudence is claiming national leadership or participation in leadership still govern us and we say you also govern the corporation and those who regulate them that is all the amount of harm... decision kindly read... decision as much as as many times as you can it says we will take jurisdiction in case we commit mistake in case there is acry for justice demand for justice supreme court doors are not closed that ... petition maybe they exercise more powers that doesn't matter infact demosprudence has come to stay but how do we use it that is the short question.....should appreciate jurisprudence ... why didthe court

do reason .... other organs of society .. failed totally in that process there is no other choice this is the only last hope left if this is also gone and they then we say in the name of ..... whatever thoughts you expressed on .. no no as learned as you are at the same time we can express our feelings as a common man as a citizen at the same time we can express our feelings as a common man as a citizen we don't .. has totally stopped ... realize the society ... how long it is ..... and political structure is totally wrong only other aspect which now remaining as a ... every individual has got respect for this judicial system and judiciary and in that process because high courts being so many .. power is with the high court or with the Supreme Court because the supreme court... does not .... many of the cases .....which were there yesterday on the judiciary ...socialistic pattern justice chinappa reddy ... various.....and the language rather than the content .... how do you go with that in the present day when we are supposed to .. governance brother kodanarao you wanted to say content rather than the language no no it is the other way ..... you just justice lalit wants to say only for that purpose justice lalit wants to saythis is not my topic just happened to be listening to everything and very interesting discussion this last comment of yours now sort of inspires me to say something I just give you an instance and then it is for you to draw the deductions see regulators is alright has anybody seen Delhi airport the kind of lavish infrastructure havent seen any international airport which is carpeted correct that kind of expenditure imagine those carpets are not going to last long which means every 6 or 7 years there has to be replacement correct who is going to pay for that was this kind of infrastructure absolutely necessary does the trafficking in and out of Delhi justify that you must have seen airports like Frankfurt and other things which are so economically in terms of space but managed so beautifully correct here you have if you wish to go from one terminal to the other you it is like morning walk in Delhi it will be more correct so it is its something like great exercise so at whose cost and for whose benefit now as justice sirpurkar said rightly the contract which was there and I happened to know why because I was counsel in the litigation so therefore I am actually speaking from my personal experience it was an open ended contract whatever expenditure you incurred it will be sort of returned to you so therefore it was not as if I had a cap on my expenditure which is 5000 crores and I had to actually make amends and make both ends meet in that expenditure I could go on till 7 thousand 11 thousand 12 thousand do whatever I feel like and finally who pays for it it is the customers it is the persons the passengers who pay for it which finally got translated into what it is the what you call the airport usage fee development fee which every person has to pay which is 1200 1400 whatever have you seen those hotels which are next to the airport 6 hotels 6 sir 24 24 are there now whose land has actually been given it is the public land which has been given so what we actually asked was that your aero services which are essentially meant for your airport if the revenues from non aero services like land and others are good enough to take care of your aero services then you must pool in all your sort of benefits and services burdens together and so therefore it will be essentially for the customers or the users of the airport facilities you will be actually relieving them of the burden that it is actually sort of segregated so therefore your airport usage which is fantastically sort of extra infrastructure has to be paid for by the customers whereas the lands etc have become some sort of a bounty which you can utilize it for your benefits and everything that is where the question

of regulation is actually steps in who allows it and why should this be allowed first of all therefore somewhere along the line what happens is we as courts if we actually see the development of this regulation law and why is that why it actually sort of emerged is essentially the deference as professor Baxi put it to the executive discretion their knowledge and their expertise and therefore in our writ jurisdiction what we say is we go by that Tata Cellular principle we are not into decision making but decision making process the moment we have actually ceded that decision making part it is where the shoe then starts pinching correct very well so therefore regulation is what regulator to a certain extent when you actually say that he is an expert himself he will and he must get into that compartment of decision making rather than satisfying himself to be subordinate to the court which will only go into the decision making process if the regulator actually goes into that process that is where the both courts and regulators put together the interests will be something to the benefit of society the common good and the common man that's what that is what and it is very present note let us get up for lunch .....tea I am sorry tea tea ..... of yes yes let us get up and immediately come back in 10 minutes IRDA

## Session 12

Way back when I was not not way back 2 years back when I was heading the Competition Commission of India we also had the MRTP dispute with us in almost hundreds of MRTP disputes there were insurance disputes and that is why I started knowing there is something called IRDA and then we use to and say why are you coming to us you can't come to us you have to go to the IRDA you have a good remedy there early because this is in Delhi you cannot avoid going to IRCA it would be a good body you can have your quick decisions there instead of your case pending or remaining pending in MRTP quotes for 5 years 10 years effective alternative effective alternatives so that is how I started knowing that there is somebody called Mr. Nair in IRDA and now pleasantly we are now being able to interact with him over to Mr. Nair for what IRDA's he will tell you everything about it thank you sir good afternoon and thank you very much sir for your kind words and what I will do is he's got not much time so I will try quickly run you through what I have prepared and you have all the time Mr. Nair don't worry about tips nobody is going to worry about it this is a seminar on the role of courts and regulator's and my background service I have been a Banker for 29 years good and for 5 years I have been a regulator with the securities and exchange board of India and 5 years with the insurance regulator so other than the Reserve Bank I have spent most of my time in the financial sector either as a regulator OS market player now the seminar the rule it's on the powers and functions of the regulator I will go true that as we go along and the need to control the regulator's actions that is another thing whether the regulator can be doing regulatory overreach and what are the judicial measures to cope with judicial overreach of the regulator problem likely to arise whether there is a conflict between the regulator we have seen that happen sometime back when I was in a RDA and SEBI had a conflict and an ordinance had to come to resolve that conflict and I will touch a little bit on that and how to

Reconcile and solve the problem off and whether this would result in better judicial review fairness boundaries coordination and resources so I will reading what I will what was expected to do now if you think of the word insurance let me tell you that insurance has been as old as mankind itself even in the old days a different kind of insurance prevailed C 3000 4000 years ago in ancient Egyptian civilization it was there but modern insurance came sometime in the UK first sometime in 1571 they issued what is called annuity Bond on the life of individuals so the UK Government wanted money for a war so they raised money in the form of annuity bonds first time Life Insurance Scheme and the government issued annuity bonds and found that people were living actually much more than the life expectancy and the government was running into a problem that was the origin of the debt market itself you know the first time the sovereign Bond raised at that time sometime in 1571 then you know the sometime in 1600 the mercantile trade crossword and the lot of European countries started colonizing places anterior lifesavers need to a lot of goods and services started coming from these colonies into UK Netherlands and all that and that is when they realize the need to have proper risk management for ships and the before the 1st origin of mercantile insurance started to the coffee shop in UK that is the origin of Lloyds you set up a coffee shop that was when coffee was introduced in UK I am when you give a corner to the captains of the ship and he said you go there and write on that book so this started writing on pieces of paper this ship is going there this ship is arriving this started writing about the weather the conditions of the sea and slowly that emerged as a Lloyds insurance at which is now even now one of the leading insurance in terms of the first insurance in UK got the first license somewhere in 1700 m25 and there was a life insurance company a bribe of £300,000 was then paid to the king of England to get the license because that was a monopoly license issue to the company later on about a hundred years afterwards the lawyers itself became in insurance company and they have what is called the system of underwriters that is underwriters take the risk and collect the premium and it is done through a broker so the first broking didn't start with the securities market it started with insurance they were called job brokers and then there certain people and their names to the Lloyds company and they became so big names came up 79 people original book in the names of Lloyds and they were actually standing at the back of Lloyds saying if there is a big claim we will make good The payment and that is how the insurance started in the UK and move to us the us was colonized by UK and there for was not allowing them the natives for not actually getting insurance insurance was only to the British interest and the British citizens and so on and so forth but over a period of time insurance became a big activity sometime sometime in 1913 the first the first insurance Act was passed in 1913 and then the second insurance Act was passed now we're seeing a third one which got passed recently amending the earlier amending the earlier insurance regulation so I am trying to give you a flavour of what happened I will tell you what b I r d a n d regulator and what the economics causes created this regulator I will talk a little bit very quickly about the Reform process which started in 91 it started much earlier but the financial sector reforms banking reforms capital market reforms and finally insurance reforms insurance reforms is a very Peculiar thing because sometimes insurance was

actually you know free market but then it got Nationalised in 1956 LIC was Nationalised 1972 General Insurance quote Nationalised mm again you have the you know the opening of the market so we're coming full circle we're coming back to a free market after going through the process of nationalization the manner in which the cycle emerged how do this Reform process the chairman called Mr. R N Malhotra he was the chairman of Reserve Bank he wrote a report it is called the Malhotra Committee report and he said competition condition is required we have monopolistic LIC and General Insurance Corporation so and IR d a was set up in 19 8 56 it was a non statutory body IRC Act was passed in 1999 and the statutory authority was established on 19th April 2000 and the first set of regulations of issued 19th July 2000 and the first set of licences were granted October 2000 now what is insurance 2 insurance is very important because risk and provides protection these are important For the economic growth because you actually allowed industry to take high risk by accepting the risk on your balance sheet and then allowing them to grow then they mobilize a lot of savings 16point 4% of financial savings come Thru The Insurance sector from the household and the large investors in the government securities market and of course they provide stability when there is a financial crisis you find insurance money is always used in bringing about stability unlike a bank or a mutual fund which you can withdraw it immediately insurance is a long term contracts generally so you can't withdraw the money once it is invested this gives you a percentage of share of household savings see after deposits the second-largest mobilizer of household savings is the insurance industry in the country and of course this is a slide with give you the movement of the indicators the Sensex and banks deposit except for one year insurance companies have been growing at a rapid pace between the density and penetration at Global do you find that 3.96 % U S dollars it's about \$52 which is not very high pistol motor scope of insurance density and penetration when you compare it with Global standards this is where we stand in comparison with the countries of the world we are very poor if you look at country is like us it is 8.7 UK 11.28 11.4 in Japan Korea it is 12.12 Soviet behind is developed markets in terms of insurance penetration and therefore there is a lot of scope for insurance companies and there is a lot assuming that is a good market now this gives you a flavor of the around 30 lakh to 50 lakh of people are employed directly or indirectly by the insurance sector except the intermediaries who like the brokers are a part of the collection of premium is roughly about 400000 crore and the number of policies are about 16.46 crores issued every year this is a large number and insurance is a large number and the capital put up by the insurance is about 36000 crores and the foreign investment is all about 8000 crore total investment in the Insurance sector till date is an roughly about 8 lakh crores which after the banking is the second largest investor in the market in terms of investment in the stock market it is the largest invest in the stock market so this gives you the growth of the life insurance it grew at 18.4 % some the time it opened up the general insurance is at a lower rate 16.2 it is a good growth but health insurance is growing at a very fast weight the comparative average growth weight of 33. 13 percent now what FB we have moved from what is called the regulated market to a market which is competitive you have new entrance you have foreign Investments you have choice for the

customers and you have a sectoral regulator no insurance amendment what it has done you have entered the regulator I will tell you how the new bill has given more powers to the regulator not only to make regulation but also to adjudication and to decide on cases of course of course with a lot of Judicial review in terms of creating two bodies the securities appellate Tribunal and the national quotes for under the Companies Act the most of the disputes go to these quotes but in terms their actual working in terms of their mandate of irda and the fact that the regulatory license all this they say should go to the appellate tribunal and they have tried to strengthen the appellate tribunal which is essentially only doing securities law now they even look at insurance and pension as additional what you call additional where people have grievance against the regulatory order can go and agitate now if you compare it with banking and insurance the difference is that insurance is a promise to pay and it is contingent on some event or an accident or a certain period is involved whereas banking you can with draw immediately there is an exchange there is a sharing of risk there is a pooling of funds and a lot of is paid by the premium of money and the transfer of risk to risk carrier and insurance importantly is bought not sold it is very important to understand that all other financial products you can go an buy but insurance you actually both the responsibility on the seller and buyer of the insurance to disclose certain facts which will come in the principles of insurance as I go along I will explain why these are the principles it is called uberima fides that is utmost good faith you are supposed to disclose your state to the insurer at the time of taking a policy and if you hide a certain thing you could have a repudiation of the claim when you make the claim it could be repudiated now this has been upheld in many courts in the uk and all 1700 there is a very famous case a lord took an insurance and he did not disclose that the he had the the disclosure was he had taken an insurance on protecting a castle or for and in that castle he had bought an insurance from an agent and he had not disclosed that the enemy had the capacity to use what is called gunpowder and smash this that was not known and you it was only that it was in a small island in indonesia and the fellow said I will insure it only against the natives but when there was an invasion and the invader had the power he actually blew the castle and the fort and when the claim went he repudiated it and the british courts actually upheld saying that you did not disclose the fact that this power was there with your enemy and it was not against the foreign invader that is very old case that laid down the principle of utmost good faith which is one of the principles of insurance the second principle is insurable interest I cannot insure another person I cannot insure her for instance and claim in any unfortunate incident I can't be the recipient of the money I should have an interest in the person that is called insurable interest and that is applicable for both life and non-life in one it is financial the other it is relational but I can't take a policy on my brother in law and then claim insurance it could be it will not be an insurable interest it has to be directly related the third is indemnity the insurance policy is not meant to make gains it is supposed to restore you to an original position and therefore when you have a loss you cannot take it as a gains supposed you have 3 policies you cannot get compensated by all the 3 companies on the same accident so you could claim up to so much from 1 up to overall it should be within the total amount of policy which is under it so you cannot make a profit out of insurance then there is something called the principle of

subrogation which says that once the claim is paid by the insurance company that property actually goes to the insurance company and they can sell it salvage auction whatever the property actually goes to the insurer and there is something called the principle of proximate cause and contribution in a sense the accident it must be a proximate cause you cannot be a chain of events and say I am claiming money for that and contributory is very important because there is a general tendency of people to underinsure themselves and when there is a loss they try to make a claim for the entire loss the law says no you should also share the loss if you have not taken a full insurance you will be paid in proportion to the loss you will not be paid entire loss suppose you have a stock of 100 lakhs when you insure it only for 50 lakhs 50% of the loss will have to be borne by the person who is taking the insurance now these are some principles of insurance which actually differentiate it from other financial products of course this is the definition of an insurance contract have already explained how the premium is paid how the policy is issued and policy is nothing but a promise it is derived from a Latin word poliza italian word it is a promise to pay and the concept behind insurance is large number and pooling of risks the types of insurance in life you have terms insurance whole life endowment unit linked annuities group and in general you have 3 classes actually property personal and liability insurance they cover a whole lot of things when insurance started in up they were covering all kinds of risks an actor could insure his face or a footballer could insure his leg except for the chastity of a woman all other things could be insured by the insurance company this is the manner in which the insurance company has grown over a period of time and it is one of the largest industries in the developed market because it is there to protect your wealth and to take care of accidents and now of course with the new companies act coming and class action suits likely to happen in the new companies act we are directors and officers insurance is going to be critical it is very important in corporate laws it was not there till this new companies act has come which says that you could be liable in a class action suit as a director of a company so many companies in which I am in the board of a few I asked do you have insurance to cover against such liabilities and only then I will become a director otherwise you will have to fend for yourself if a class action suit it can actually hit a lot of people it is not yet tested in the Indian law but I am sure class action suits will come up in the companies as company law evolves this is the brief background of the insurance sector itself now coming to the fact that the role of irda and what does irda do now when I joined irda I found that I was one of the members there were 5 members there and a chairman and the legislator in their wisdom have created a body where there are 4 other members who sit in the board and we make the regulations now how do you make regulations that is one thing there are 2 theories of regulation one is you want to control human and social behaviour by rules and regulations issued and the regulations cover all private and public behaviors and are supported by penalties and incentives 2 theories are one is that you are making a regulation in public interest the larger good of mankind and so on and therefore most of the regulators I was in sebi we tend to look at the least protected person in the market whether it is the small investor or the small policy holder and try to see that justice is done to the person because he does not have much access to the say the courts it is too expensive to go to the courts so the regulator tends to take regulatory action in a manner in which you protect the small

investor the other aspect of regulation is we have seen it happen in the us or financial crisis is that there is a regulatory capture that is the regulator itself is created by the executive and there are you will see that regulations are created in such a manner that they benefit the most not the so called small investor or the so called market system or the financial system we spoke about earlier so all that goes for a toss but the profit of the corporate becomes primary because in the us we have seen a revolving door policy we have seen people who have actually been the investment bankers becoming the finance ministers or the regulators themselves then they try to make policies which will benefit their own kin that is what happened if you see the financial crisis it was created by regulatory capture and finally we say us itself is a very big model to follow but if you look at it the us is an example of regulatory capture if you see securities and exchange commission it is not a very great regulator in the sense that it has got powers but it is fettered by the fact that whenever they need money they have to go to the executive and therefore they do not have the financial powers luckily for us in the Indian context regulator so far have been funded by their own fees and they do not have to remit everything to the government the moment they remit all the money to the government you find the regulator going to the government with a and sitting in front of a undersecretary or joint secretary asking for money and therefore aspect of financial autonomy was not there in us which is there in the Indian regulators so far but there is a move to actually take the surplus money out of the regulators and transfer it to the consolidated fund and cag has been agitating this matter that the regulator should not keep money they should move it to the treasury and then draw the money based on a budget both irda and sebi have been objecting to it we have to see how long the fight lasts but internationally they say the regulator is an independent regulator only if he has financial autonomy therefore he is able to manage the affairs within his budget and the fees of course you get surplus money you can transfer for instance fines and penalties are transferred to the government in irda it is not there thought we did tell the parliamentary committee that we should not keep these fines and penalties but they still didn't legislate on that and now fines and penalties remain with the irda there is one anomaly in the regulatory law that is the role of regulation broadly philosophically the rationale for regulation is 3 things as far as irda or sebi was concerned one is to prevent market failure you don't want you have prudential regulations you should by the regulator that you bring so much capital then you check the anti-competitive practices that is products are approved by the regulator and the products are not priced in a manner in which you create a problem for the customer and to promote larger public interest but these are the 3 overarching rationale for regulators and you know the last im sure you must have hear a lot of people speaking about regulation so I will not go into the prevention of market failure but these are at the back of the mind of the regulator all the time now regulation in India what happened in post-independence we went into a control state of economy where there was no need of a regulator insurance was regulated by a person called the insurance controller who used sit in Shimla because it was a completely regulated market the premium was decided the tariff was decided there was no need for a regulator and when market opened up sometime in 1999 2000 then they created this body first it was one statutory body after 4 years it became 5 statutory body so brief introduction in to irda started in 19th April 2000 there are 10

members 5 whole time members chairman and parttime members they have an office in hyderabad and the mission statement of the regulator are actually only 3 but I will elaborate 1 is to protect the interest and secure treatment of policy holders bringing about a orderly and speedy growth of the market including annuity and super annuity payments now this is what one of the growth areas ... of the common man and long term growth of the economy 3rd is to set high standards of integrity and financial soundness and fair dealing dealing and competence to those it regulates then to ensure speedy settlement of genuine claims so you have a most people are not aware that there is a grievance and redressal cell and if you write to the regulator generally the regulator entities are quickly resolving this issue but people tend to get into the consumer court and takes sometime much longer than you would coming to the regulator or going to the ombudsman then to promote fairness and orderly conduct to the financial markets and to take action where such standards are inadequate in effectively enforced and to bring about effective self-regulation we have set up 2 3 bodies for self-regulation we have the insurance council and the general insurance council now these are the core functions of irda regulation and supervision of insurers regulation of insurance intermediary agents that is regulation and supervision of corporate agents surveyors loss assessors insurance brokers now there is a new tribe called wealth aggregators they give you an idea they compare the policies and put it on the screen so that is also getting regulated because there are times where they can also mislead so we have said no you put in this manner for this product you look at that and start buying you will not know the underlying problem in claim there will be a lot of exemptions and you will think why did I go there so price is not the only consideration and development functions are also there like consumer education and rural and social sector it is mandatory the act that you must sell a certain policy to the rural and social sector and weaker sections and of course promoting research institutions so now the total number of companies about 45 around 53 are there 45 are in the private sectors and 8 companies in the public sector of course insurance sector is still dominated by the public sector in the life side life insurance corporation has got about 70% of the total business and 30% is with the private sector which is slowly catching up with the life insurance in terms of life with the non-life it is 60 40 60 % is with the public sector and 40% with the private sector so they are also growing there is a a lot of competition in the market in a sense they are trying to introduce newer products to get new customers now what are the laws of insurance act 1938 you have irda act 1999 you have lic act 1956 and you have general insurance business nationalization act 1972 these are the 4 major acts which govern the major industry apart from the 4 acts like the anti-money laundering bill and so on then you have specific laws like the marine insurance law 1963 you have have motor vehicles act 1988 and the actuaries act these are specific acts which actually affect the insurance and the customer in a big way now talking of the role of regulators it performs many functions one is the legislator role we make the subordinate legislation we have the executive role I will explain the executive role we have a supervisory role in terms of inspection and so on then you have a quasi judicial role now in a sense you also adjudicate on certain matters and finally you have a development role so it is a very complex body which does multiple things which is not envisaged in the constitution generally you have segregation of these powers but there is a method in the madness of the legislative intent it is

not that it has been put there are a lot of restrictions in the powers particularly on the judicial powers you have put a lot of restrictions on the legislative role the framing of regulations are on the 2 sections section 14 and 26 of the irda act and 114 of the insurance act under these provisions and I am glad the case study you have given is a very nice case study of the heritage not too many cases decided by the supreme court on insurance because it has not evolved into that kind of a market like the securities market but the case was very beautifully handled the supreme court finally upheld the power of the chairman of the irda in cancelling the license of a very powerful broker he actually won the case at the high court but when he went to supreme court the supreme court said no the person has committed lot of offences and he is not a fit and proper person and the chairman has not exceeded the power in cancelling the license. it's a very nice case which I read here after coming here I knew it was there when I was in irda that we had won the case but this is a cited case which has been given as a material which actually upholds the power of the regulation to create regulation and to take action of cancelling the license suspending the license and of course regulation generally when the irda was made in 2000 we had a chairman who was actually moved from the insurance regulatory authority to the insurance regulator he was a member of the Indian revenue service and a chartered accountant and he made good regulations even before the regulatory authority started so when the regulatory authority actually started this was one of the few regulators which had regulations in place immediately he notified most of the regulations of accounting actuary and so on so here was a regulator who hit the ground running as soon as he got the permissions for the authority regulations were in place in 5-6 months. unlike the sebi and all which took many years now if you look at the intermediary regulations it started in '92 but it went on to '96-'97-'2000 also regulations kept coming now initially regulations came '95-'96 portfolio it kept coming but here most of the regulations came in the first year of the creation of the regulator because there was a continuity between the chairman who was the interim authority chairman and the chairman who actually became the chairman of the statutory body now that is the legislative role now the executive role of the regulator is basically licensing of authorities all intermediaries need to be licensed by the regulator whether the company or the agent or an intermediary and of course there are approvals required for share transfer foreign investments opening and closing of business advertisement registration renewal administration provisions of law so these are the executive roles which the irda plays and the supervisory role is basically 2 things one is we do onsite inspections and we do offsite inspections also and based on that we do whatever based on inspection reports action is taken the quasi-judicial roles are suspension revocation and cancellation of license imposition of penalty or fine refusal to grant permission to do business of insurance and finally adjudication disputes between insurers insurers and intermediaries and taking up prosecution now this is the major role of the irda in terms of the quasi-judicial role and I will tell you on the new bill actually given a lot of teeth to the regulator to carry out this role and of course you have development functions which is the 5th function which is micro insurance regulation which you should reach the poor man we have done it through various schemes called the aam admi bima yojna now you have the jan dhan programme some insurance and pension for poor people all that is happening through the development route rural

and social obligations are mandated in the act if the company doesn't meet it he is subject to a penalty which is quite substantial now so they better do it third party liability insurance is now compulsory for all ... beg your pardon .. deal with motor accident claim cases I will come to that that is a major head ache because of the .. you know the the the there is a there was earlier no mandate that you have to insure now the law says that the companies have to insure the regulator will now have to decide based on its total premium how much percentage he has to do minimum it is now ... it is correct number.... recently in Chennai you know..... they say it is not covered if you pay extra premium it is covered why should he... ..... let me explain to you because I have been a banker now comprehensive covers only 3 things the risk strike and malicious damage it doesn't cover natural disasters that is not told by the company that is ... let me tell you .. when you say comprehensive it is supposed to be comprehensive sir most of the people take a bank loan and they take this comprehensive cover only if there is a bank loan otherwise people don't want to pay that premium they only take third party and they expect when there is a fraud the insurance company where is it exactly ... that is what I am trying to ...even if we .. irda certain matters which must be stated in general insurance policy if .. is covered or not covered whatever is not covered should be mentioned they are supposed I agree with you that there is a grey area for instance we don't cover our own houses for burglary and fire and when there is a fire and burglary you realize you should have got an insurance most people don't do it because it is a cost similarly Mr. Nair can answer axiomatically whatever is covered the rest is not covered true see an insurance policy is sold not bought therefore you are expected to tell the insurance company that I want a cover for flood I want cover for earth quake and then they take a very small premium for that....I agree these are.. every time I take a proposal from another ... extra fee.. you see this is an evolving area and I agree with you comprehensive cover is generally taken by bankers for their loans and there also it does not cover natural disaster if there is a flood or tsunami comes it is not covered because it is not covered in the policy and flood in Chennai came after say 100 years so another 10 years so people generally don't tend to cover it so if you tell then they say no I don't want the flood cover because it is not going to happen these are of course these are the regulator has taken lot of action they are saying you better settle the claim fast if that is one thing they are trying to do all the claim ... previously they used to say whatever the insurance policy doesn't cover the insurer will not indemnify even if the that happened in kashmir in jammu kashmir they said that the company went through a lot of difficulties there see they are not very financially strong companies if you look at general insurance companies there are not endlessly having money to pay they are also funded by shareholders and profits over period of time and if you say pay and recover the question is who will pay the entire in case of banks there is a subvention and the government infuses equity in insurance you do not see that happening so there is a grave risk of adverse selection and moral hazard of course the courts weigh on equity which is very good because it happens in the rarest of rare cases when the courts say you pay fast and recover but there should be a method of capitalising other wise it would be a loss of market integrity and loss of good institutions say like lic or so but it goes against the principles of insurance ..... across the world on the concept of insurance no the point which brother satyanarayanan sathyanathan raised was

covered in the mrtp act fair market policy in a market you must be fair now in telling a customer that we are comprehensively insuring your car and then telling that comprehensively means only this would be would not necessarily be a fair market policy your marketing it as a comprehensive insurance I agree with you sir that is why the regulator is also supposed to look at the language and the manner in which it is shown and the way it is being advertised but comprehensive let me tell I have been a banker it is taken only for bank loans otherwise that fellow will not take the insurance in number of disputes that came before us the mrtp court we sent them to the irda only on these issues as a matter of fact we said that you have to decide as to whether this was a fair market policy or not within the terms of section 6 of the mrtp act that was the difficulty and sir the actually the regulator actually approves the product also and the manner in which it is being sold also you know in terms of what kind of advertisement it regulates the agents and the intermediaries yet these things happen ... beg your pardon.. yes I agree these are medical insurance is an evolving .. you did not state that you had suffered typhoid when you were 4 years old he is on that ground the policy is rejected I have myself contested the cases sir now the regulator has said if you have a policy which is having 4 years old that is 3 to 4 years old and even on a pre existing disease you will get the claim so but at least for 3 years you should have run the policy another thing which has come in law which is very good now which is actually not insurance but is part of the law now which says that no company can repudiate the policy even if there is a fraud after 3 years so the job of the insurance company is to check proper underwriting has been done within 3 years after 3 years he has got no right as per the law in one of the suits which I was where it was appearing for the plaintiffs I got in cross examination from the insurance company witness that it is a policy it is a matter of policy that we repudiate the claims which has been made within 6 months or 1 year how can it be a policy I agree sir how can it be a policy how can it be a policy I got it in the cross examination and the judge was furious he said you mean to say after I insure myself if I die within 6 months you are going to repudiate he said yes sir see unfortunately this is what happens sir it may not be true in a life policy but in other policy like marine motor life policy generally regulation is unless there is a fraud you know suicide or something within a year or something they can't repudiate the policy but on that day I decided not to purchase any policy I said even if I die my wife is self-sufficient enough to fend for herself this is true in case of other events sir because there was a fire in an export unit in Bhopal only and they lost 100 kilos of rice and then the claim is still not paid so they appoint surveyors I will tell you what happens I am now talking about the way things are run now these are public sector companies they compete in the market for health claims also the problem is when they go for corporate claims they try to undercut and they want to get the business at any cost ok and now when they do poor underwriting they actually charge lower premium than the outgo now if they charge then where is your profit there is no profit you are losing so when you make money you make money in your investments you collect 3000 crores and you pay 1200 crores and your income is expected to be made up by investing 1000 crores and hoping the market will give you 20% returns if the market tanks say that year the stock market doesn't do well or the debt market goes for a toss the company will be in the red so they have been living off their old resources and also on this

principle of very poor underwriting they are not charging the premium of course there is a competitive market therefore we don't say that customer should not get benefit but where they are getting hit is by giving very low premiums to corporates on insurance see the normal policy of health insurance is not a loss making it is taken by individual here they are actually making profit when they sell to corporates they go and they go with quotations and then you quote a low fee and finally we were in charge of administration we were paying a fee of 1 crore and then collecting a premium of the claims were more than 1 crore 20 lakhs then how do you run this business they quote we want your business they are giving good business and therefore they are underquoting this is the market practice which is not a good practice and we are but we as a regulator are not tariff driven we are not saying there should be a minimum tariff but I feel the regulator should step in somewhere and say at least cover the cost when you quote the policy but then it becomes the regulator trying to micro manage that becomes a criticism that no let the market forces play in some foreign investor is putting in money and burning capital why should you these are dilemmas of the regulator but one day they may have to intervene for a floor price actually there was a tariff price earlier the tariff advisory committee got abolished in 2007 at that time they used to charge very high premium because people were not buying because they were collecting on a car motor health youth premiums now it is competitive it has fallen it has fallen 40 50 60 70% some of the premium and yet some of them are making money because they are doing good underwriting the business of insurance is how you manage your risk so if you take a proper risk and charge a proper underwriting commission underwriting premium you can still make money in this market so there are different types of players there are people who enter want to show growth they will give a lower premium the reliance case is one where they actually gave a very low premium in the first year and the second year and third year they increase it and then they increased it for certain people who had made claims in the earlier year they said for you the premium will go up because your claim ratio is high and after the regulator stepped in now they are saying for 3 years you can't change the premium so there have been interventions by the regulator off and on but they have been these are evolving market practices now coming to the last one question .... if it is true or not .. why companies go in appeals appeals after the claims are settled .. Especially in cases of large claims .. affects the business and overall system ... you see that across the society at least in working class if it is working class they are mostly ...so there it become very important .. repudiation is normally ..... if I were to take in appeal to supreme court .. insurance companies are allowed to take the online .. correct the interest imposed in ....whereas on day to day basis how far it is true yes I agree with you see ultimately when you collect that is what I said they are making money on the treasury income the solution is for the courts to insist on deposit pending appeal yes that is a good solution that is a good solution but sir let me give you another dimension of this why people go up to the supreme court or high court though they have a weak case is most of these companies are public sector companies and the presently what happens is if you settle a claim quickly some fellow writes a complaint he has taken money so it becomes a vigilance matter ok then the central vigilance commission will issue a letter and therefore the fellow is very scared if I settle fast .. there is a problem the fellow wants to pay the

claim this is not the private sector private sector they pay or settle fast the public sector is worried if it is a large claim there are somebody to write the complaint and then they ask queries now then the poor fellow's career goes for a toss because some vigilance inquiry is pending so they say ok let it go to court let the court decide nobody will hold me responsible I will not.. go to the high court in appeal. so this an unfortunate systemic problem which I do not know the solution to this I don't know how to solve this problem because they have put some judges in some companies who actually adjudicate and settle claims many good companies have done this retired judges have been put and they look after these claims repudiated claims first go to them before going to the ombudsman and many companies like lic are settling immediatelyoh really.... but that is for the company to do see we can't say it is the company's business proposal cant you do it in your supervisory capacity sir we also do but see what but they then come to us most problem happens that people are not aware if you complain to the regulator he can take action they just fight and go to the consumer court sometime and it goes on and on the cases get dragged..... yes it goes on therefore then there is an ombudsman who is empowered.... that fear psyche is there that is a mutual disbelief theory of mutual disbelief if you settle it fast .. and after many years they will inquire you may go from that place afterwards somebody will say this fellow took undue interest in settling the claim quickly it happens in cases of banks sir I was just going to say that with your permission in banking with this naik committee report on governance is formed empirically if any officer has handled loans he becomes unavailable for senior management because by the time he becomes gm some loan has gone bad that becomes a cvc case gm and above you don't have loan officers the guys who understand real banking are unavailable for senior management because they have been tripped there I agree sir see I have been a banker myself mostly who is a banker person who lends money the fellow who lends money will take some risk he will lose some money somewhere now if you go into penalising for that it is adverse selection the fellow who doesn't know anything comes up that is also with judicial litigation ..... im saying that the system is not meritocracy it is person who doesn't make mistakes and banking is where you take risk insurance you carry risk like its more judgment more mistakes less judgment less mistakes less mistakes incompetent no judgment no mistakes competent it is like that .....the prescriptive part of the solution also can be regulators are not punishing the regulated for harassment caused by the so called safe decision making so it is easy to say no the incentive is to say not there is no disincentive .. if you see the regulated entity if some metric is built in it if we say disposal is a great thing ... gentlemen we are getting late for our I will now come to the last part on the role of the courts sorry sir on the role of courts tribunal and government very quickly I will put you the power of to appoint controller of insurance in case of supervision of irda board that power is with the government now if they are unhappy with the regulator they could appoint the controller who can actually supercede the board that is the government power power of the government is there in case of provisions of the sez act that is they can legislate separately for entities which are located in the sez registration if irda has the power to refuse people for registration the ultimate authority is with the securities appellate tribunal so a person can agitate with the sat within 30 days he should go with the petition why he was not given the license then

the power to appeal to sat against the order of irda for declining returns now certain returns are submitted we have the power to say you returns are improper and he can again come and say no no returns are proper and in case there is a dispute he can go to appellate tribunal and they can say whether the irda has been unreasonable or not then finally the power for forcible amalgamation under section 37 is to be placed before the central government so there are 2 powers earlier we can clarify which says you can go to the courts for other areas other than insurance but now apparently in the new legislation they have given the power to the regulator 35 where the power to regulator actually forces and entity to merge or amalgamate there within 90 days the matter is got to go to the central government the earlier rule said that they should be placed before the rajya sabha and lok sabha that has fortunately been improved so there were .. then the payment of money can be made if there is a dispute between 2 parties the payment of money can be made to the court of law and that is accepted as a discharge of the liability by the insurance company that has been specifically legislated with the legislation and power of the administering now for instance the regulator can appoint the administrator for the company and that administrator has certain powers of the civil court for taking action and action of that appointing the administrator or the action of the administrator himself cannot be challenged in the court of law as per the new law but they could go before the no suit can be filed in a court of law 226 but they can agitate before the national company law tribunal if there is problem if there is an injustice they can go before the national commission and agitate and order of the national commission itself in the dispute can go before the appellate authority that is the nclat there is a new law which has come as per the new bill of course the power to adjudicate is there and section 110 says all orders of irda are now appealable in the appellate tribunal so these are some of the legal provisions of the new act which I thought it is not I have not been able to complete there is much more but I will just give you a broad flavor of the thank you thank you Mr. Nair I must admit for the first time I am seeing a very responsible very responsive and very open man on the insurance side ... let us give him a big hand and go for lunch we will have the group photograph before the lunch.

### **Session 13**

good afternoon gentlemen as the chairman of the advance rulings authority I am required to decide the disputes the advanced questions which are raised of income tax so I sit in my office in yashwant place for 3 days to solve the income tax quarrels one day I spend deciding the central sales tax disputes last day that is friday I have to go to samrat hotel and my office is on fourth floor but on third floor I always seen unprecedented rush I sit in samrat hotel only to decide the advance rulings in respect of customs central excise and central sales tax and service taxbut on third floor it is always flooded with the young lawyers Ladies senior lawyers not so senior lawyers anyone know that all the lawyers all leatned unless otherwise proved that tdsat is headed by my good friend Aftab Alam who was my colleague in the supreme court before that was justice sinha and another brilliant judge before him was Justice Arun kumar Who is unfortunately no more Delhi judge again a very brilliant judge and when sitting in the Supreme Court when

I had to come across the judgement of justice Sinha because the appeal from the tdsat lies directly with the supreme court and on fake agent I had to deal with the cases the judgement of justice Sinha I found the attachments to be outstanding they are always outstanding justice in are used to write outstanding judgements in the tax regime no he was never tax practitioner and there we came to know the tremendous impact of this TD sat authority and this t r a I authority it directly affects every house which has got a television it's tremendously effect I won't say higher middle class lower middle class because Hindi lower status also the TV has become very common therefore the cable man has become very common and therefore weather at dispute between two cable men one cable man cuts the cable of the other which is the usual the case and there are unprecedented fights between the two agencies supplying in my Nagpur house there is always this problem so the TD sat and the t r a I have become very important very important subject very important tribunals before that as you all know any of our telephone disputes it usually used to be that I have hardly ever used my telephone in one month but my bill is of 270000 rupees so The Telegraph act and now the hole now there is hardly any party I don't know accepting the few High Court Judges like us are the few judges who used the landline also and bother to print on landline number on a visiting cards everybody believes in printing the number of the cell phones and the mobile phones but in the new scenario the shift has been there is a Paradigm shift from telephone 2 cell phones and from newspapers to the television everybody wants to have is news on the television everybody wants to be seen on the television and that has given tremendous generated tremendous litigation and I am sure Mr. parameswaran is going to take care of all of that tell us everything about t r a I t r a I and also the TD sat over to Mr. parmeshwaran thank you sir good afternoon everybody its really indeed an honour to make a presentation before the honourable judges of the supreme court and high court and sir specially what a brilliant introduction you have given to the for the whole topic cannot be even I couldn't have thought of giving such a nicely in fact to take it from there itself in fact right up to 1995 our tele density in fact in international forums there used to be like the below the poverty line like that above the poverty line below 1 means one telephonic for less than hundred less than 1 telephone for hundred people we used to be standing in that Below up to 1995 just about 20 years back today it is 77 so the growth has been so much I mean if you look at the growth of the sector similarly even in the television sir I will go through that the number of channels work 1520 in the nineties today it is 800 n and something and all those and 2 television watching is not and entertainment in the country especially if it is in India Pakistan cricket match or something like that well if it is not I mean available at some place I mean it will the whole place will be a law and order situation problem that is the kind of thing that we are so I have to do small presentations what I'll do first do is I will take it on the Telecom side. The broadcasting site in India and abroad in the regulatory this thing so basically I am a technical person but in the regulatory this thing 4 so first I'll take the Telecom regulator I was start with the Preamble of The acts it is there in the this thing it is basically to provide it is a small act as you know it is to provide for the establishment of why I am just siting this

because there are two three things which has to be noted there is a t r a i which has been created under the act there is a TD site which has been created under the site both are created this is after the amendment the 1997 act only had t r a i weather judicata power was also with the t r a i it was headed by retired High Court judge at that time in 2000 amendment was brought in where the adjudication was I'm sorry I mean the appellate authority was segregated into TD sat Tulsi carefully look at it it says both I will only say that to protect the interests of the service providers and the consumers of the sector there are 3 jobs which are provided to it protect the interest of the service providers and the consumer for the orderly growth of the sector this is the cross I wanted to touch on here Saudi Arabia established 1997 it consists of a chair Man 2 full time members in 2 part time members who are from the Academics side or we have some management directors also part time director from Bangalore and all so that is the kind of people 2 roles that's t r a i has got is recommendatory and regulatory there are two roles very specifically and it regulates telecommand broadcasting in fact broadcasting role came to t r a i as a result of high court order in 2004 they were introducing the conditional access system and the court after ministry of Information and Broadcasting you can't do that without having a regulator in place then government found the shortcut shortcut means they found a easier ways there is already a Telecom regulator so the definition of Telecommunication was changed through an office order to include broadcasting overnite t r a i became the broadcasting regulator also I will recommendatory and regulatory functions recommendatory functions are basically any new services provider has to come in in the network Sony service like right now we are not talking of new services earlier when we started the liberalization from 91 onwards what it was first liberalised then radio paging lots of services are there satellite service then long distance service National long distance International long distance all the services were one by one liberalized so when should it be liberalised what should be the terms and conditions and all these things t r a i give the recommendation here are the licences issued by the Ministry TR AI does not issue the licences and all the spectrum related matters then it is the recommendatory power t r a i has got regulatory mainly 3 it is interconnection quality of service tariff I was just briefly elaborate what is one of them are in fact regulator t r a i issues Orders and directions from time to time well this is the section because it has got 11 1A and 11 1B of the act 11 1A says the same thing need and timing for introduction of new service provider terms and conditions management of spectrum in all these things the TR AI Nifty recommendations to the government it doesn't decide it's only recommendatory to the government now the regulatory functions it is just the provisions of the act I am repeating so not reading it out diesel all quality of service centre connection and tariff on this TR issued the regulations on orders now I was talking about the recommendatory is this thing the two aspects it is mandatory for the government to see the Recommendation of the t r a i milk and of course of cornelius effect Almost Human task on most of the matters but on 2 aspect that is needed timing introduction of new service provider and terms and conditions of the licence the government has to mandatorily ask the regulator For recommendation the authority shall forward recommendation in 60 days call asking of course of 60 days is not usually 3 to 4

months directions are given now government can have a difference of opinion on the recommendations on some points of the regulated kids so we have a different opinion on that in that case the government also referred back to the authority for reconsideration again now the authority has 2 reconsider it and send its recommendations domestic to the old recommendations and say no we don't think we R I means we don't agree with the government we stick to whatever we have said or may be changed but in any case government can take a final call on that it's not necessary for the government to accept the recommendations in total it can change it but after the recommendations are sent to the government now moving on to TD sat adjudicate any dispute between the licensor and licensee that means of Government and the licensees between two or more service providers then between a service provider and a group of consumers I would only like 2 make one small mention of honorable justice Goyal had mentioned in the morning that the individual subscribers if you look at the page 13 of this book what has been given to you it has been very clearly written that the individual subscribers can go to the consumer court in fact we cannot go to the TD set because when does Act was formed it was very clear in the beginning this act is not going to encroach upon the jurisdiction of the consumer court but then it came back how can it be suppose there is a consumer issue it was told that group of consumers now didi fat exercises 10 almost the instance what was cited as somebody committing suicide was cable operator not an individual because a cable operator 60000 people are there they like individuals only in a way so who committed suicide was because he was not given a good time by his multi system operator was harrasing him to give the television signals I will come to the presentation the second part of it when the media comes the consumer court Avenue is open to it it is not I mean they cannot go to TD sat and also pgecet can hear and dispose any appeal against any direction decision or order of the trai now if any of the directions of the authorities is not complied with so there is a contravention unfortunately the t r a i act provides that the complaint is to be made by the authorities in the court of the chief metropolitan magistrate or first class chief judicial magistrate that is the what the act provides and define Max 10 to 100000 rupees on first instance and it will be 2 lacs for the second of subsequent offence or if it is a continuing offence even upto 2 lakhs . but issue here is that even the Complaints that have been made in 2005 and 6 have are still pending at the Cmm court so we don't have the I mean t r a i does not have the power to impose any penalty on the service provider this is what I was mentioning about the taaras quality of service and interconnection the power or with t r a i and the government besides on spectrum licence and content in the case of broadcasting in the case of broadcasting t r a i only regulate the carriage content it does not regulate now what are the regulatory principles in fact these are all the ones in fact I was complimenting Shruti for that document which has been distributed the first paper on the oe CD this flow from all of that flows from that VCD the compilation of all that what are the regulatory principles we were having a discussion of all the regulator all the regulators last Wednesday in Jindal University that gives us beautifully all the practices followed by 34 countries off oecd under the so I was also as far as the regulator

is concerned the principles and procedures followed are quite up to in line with that now very transparent procedures as per section 11 4 of the tr a i act the authorities mandated to follow the transparent procedures it is mandatory then participatory decision making all the decisions are made by involving all the stakeholders then timely decisions now time is a very important because it is a very fast growing sector and the idea is to have better services at affordable prices that is been the code and the other is to ensure a level playing field among the service providers when you have so many operators operating especially some operators would have come into the scene earlier they try to play a dominant role so this is 1 important things so overall development of the sector then as in the Preamble it is to protect the interest of service providers as well as that of the consumers and lastly is to maintain Technology neutral policy means that the regulator does not prescribed the technology they don't say we don't say TR AI does not se that you use this technology the service providers free to use the technology that they want the standards the technical standards normally is adopted there is an international telecommunication Union under the UN where all the countries are members dataset there we also follow that and of course there is a standard setting organisation within the department Telecom Telecom engineering centre so technical standards may be there but we will not I mean it is not prescribed that you use the technology of this person or not it is left to the service provider now what is the procedure followed when we say that this is a transparent process this is very important for everything weather Ritu the regulation or it is an order meeting is there first and foremost the consultation for paper is prepared and which gives basically what are all the issues involved and what are the probable solutions of that what are the pros and cons each of that this is discussed and put on the website and at least 3 weeks time is given to all the stakeholders to give the their comments it is on the website anything and everything is there it is always on the website right from the beginning then the stakeholders give their comments then what is done all the stakeholders comments is also put on the website and say that if somebody has any counter to offer to this comment because always when the operators comments they would give the comments keeping their interest in mind and there was a no no their own competitors would point out no no what he is saying is not correct it is like this the counter comments com that is also put on the website then we have an open house discussions for example Internet neutrality recently you may all may have seen that 18 lakh comments on the Facebook net neutrality so we had 1800000 comments and then open house discussion is held weather people come and talk about the comments impact literally BC I mean bubble fight going on in the meetings and all the issues then after that then it is an open forum Easter authority feels that certain stakeholders are to be separately called in because you know an open forum certain points are left out there also called as discussed and after that discussion of all these things the analyse stakeholder views address it what is most important is if you look at any of the recommendations orders all the points raised by the stakeholders he has raised this point why the authority does not agree to it oh really. 1 views this one is this what is the view that the authorities taking why did they come to that that is explained this comes in handy as if it is a regulation you have an exclamatory memorandum with

that in fact all the litigation all the discussion is on the explanatory memorandum always because the more the most speaking it is the lesser litigation will be so then the recommendations are issued now let me come to the 3 things I mentioned interconnectivity quality of service I mean quality of service and tariff hotels what do we cover in interconnection just briefly to mention that See telecommunication is basically network service when I say networks service I mean I have a telephone here what if I want to talk to anybody has any word in the world I only asked his telephone number nothing else he may be sitting in Uganda I asking what is your telephone number if I give Sister your phone number it is taken for granted that's from this telephone of mine I will be able to ring a him up so for that the network in Uganda and the network hearing Bhopal should be totally connected show the Telecom by its nature is a network service show all the service providers all who are providing service anywhere in the world has to be connected to each other connection means interconnection then the issue comes interconnections what is the suppose a call is taken from here to Uganda Let Us C my local operator will be carrying UP to Bhopal from Bhopal to Bombay maybe one long distance operator will be taking it from Bombay to maybe Nairobi another operator maybe taking international so this there are so many operators involved in the line how much IPL to my operator here now part of the money has to be distributed everywhere this is why interconnection is important in fact I remember hearing the chief of sCC the regulator in US saying that there are only 3 issues in telecommunication interconnection interconnection interconnection so this is most vital thing because if you are not connected there is no telecom service because when you are connected it comes you know earlier it was a government service provider BSNL was the private operators were coming they will not give in the connection because for them to survive it is required now it has become a private monopoly when Bharti I mean idea Vodafone they are the big ones when smaller operators come they also play the same thing they will not give the interconnection even if they they will say you apply it this is not there that is not there so there is a time frame it has to be given if somebody ask for that you have to provide it in this much time at what caused it has to be provided these are all the things that get covered in the interconnection now we come to the quality of service quality of service consists of Technical parameters and now when you talk of it is almost mobile we are having only 25 million fixed line connection and 1 billion mobile connections so the I mean fixed line connections are coming down and mobile is growing that is what the so that is what we talked of whether the coverage is there how much coverage you provide this is another aspect is covered industry then consumer grievance redressal is consumer has any problem How the issue is addressed then billing procedure how do they build because it is very easy with 1 billion people even 1 second difference will mean they will make money in crores if you talk for I mean 2 minutes and you are built for 2 minutes 10 seconds like that everybody well so these all the system monthly and quarterly there are various reports and t r a i employees auditors and surveys for the consumer and all an auditors for the they go check it and in fact we have made sometimes ask them to refund the money back to the concerned I mean whole lot of money small error is detected not only that person anybody else in the system

the new Audit and say everybody you return and if you cannot find a subscriber and money cannot be returned IT course in to another fund where it is used for consumer education in that you will be surprised we have collected more than 30 crores now coming to the tariff 3 main functions of that interconnection quality of service and tariff in the tariff t r a i when it was formed in 97 one of the first jobs was to fix the tariff you see tariff it is basically the principle of regulation u regulated such a way that you are not required that is the ideal one it is like a family doctor ideal family doctor is the one where you do not have to go to him for any medical purposes he keep you healthy like that the regulator first fix the tariff then come the you cannot charge be on this this is the cap im giving then the competition will become so good that today in the mobile there is no tariff fixing at all only it is told you fix your own tariff but inform to the regulator within 7 days after fixing it with the result that we all know it was 16 rupees per minute from where it has come to less than 1 rupee today yes it was 16 rupees in fact the real growth started in 99 itself to be very precise even though we had started in fact in 94 91 it started then the case went to the supreme court for two and a half years because the selection of the metros 94 onwards it started in fact the real this thing started when we shifted to revenue share revenue share that is in 99 from there it was an explosive growth Saturday it is I mean less than 40 Paisa 50 paisa less than 1 Rupee in any case that is why so this is why the tariff is going so these are the three main this things in inter connection you said a number of operators yes sir actually it is in other countries sir in India typically what we see is the aircel About 6 7 people

No sir about 10 12 people 10 12 people major operators all of them are licensed operators Docomo Tata then that is exactly what to 2 g was four operators in one circle which got increased to you know 5 6 7th operator so if I'm a share within the four walls of this rule I had it should not be I was one of the persons that said at that time I had about 6 or 7 operators and that is enough nowhere in the world you have Court more than 4 of 5 you can go anywhere in the world and you will have not more than 4 or 5 then well the reasons for something else everybody wanted it because till then there was no value for spectrum so I'm 98 I have had meetings I have been party to the meeting why people have told that it is not possible for us to run the show spectrum is not an issue at all because it suddenly became this thing when the growth and more and more services started coming on too that till that time The spectrum nobody was it was not a prized possession at all still suddenly it became this thing and everybody thought that ok if you have another operator aur another name of whatever it is so maybe we could make some money out of that by selling it that is how It has it has letter to all that is happened it is what has happened my Association with all this subject matter was only as a public prosecutor in the 2G scam sir we know. tender him When I saw your name I said because before I was in the regulator for 10 years I was in the ministry and in the ministry I was doing the licensing and all that so sorry so one of these one actually the objection taken was initially to start with there used to be four operators in one sector India is in divided into 16 or 17 sectors black Delhi is one sector Bombay is another sector rest of Maharashtra is one the used to be 3 of 4 operators in 1 sector they took a policy

decision to reset numbers then the question was whether whether 6th 7th operator what should be the charges paid by those operators would it be the same as 1234 Orkut ID be the market value then two schools of thought one is if you take market value from them the naturally the tariff which will be sort of chargeable by BSNL would certainly be higher than the existing ones which would create an imbalance in the economy structure in the market therefore one school of thought which made with them balls to actually V vi VII operator on words we was charged on the same value which was then payable by 1234 operators that is essentially the Cruickshank off 2G matter absolutely sir now when we talk of interconnection quality of service and other things some of the reasons recommendations of the regulator IC if you see that just to give an idea of what work is done in t r a i Cochin talk of spectrum auctions see there are many things in that like what should be the Reserve price one number 2 is how much should be the minimum it is always sold in small lots what should be the lot size then what happened is vs also fix the cap it should not happen that one operator gets everything then it will create a monopoly so we say that in any band you cannot have more than 50% of the available quantities of spectrum one operator cannot have more than 50% so that is there so this kind of I mean limits of 6th very recently last week only the regulator gave the recommendation that for the options which are going to come up in June for all all the 7 bands 700 900 800 all this that is a major work with the regulator cure again it is a recommendation and I am sure this recommendation will go to the government on any point if there is a disagreement it will come back then the reconsidered one is given by the regulator then mobile number portability I tell you there was a lot of opposition from the telecom service providers because we know the mobile number today in the country is like a social security number if I may say so we have our identity in the mobile number where do you go to a dentist or a dry cleaners or anything she is not interested in your name he only asks your mobile number it has become like that because we do not have a social security number so India to US whatever the thing is that consumer does not get a good service service provider he can't change because his number is so that is why this came in and now good percentage of people are porting it and you can get it posted in about 2 weeks time so there is no problem on that and very good I mean in fact very good mechanism has been put in place and operators having penalized for not doing it I mean initially there was a lot of this thing but now it is streamlined that all India portability is also there initially it was within the circle is honorable judge was pointing out the country was divided into 22 circles so only within that area means Madhya Pradesh you can only change within Madhya Pradesh today even from Madhya Pradesh you are going to Karnataka you can carry the same number now broadband penetration this is one issue which is getting a lot of attention after regulator now because the future is in the broadband everything I mean it's like it is the penetration of broadband what you are talking of ... National Optical Fibre network because in this again the country's status the country's ranking in across the world is not very good in mobile we are very good not a problem at one time we were even better than United States S as far as mobile phones are concerned in that case the recent this thing on call drops and all this the performance was not good either wise the coverage wise and everything we were second to none

in the world but that are slightly changed over the last two three years I mean broadband broadband is not picking up in the country primary because in like unlike other countries the fixed line penetration in our country is only 25 million while most developed country there is a large landline network so and and that is broadcasting there are hundred million cables connections so cable connections can be used extensively from broadband in fact world over majority of the broadband is provided through cable so far it was not possible in our country now it is possible because we are digitise it there is a government order it is now into 3 phases 3 or on over the entire country will be converted to digital cable Nexus of course I need not say that the call drops we are all Sunny Leone with that victims of that the call drops and this is also squarely up with the regulator now in fact the t r a i has ordered compensation to be paid to the consumer the matter is being litigated in the Delhi High Court and there are a lot of consumer protection regulations and place for example of any I am just giving you an example due to shortage of time if you take a particular package from the service provider he cannot change it to your disadvantage for 6 months this is one of the many such things that are there essay why this thing she gives you well at least for 6 months years to give that to you of course he can better yet but he cannot I mean make it harder so there are many such measures like that like morning it was stocked the insurance we were talking about misleading advertisements there cannot be they cannot issue misleading advertisements we are able to ask immediately to call it back monitoring that that what is to be told has to be told very transparent Lee and I dont mislead the people ... I would say on this that Reliance jio is going to come out very soon with a very huge launch because there waiting any day they are going they going to come they are going to come show the existing operators are trying to safeguard their turf It is going to major war that is going to come up that is what is anticipated so we don't know the commercial one but everybody rather cautious of it because Reliance jio they have all the equipment they have been putting money for the last 5 years there yet to launch the service so that is the four G service so once they come in Airtel Idea Vodafone don't want to lose the market that is why all the ads you will be seeing of 4g ..... absolutely sir your observation is bang on correct it is going to launch in December so it spiked up then now they said they are going to launch in March or June but I have to launch it because there been vested lot of money for the last 5 years and the number of awareness programs are conducted for the consumers 5 regional offices across the country and about 300 400 vs programs are conducted across the country where consumer groups are called made aware of what are there rights the grievances it is also done then net neutrality is also another issue you all know that the Facebook thing that as it is not, come up yet this is a issue on which lot of debate is going on can you tell me what exactly is net neutrality try to understand net neutrality what exactly is does it mean .... sir I can let me attempt that ... 5 years back there was a some of the companies have been giving Optical Fibre yes sir ... so we have in the country something like 9 lakh Kilo metre of fibre fibre is the backbone sir broadband anything even for your Cellular connection the towers that you are seen that is connected there will be a central switch all the Tower will be connected there will be be suppose you you sit at Bhopal they

will be 1000 of towers here it is connected to the main thing by fibre only mostly fibre that is the most economic way fibre the advantages the bandwidth the carrying capacity is very high bandwidth is nothing but the width of the road the traffic is what we talk and all when I say there is more bandwidth the fibre has got a much wider this thing and advantage of the fibre is that the technology keeps on developing in the fibre all you need to changes not the fibre but the end equipment so your capacity goes up you don't have to take the road again put the fibre the fibre remains the same when the technology growth what it could carry probably if you look at the carrying capacity of the fibre 5 years back it is more than doubled all you need is change statement at the end which is easier so that is why fibre fibre in fact fibre came in the mid seventies beginning of seventy's like till when it was microwave but now it is mostly fibre people propose fibre for carry any communication it how quickly try to say what is net neutrality so then I will go to the next part of the thing is Internet has come out as a completely un regulated neutral means I should be able to connect to the Internet without any this thing that is without anybody restricting anything now what is the two in actually Yevadu offers in this I will tell the specific ones Airtel 0 M Facebook now let me take the specific cases so that it will be easier for you to understand how to use this supposed today there is a website on anything you will access it you will be paying the data charges to the service providers what is whatever is the charges you would have taken taken a data package which has 20 GB download and 4 Mb bandwidth how much data you accordingly you will be billed for that now Facebook came and said suddenly look here I am creating a Facebook . Org a website which are the people who have joined me if you access my website you don't say anything to the service provider now only me only me Facebook if you access me then what I said that 4 Mb you pay up some money she said no that will that was not be built whatever download it will be free you go to another website you have to pay now this is only possible if you are a Reliance com subscribers not if you're Bharti subscriber not sure this thing this is what the Facebook offer is now the advocates the activist of the Internet say how can you do that this should not be permitted in the country it is not permitted in US C accessing Internet how can I say that and also Fu this is all the argument it's not my views I'm only trying to explain how can Facebook hebmaybe charging some money for the other to join him I will charge you so much he may be charging the service provider who pays the service provider anyway there is no transparency and all that it is not a free this thing another thing what airtel 0 did was that Airtel zero said that I am going to give you to certain websites the same so the Internet activity that neither the content provider who is Facebook can Facebook provide the content no the service provider aura telecom service provider can be a gatekeeper in the net neutrality net is a Universal phenomenon you are charging me for the data do that if you want to provide free provide free to everybody why are you only provided free to some websites this is a debate in the what Facebook is telling that this side of the story we will give you great service we will not leave you video service and all I am going to give you very minimum it's like tea tasting getting you addicted on to that then you will switch on to the other one this is what they claim openly they made a presentation to TR AI in fact the chief of SCC is now working with Facebook Kevin Martin he comes around and in

fact they are comparing India on that he came and made a presentation to t r a i he said this is the thing we want to enable more and more people too use Internet once you get into the habit of that then will come to a regular plan this is what it says so that is why they are calling it basic Internet basic Internet where are you can't have video download and all these things this is what they say to the other thing Airtel was his son is in the content business hike is his sons only Kevin Martin Kevin Mittal so they are all people was having in that not that alone he has given 2 others also only these websites you don't pay me otherwise I will charge you that is Airtel zero is Arpit to think both are been contested by net activity both both are not in conformity with but net neutrality means the neutral Internet is an international phenomenon and it's a network with people around there because it is not developed like that basically Internet developed as a network between Educational Institutes and all that Harvard network and all that way back in 70s from where it has come up so that is in short about the net neutrality It did not developed like that basically Internet developed as a network between educational institutions and all from where it has come up so that is in short about the net neutrality I hope I have there is a competition issue also in it well the thing is what all TES telecom service providers they say no when does find that the best way is come to the t r a i TD sat and say that it is a competition issue so that it gets diverted there sometimes it is passed fighting it out and they will say no it is not a competition issue ok then come by that time technology is so fast changing what is an issue will not be an issue 2 years from now R 1 year it changes so fast it changes so fast so if you can postpone the problem for a few months or 1 years most probably the problem because the people people would find out a solution for it see what happens in all these cases what happens is people will find out the solution in fact we were in telecom when it was opening up so much of experiences there because I was there right from the opening up of the telecom we thought sms will only be used by the elite we were so throughly wrong sms english and what happened this is the indian this thing the missed call is an indian technology if the driver gives a missed call anywhere in the world you know he has come and he is calling and he is waiting there nobody is isnt it sir we all know that but anywhere in the world the technology is there no sir this is an indian technology indigenus so many things have developed like that and we at One time ask Nokia to producer phone costing less than 1000 rupees I was in the ministry at that time and we thought devices are the ones we forced them we called their ceo we went to Finland and all that thing but outcome was that there were no takers for the below 1000 phone remember when my driver lost his phone I gave my old phone he said so if you can give me 5000 rupees loan its ok dont give me the old phone because everybody wants a sophisticated phone smartphone smartphone now sir even few years back nobody wanted a small phone even the guy who cannot she told me openly so we take only once in that a little so Nokia made it but the exported it to Bangladesh because that was not selling in India hey there is so much of learning experience in this journey I can tell you and in fact in 70 there is a file in the ministry that there is a market for 100000 cell phones in the country total 100000 in the sixties I think it was done late sixties I saw this note I am I remember it was called value added services my designation was Deputy General Director General value added services because mobile was never

remain service so anyways so this is about this presentation I have one more small presentation on the media site this was about the Telecom site I've been asked to do both the presentations one following the other yes yes please proceed you know when cell phones actually started before that's there used to be car phone absolutely sir people use to connections in the car intestine recollect in the entire Supreme Court bar they used to be only one advocate who was having a car phone and that was K K Venugopal because therefore his assessment that it was 100000 perhaps value added services on cell phones wasn't actually of the mark actually it was on the mark in fact I had still keep the first cell phone Tatas come which is actually the size of a brick the Motorola one brick size I said Someday I'll get an antique value for that Yes sir yes sir its battery itself is some 400 grams so keep it keep it just on this there is a friend of mine who had an old Kodak camera quite an ancient and antique 1 which was of early thirties or something and somehow his grandfather give it down the line and he is still having it which is still in functional capacity and kodak people somehow actually came to know about it the landed at his place and they were willing to say that you know we will give you anything because we ourselves do not have the model in our museum ..... you don't exist why because you are not on Facebook this is the thing I said still my dying day I will not join the Facebook ..... so I am with you I have also not joined Facebook ,....., unless you are able to do things through the net you are not considered as literate cell phone I think it was no no market yes but it actually got the imagination after 2000 all over the world after 90 you said I learnt about phone 1998 call cell phone at the time it was moving phone phone with where you can move and talk cordless I mean phone where you can move and talk will yes that is where you can talk in that kind of thing India is unique it is more to support the regulation than 2 something call the satellite phone in the US from cell phone ok let me answer that

there is a service called gmpcsglobal mobile personal communication service in india also a company called iridium launched it this is a case where there is a clear technology takeover means the satellite phone you could go any where in the world even now today it is there turaiya firm in uae it has come in bombay it was not permitted in india because of security reason because they are not willing to set up their technical station here in india they say all the calls will be monitored there only .... bbm message sir this also we prolonged it so much that technology took over we never succeeded ing etting them here there is a very clear case blackberry lost out because of that now nobody is having a blackberry now excpet ..... cominhg back to this satellite services what happens is this satellite phone you could go and talk anywhere and this thing so what happens is this pphone communicates directly to the satellite and if you have a phone that also takes from the satellite so this phone will be very powerful because satellite are stationed 36thousand km above the earth that is the geo synchronised orbit because a satellit in that appeared to be moving along with the earth so this requires that much power hat is how this technology came because you could go anywhere and talk cell phones meant at that time you could talk only wherever you are you could not go to a next state and all that that was not permitted then came the roaming in mobile today even if a take this phone to united states i can talk it gets attached to the local network there so what is the difference between this phone and satellite phone utility and satellite phone

cost me 1 lakh at that time and i gave the license i remember fir iridium it was launched here then the company had to close in this case if the hub of the thing is in india it can be traced the main data base is india it can be traced what happened with turaiya they refused that so india did not give permission now it is used by terrorists and all these people naxals and it has a coverage the advantage of a satellite phone is that it has got good coverage it can cover a few countries straight away all asia it can cover because it is way up there so that is this is a case where the technology overtook because this handset was costing 1 lakh even at that time about 15 years back i think i gave the license in 1999 for that iridium they started operating and they had to close down because this roaming took over and there were no takers for that of course that network is working us military is using that network of motorola iridium you know how that name came iridium the name came because there were 77 satellites it was not a geo stationary orbit which are low orbit satellites so 77 satellites were positioned all over the world and 77 corresponds to the valance number of iridium in the periodic table that is how the name came as iridium. this is how the name came .. transmission through .. that is lite they call it that is still under the still under not commercially it is still in teh lab stage sir you can find that if you got to at&t usa and all most number of nobel laureates are in telecom because the physics and all the people all come there the guy who will get nobel they are all .. lovely laboratories are there in canada us and all where the technology is getting developed so i will now quickly go across to the broadcasting side with your permission sir yes yes please in broadcasting sir i am trying to cover the services the value chain and the snap shot some of the key features of the broadcasting regulation in the country and whatever regulations in teh broadcasting and touch upon the issue of media ownership these are the 4 aspects i would like to cover whe we talk of broadcasting services we talk of the cable tv the direct to home terrestrial television that is doordarshan is offering where earlier we had even now it is operating where you put an antenna on the top of the house and .. that is still operating then ip television it was provided by bsnl in some places internet protocol tv that comes through broadband this television and radio we have fm radio which is open to private then am and the community radio now this is just a diagram what is the value chain this is only in the tv broadcaster gives the signals either cable operator cable operator means that is where i have the the broadcaster gives to the cable operator the multi system operator and the local cable operator and comes here if it is dth it comes directly to you there is no intermediary ip tv also same hites it has not come yet it is nothing but a cable operator who uses a satellite instead of a fiber if he uses a satellite for distributing cable it becomes a hits headed in the sky operator then you also come throught the local operator this is how the value chain is just for you to understand if i talk again you know what this is just a snap shot i was just mentioning this there are 277 million households with a tv households are 175 million and 243 operational fm channels 827 channels which are registered all of which are not operational about 700 are operational i think less than 700 pay channels are 245 rest are free channels then as a as i was mentioning local tower cable operators 60 thousand lco small small they are the people who are in fact the service started only after the act came in cable tv started after 91 during the gulf war but the cable tv act came in 94 and regulator came in 2004 that is why it is quite disorganised and there are lot of issues in that that is why majority of them are the

cable operators in the broadcasting side not telecom most of them are from the broadcasting side actually ... what has happened is that now you have got to change the system which is and in this particular this thing the cable i can say that sir initially the industry was not very good then they found that there is lot of money to be made there all anti social elements you can say that it has come in it has established they have established their own rules of the game then you are trying to regulate them and bring in the you would know that in cable nobody gives the bill in india there is not bill in the cable industry they are doing like that the regulator is trying their best to make them give the bill ....exactly sir now i will come to that what is the reason for that i will just come to the digitisation part why did we go to digital not for generating money alone just after this slide i will come to that sir see what is the unique feature of the broadcasting i would like to mention here in comparison to other countries means no exclusivity of content in fact and the chairman of the fcc us complemented our chairman once because in us uk and all for example if you want to watch english premier league you have to have a connection from skyv because english premier league is like cricket there everybody wants to watch that so if they want to watch that you got to have a connection from skyv no other operator will be able to give you so that is exclusivity of content here by law it is that any distributor or broadcaster of the content he cannot say no of course money has to be paid but it cannot be denied this from the beginning it is there so that is why we are able to enforce that whereas in us it was not in the beginning so they are not able to enforce it now this is the reason now sharing of important national sporting events as i was mentioning cricket is not a sport here so there is an enactment of the parliament that the signal when ever of national importance here only football and cricket has come cricket also where india plays who so ever the guy who has won the rights has to give the content to doordarshan doordarshan will get 75% of their ad revenue and things like that that is again in the supreme court and the quantum of the amount and all that it is mandatory for the distributor to carry public channels all your cable operators and dth operators have to carry doordarshan channels it is mandatory then there are detailed quality of service regulations here also like in telecom you have interconnectivity quality of service tariff order you may ask what is interconnection here it is not a network service where as telecom is here interconnection is this `inter connection means there are more than one guy here telecom means only one person is there there are no stages there value chain here here is a broadcaster there is an mso there is an lco local cable operator how do they distribute among themselves this is the main contention that goes to the tdsat how much money is there to be distributed between the 3 and so by nature broadcasting content is monopolistic if you want to watch an india pakistan match can you watch some other channel no only that channel is there or even serial your serial is coming or your mahabharat serial is coming you want to watch that is the only one there is no question of substituting that so the thing is by nature broadcasting is a monopolistic this thing the content is monopolistic in nature so that is why there is a regulatory framework is there for interconnection between the service providers based on this they finalise the interconnection now in the quality of service here quality of service other than of course consumer and consumer billing and redressal how you the procedure for disconnecting a person transferring etc is not as grave as in telecom its not the quality of service here the fairly the details the quality

is good nobody has any complaint about the `quality of the signal you get it cables once it is digitised there will not be any dth there is a small... sir this is nobody can help it sir i will tell you why sir that is why cable is surviving sir dth operates in the ku band of the frequency this thing that is prone to rains because what happens is that int he satellite the moment your dish size comes down it is more prone to rain earlier the cable operator had huge dishes you cant buy that dish in home there is no problem in that because you are operating in the c band once you come to the ku band where the frequency is higher it is prone to rain so this is your dth operator cannot do anything in that it is because in that frequency rain will affect the signal this is the reason why in certain places dth is not successful in across the country if you see in india every where dth is not dth this tat sky is dth dth tata sky is dth tata sky air tel relince dishtv these are all videocon yes there are 6 private players and one door darshan door darshan has also now free dth service so these are the ones of course there are some set top box related issues now the hot topic is about the set top box interoperability i want ot change the operator i should be able to do so without changing the set top box in our state the state run company is facing problem arasu yes now in the case of tarriff here whole sale tariff means the tariff the broadcaster gives it to the cable operator and retail is the one what the cable operator gives to the dth guy gives to the i mean for this both are here again now what happend is in i was mentioning inititally there were only 20 30 channels now more than 700 channels are there working in 2010 all these disputes of interconnection and everything was because there was totally no transperancy the cable was analogue analogue means if a cable runs throught the house of all of us every body can see only the same channel its not possible for you and i to see different channels all the channles that are copming is shown to everybody that is how the cable was in analogue it was totally non transperant system so if the broadcaster is giving in the distributor how many people do you have he will there is no way one can see he will connect from house to house there is no way he can see that he will say i have got only thousand people then it is just a blind game both play with the result what happened is disputes so we the trai gave a recommendation in 2010 to the minsitry that okm we have to convert it to in the digital cable also digital cable can take broad band and not the other this was the the cable tv act was amended in 2011 by the parliamen and said that in a phased manner the entire country will switch over to digital cable of the 3 phase are over already the 4th phase will be over next year which means tha t every cable will get covered in fact what facilitate was that the channel increased see earlier capacity was only 70 80 channles maximum was 100 100 also you wont get but whereas dth gave 1000 channels and dth also gave a competition yo cable as you said cable the quality is not good people said why dont i get dth quality better qwuality and this hd 3d channels not in cable only is digital then the biggest this thing is even though the same cable goes to all of us every body can select their own channels if i want to pay for only 10 channles i can pay for 10 you want to pay for 20 another cahnnels you can do that all channels are available but you can choose then transparency int he operation now let me come to the next important thing that is media ownership we will we will stop here shall we stop here as you say have tea and then justice lalit will proceed on media and then you also as you say sir ...absolutely sir ..

finish it in 10 minutes .. i can run through it in 10 12 minutes if you say so should we or should we have a cup of tea we should have a cup of tea and then resume.

## **Session 14**

Welcome to the last session now would you like to finish how would you like to start no no you finish it then I will take over thank you sir on this particular topic I will just run through a few slides which trai had done few consultations for the ministry of broadcasting this is again the consultation was done this is strictly not carriage but the issue was so important that we went in for a consultation strictly trai regulate only the carriage in case of broadcasting but looking at the issue which is very important the consultation was taken up and recommendations has been provided to the ministry on 14th August and I'm just giving you the highlights of that recommendation it is available on the website of trai it is 12th August 2014 we have given this recommendation everything what I am talking about is from there from that recommendations just see the needs to regulate the media ownership definition what is cross ownership vertical integration and issues affecting internal plurality and the media regulator so what is the need to for a media ownership regulation we know Indian Dr media plays a vital role and is often termed as the fourth pillar of democracy so it is very vital to ensure the diversity and plurality of views are there in the news and views we get the diversity of the view that is very important that is why there is a need to regulate the ownership now when we try to address this the first thing that came up was that how do you define the ownership because we were having cases very doesn't have any one is very straightforward at least 20% of total share capital that alone is not enough he may not have any share at all then there is a de jure by having not less than 50% voting rights are having more than 50% of the members of the board controlling the management or de facto control by means of agreements he may give loan and agree say that I will control your company there may not be any share capital invested at all so by any of this he has got the control that is called the ownership this is done in the competition Commission act CCI it also it is a line with that that's how they define whether of Association over entity has got ownership of control that is how they define it now when we talk of cross media ownership what is important is that you know cross media there are 3 print television and radio now the relevant genre see in the what you we are talking of diversity plurality of views we are only talking of news and current affairs it is not applicable in case of an Entertainment channel say Star Plus are these kind of channels it is not important from this point of view now what is the relevance segment print TV and radio I said in the radio today news is not permitted in FM private players only a i r can give the news FM also we have excluded inprint also there are periodicals and newspapers confined it only 2 newspapers because periodicals of monthly weekly so what is the relevant Geographic language market it is a language say if somebody is very prominent in Andhra Pradesh it is a Telugu news paper it was no impact in Madhya Pradesh so this language is the relevant geographical market now how do you assess the beach and market these are two things which you can see how much dominant

she has got reach and volume in case of print sedition figures are available from Registrar of newspapers with this you can see what is circulation in that particular newspaper in Madhya Pradesh you can see what is the circulation you get it now in television it is a volume and the reach it is called the cross waiting. it is calculated but there are methods agencies doing that that is how many people are viewing that channel for how much time if I am viewing say Times Now I am watching for 1 hours in a day somebody is watching for 2 hours this is gross rating point these are the things that I used for that now how do you say that the whether now this itself is applicable the market which is concentrated suppose there are 10 players in the there are 10 years the market is not concentrated there is an index called herfindal hirschman index hhi it is nothing but the square after percentage top share of all the players what percentage there are 4 players one has 30% another has got 40% like that each of the percentage you square it 30 minutes 900 you add it up like that that becomes the hhi awstat market and it is told suppose hundred percent is owned by 1 guys one guy is there when does index will be 10000 hundred in hundred the maximum values is hundred minimum is zero is international ticket that if there is hhi is more than 1800 in some countries some market it is taken as 2500 you say that the market is concentrated if the market is concentrated the guy who is responsible for that the increased hhi cannot have an hhi of more than 1000 in print and in television for consecutive period of 2 years this is what trai has recommended then that guy has to bring his down control in one of the media's these are the two medias of course then the mergers and acquisitions 1 companies tried to merge required another company then also one has to see that whether this barriers is broken or not otherwise don't permits them to merge then there are very elaborate reporting requirements which can the second aspect is since we are talking of the cross media horizontal one the vertical integration also vertical integration is applicable only in the TV you have a broadcast and a distributor simple example Zee TV they are broadcaster also they are in DTH also In cable also so they are fully integrated there are some broadcasters who are also distribution as sure what the thing is that from the point of view of fair competition you want distributor the broadcaster will give favourable treatment to him The Other distributors will have a tough time so from that point of view there are some regulations that we have recommended the distributor if they are vertically integrated they cannot have more than 33 percent of the market share then the distributor should not I mean mark more than 15% of its capacity for carrying its own channels some things like that we have recommended on that now the most important thing is here which is more controversial is internal plurality so far we are talking about the external plurality internal plurality means in this what the recommendations off trai r has been that the political religious state government entities should be barred from entering into the broadcasting and TV sector this is the reason why arasu has not been given a licence so far even though the government has not accepted this recommendation this is a reason why arasu has not been given the licence for that I mean they cannot be but what is already existing there is the recommendations are you come out in 2 or 3 years but till the recommendations are not accepted status quo is getting continued then public broadcaster Prasar Bharti the door

Darshan should be Independent and at arm's length from the government then in the articles in the recommendations chapter 5 there is a whole chapter which has been given on this paid news private treaties and all that and there the the quote of people like ... all these people their quotes are there if interested one can go through that it gives a very elaborate on that in fact today paid news means a politician pays the channel to broadcast in his favor that is the paid news is today he is caught it is only politician who is accountable so now we have recommended that both should be made accountable to stop this another is private treaty private treaties means a corporate enters into a deal with one of the media organisations where the ensure that he is given a favourable coverage his competitive is not covered at all all that so this should be curbed private treaties because basically the corporate gets into agreement with a news channel or a newspaper all this another thing is editorial independence often we have heard examples that X Corporation pics of news channel and editorial board quit there has to be both the cases are discussed here because the editors r not taking a stand which is favourable to the company they are not theyre going very independent which is becoming uncomfortable these are the issues which are two be in the interest of plurality so now taking all these things what the paper has recommended is to have a media regulator what the recommendations are the government should not regulate the media number 2 the self regulatory approach whatever we are telling is not working the Press Council does not have any power to penalize or so it is not working now there should be single regulatory authority for print and television the regulatory authority should consist of eminent persons from different walks of life including media predominantly non media people should be there in that that is the recommendation the appointment to the regulatory body should be just fair transparent and impartial process should be there then the most important is such a regulator should entertain complaints on paid news private treaties editorial Independence etc. the regulator should be empowered entertain these complaints and have power to impose penalties then then only this will be there such a regulator this is what the paper had recommended because it is not out of this thing because a similar exercise has been conducted in UK and it is a very famous report justice Levinson report Wonderful report that is available on the website also and on similar lines what we have recommended here is that a commission headed by a retired supreme court judge to comprehensively examine the legislative and legal framework to establish a robust international institutional mechanism for media regulation. ewven though we have recommended all this we have said ok take a final call on that or whatever that is to go in this direction i mean have a commission similar to the justice levinson commission and come to that thank you thats all.

very wonderful discussion all that technical issues technical overtones and the shadow of all technical sort of intervention has bee sort of touched on by the other speaker. what i will touch upon is essentially the perspectives of a lawyer or a judge what i find in courts of law when it comes to regulating media the very idea is something which flies in the face of 19 1A right correct so if you go down the history romesh thapar down the lane 19 1A is a cherished right that perhaps that is the reason why there is no statutory framework as of now to regulate media but

ofcourse with recent times and the avalanche of you know the electronic media especially the electronic media where the reach is vast coverage is enormous and the speed with which it can actually reach the common man is so terribly fast that perhaps before you actually close your eyelid the damage is done and one of the recent examples was what happened in kandahar got repeated in the coverage on 26 11 on bombay what happened in 26 11 again got repeated in pathankot so therefore somewhere along the line when it comes to questions or issues of security of state or the safety of all the citizens in that sense somewhere along the line there is a crying need to actually have self regulation or some kind of statutory network and if we analyse this there are essentially 4 broad areas where perhaps i think the intervention of the courts actually is called for the first is purely private action where whatever has been published maybe in print OR ELECTRONIC MEDIA we have the character of defaming somebody so defamation become a purely private action in that sense what happened in one of the cases was a former judge of the supreme court also initiated action in defamation correct and he actually in the first court won the action and there was a tremendous amount of fine that has been imposed on that particular publisher these are essentially private actions but nonetheless the media is held responsible for that this could be and this is what some of the litigations have sort of shown us that like for instance there was a war between one of the tv channels and one of the industrial house the tv channel actually went about saying that that particular industrial house was a favoured one and this is exactly what their conduct and their behaviour was called in comment in the cag reports now this went on the industrial house now in turn says this is nothing but defamatory this was not the purport of the reports of the cag but the news channel went about that so they said the action in civil court where perhaps i think their prayer for interim injunctions was also favourably accepted by the court normally in all these matters defamation it is the post act either corrective measure or punitive measure either you punish the guilty for the acts of defamation maybe in civil law or criminal law or it could be a corrective measure a corrective measure could be in a series of action you may even try to give an injunctive relief so these are the broad parameters when we come to the first segment which is the defamation which is purely private in action the second part perhaps could be where there is a need for some regulation and which is where the publication borders on commission of contempt of court but for instance we have the example of arundhati roy writing something about one of the judgments of the supreme court whether what the supreme court did was the correct thing or not is not the point here but the lady was punished in an action for contempt therefore again the second part is something which will again be post act punitive in nature in contempt action you cant touch wood imagine somebody being injuncted unless it happens to be a series of actions where a court of law will be so sort of guided by the previous conduct or the previous experiences to justify any injunctive relief very rare not that it cannot happen it may happen in a given case but very rare in a second part is again bordering on contempt where either the publication appears to be scandalising or lowering the dignity of the court so therefore that is the second action this action is also more or less is post act corrective action three is concepts of morality that is a very very wide spectrum concepts of morality could be having sexual overtone it could be having racist kind of you know insinuations it could be having

religious sort of inciting tendencies anything so therefore anything that normally shocks the conscience of public morality can come under this there normally what we find is apart from the corrective measures there could be injunctive reliefs also now some of the examples on this sphere is essentially one of the shows one of the stars of bollywood in one of the reality shows she said something so derogatory of a person almost calling him impotent in public eye on a stage the gentleman couldnt take it he committed suicide and that is where the standards actually are you cant say that that starlet should be held guilty for abetting the suicide but certainly somewhere along the line if you have crossed the limit if you have gone beyond the parameters of morality or concepts of morality then the action is certainly a questionable one similarly like for instance especially the naxalite movement whatever they publish at times the .. of an idea or an ideology behind that you have seen these kind of movements in various parts of this country fortunately we have been able to sort of sustain ourselves and come out of that but nonetheless in certain parts of this country the movements are still on i will give you an example we were dealing with a case from manipur where one of the allegations was there were all faked stage managed encounters people who were allegedly part of cessationist movement or members of organisations which are banned organisations under uapa were systematically liquidated by the uniform people that was one of the allegations and we were going ahead we are still going ahead with that matter on the particular day while you are actually entering into discussion as judges who actually one view point so therefore you interact so therefore you again put a counter viewpoint and the discussion went on a particular topic where the attorney general also had something to say and next day in newspapers in manipur what was reported was completely of a different dimension and that appeared to be completely deliberate so therefore tendency which is to incite people which again is something which goes beyond your normal canons as we call public morality so sexual overtones religious now today if you are actually going through a cobweb of various kinds of allegations counter allegations on tolerance intolerance that also has a tendency to incite people maybe having certain kind of religious kind of overtones behind that just yesterday itself there was an attack on the tanzanian student i dont know if anyone of you had actually seen the tv coverage the allegation was that one of the students was actually beaten up and the kind of coverage the camera was actually moving from one part of the body to the other part of the body to my eye it appeared to be sort of you know not in good taste in that sense where the press perhaps should have been more decent rather than showing the parts of the particular individual there are certain you know decency and public morality issues which get involved in this that.... the issue such as security of state and ofcourse public interest in the larger sense when i gave you the example of the coverage of pathankot especially mind you around the same time there was an attack on paris and they say the way the coverage of that assault in paris was actually done by the french and then the media all over the world showed lot of essentially discretion in the matter and deference to the sense of public morality i have at times seen coverage where dismembered sort of bodies are actually shown on tv it doesnt carry the message the message is something that if some persons are actually died as a result of any encounter the news itself is good enough you dont have to actually go into the minute details but then people actually do that the press at times does

that as against the pathankot version the way it was done in paris was something which was at a completely different level whereas the coverage in 26 11 in bombay and in pathankot they say actually helped the cause of the terrorists they actually gave out locations they gave out the news that NSG commandos are descending they are actually waiting or this is the strategy so on and so forth so the exuberance on part of media to coverage everything and to be the first one to come out with breaking news at times sacrifices the interests of security of state and also public interest therefore the need to have some regulations somewhere now as i said there could be 2 ways to consider this post incident corrective or punitive measure but then by that time the act is done so what do you achieve by this maybe the matter will be dissected in a court of law 10 or 15 years down the line by which time everything everybody has forgotten the damages lost in the assumption and estimation of everybody and therefore let me do thereafter is the forensic discussion and dissection of the entire matter should there be a pre incident regulation which is nothing but pre censorship bow who gets the right and that is precisely why my learned co speaker actually said that trait has when it comes to regulating media it controls everything but the content of the publication it can control the ownership it can control cross owning it can control carriage it can control everything but not the content that is a very delicate balance in that sense see a movie or for instance a television serial lets say tamas which they said the petitioners who went before the supreme court they said that actually incites given the portrayal of what actually happened during partition days the submission was that it incites it has the tendency to incite people the matter was considered everything then the case which came from south india kerala where one of the sort of the lower category girl was being subjected to some kind of harassment then again the supreme court considered it supreme court saw the actual serial the movie everything these are post or corrective measures whether then you can suggest deletion of a particular part so on and so forth but the need of hour essentially today is the reach of electronic media is so quick and fast that the by the time we bat a lid news is gone across the country and whatever has to happen may have happened maybe it is a sting operation maybe perfectly justified or clearly motivated it happened in one of the cases of one teacher from delhi whatever the sting operation was they say it was so stage managed that it completely marred the reputation of that lady but then it couldn't be helped in that sense what could i do thereafter therefore the need of hour is essentially to have some regulatory mechanics how does one and where do we draw the line there was an informal kind of you know self regulatory body which has been put in place by all media channels the electronic media channels which started functioning in 2008 under the chairmanship of justice js verma as he then was i don't know who is the present chairman after his demise ap shah he was there i do not know about that the reason why i remember is i had an occasion to appear before that committee it was some channel it was typical warfar between 2 channels for ... one was the this yr's son on one side and the .... so therefore i was representing one interest sakshi yes that is right so therefore it is going on now the intervention of that committee was certainly sort of a welcome idea but what would that committee do there are no teeth in that sense what you were the recommendation internal body internal body bar council where bar council actually gives statutory power to .. somebody so whatever recommendations they gave i tried too sort of work

in that direction that where is the source what is the supposing the directions are given how are they enforceable is actually .. therefor this is some kind of a code of conduct which must be adhered to which must be obeyed which must be strictly followed by every member of that body it all depends on your self regulation that may not be so adequate similar is the situation of press council though there is a legislation press council of india act again it can issue certain directions yes but so far as content is concerned they cannot be any pre censorship any ide of precensorship is abhorrent to your rights under part 3 and thats where it is a very very delicate balance which has to be struck the balance can be nothing but having more powerful self regulation and i dont how to do it but this appears to be purely a legislative action and which must be done something qlike say professional bodies like MCI bar council of india or some such thing where all the concerned players who are broadcaster who are actually in charge of electronic and print media must come together and there must be this self regulatory mechanics or mechanism that is the only way we can regulate media there is no other way where one can have pre censorship whatever may happen later if it crosses the limit if it crosses the border when it becomes either defamatory contentious or shocking the conscience when it comes to issues of public morality can be corrected with corrective measure or injunctive relief is a different issue but you cant stop a virgin publication going by the present sor ot scheme that we have and that appears to be the real test we have somebody in the form of our co-speaker who was of course former principal advisor but this is what my impression on the subject is thank you so much thank you.

what is the ... see in no democratic country can there be any pre censorship that goes against the concept of everything correct the moment you say then you are back to your emergency days but sir courts can courts can american courts have evolved this clear and present danger theory i think when it comes to the mind of the courts that this is really a clear and present danger to sir that is why i said virgin publication suppose i wish to publish something today for the first time it will not be possible for anybody to have pre censorship if i my publication today has a tendency of whip up somebody's sort of you or incite somebody can it incite a section of people then i gget branded as somebody who is capable of writing something which is defamatory or inciting then the next injunctive relief will be based on my past conduct correct and then as a court of law the thing will say as clear and present danger clear and present danger quote unquote based on my previous conduct you cannot brand somebody who hjasnt exhibited any previous conduct ON WHAT KIND OR WHAT MATERIAL WILL YOU be able to brand somebody. the first time offender thats what it is virgin publication is the biggest issue if there is a series of something then the matter stands on a different footing correct and mind you this is exactly what our freedom fighters actually did for the country that is right see what was lal bal pal in those days what lokmanya tilak did in maharashtra or you know in bengal and punjab was nothing but taking advantage of this what we call nationalistic movements was nothing but that in order to actually reach the people ..... no what i am saying is it is very difficult in the present mechanics even if you think of any mechannics that mechanics will not be something consistent with 19 1 A how intelligent the press is is can be seen during the emergency so called opposition papaer there used to be precensorship it had to be shown so then what that paper did was they

showed something blank that which is apparent doesn't interest you but that which is it interests you so people started asking what is what was that news about it happened even in tamil nadu ...[38.31] he has written an editorial on the news ..means dictator ... after the emergency where a person like justice lalit goes to a bookseller and asks for a constitution and bookseller drew himself to his full height it cannot be the judicial height... like katju and he says we don't sell periodicals you can go next door constitution was demoted to the status of a statute correct and frequently amended that's right in the emergency the power of free speech is open to is always seditious correct it stands against public order it has that you know when you say that even an individual has a right to say something against the establishment correct and when you say against the establishment it has it borders a thing distinction between what is seditious what is cessationist and what is purely nationalistic is something very very thin how will this impinge on judicial decision making powers it is you know that is where clear and present danger the that's right the clear and present danger is the test very difficult for any judicial organ to lay down any test and this happened in that one of the news media persons in chhattisgarh he was actually kept in prison and the supreme court released him under an order of the supreme court justice bedi presiding and that is exactly what they did see what ever he said you can't brand him to be that material to be so abhorrent or so seditious that you could actually penalise him somebody who says yes you must rebel against injustice that doesn't mean that there goes a story there goes a story after madan lal dhirga killed wylie in england there was a meeting to condemn madan lal dhirga there was one person attending that meeting and at the end of the meeting therefore the just started drafting the resolution this meeting therefore unanimously he held not unanimously that was savarkar that was savarkar and this is what they could do nothing to savarkar he said no i don't agree with it it can't be said unanimously it can't be represent no that you do whatever you want that word has to be deleted the word unanimously has to be deleted. that is the effect and they could not do see our entire freedom struggle is nothing but essentially dissemination of information and opinion informed opinion to general masses correct what gandhi did what is his essentially that non cooperation movement is nothing but that it is the voice against the establishment if you raise your voice against the establishment you think in an orderly fashion and nothing wrong about that but your voice against the establishment in order to overthrow the government or have seditious sort of element or cessationist sort of idea behind that then it becomes what is called normally quote unquote illegal action that is right ...[42.52] and also of the ... that's right the difference is they want it is not a ... issue it is more .. individuals more that will be definition moral truth is essentially a private cause or private action see 19 1 ais in extreme form if some words had been added to it to water it down then this may have been possible but they have clearly as justice lalit had pointed out they clearly carved out those categories that if these if the speech is not within these categories then the people have right to live right to blurt out anything say anything at all [43.48] in london hyde park you can go and say anything hyde park so therefore there is there has to be some outlet somewhere correct you can't choke the emotions of people in that sense therefore on the larger perspective it is certainly yes but we are thinking in terms of regulating it that is why that i actually my idea my assessment is

it is very difficult to regulate media on any parameter which can then take care of these parts very difficult going by the present mechanics that we have whatever mechanics they may devise we will certainly have to actually pass the test or muster under 19 1A is a different issue they went to the extent of saying take the newspapers case whose print whose site was to be regulated by the government express newspapers express newspapers they said that it is it amounts to breach of our article 19 1A right ... arasu it was taken off air for 3 days broadcasting something else ....45.06 this pathankot case they have not dealt ..... pb sawant pb sawant in that context is it that the forum for these private individuals ... on account of the press and so much so the press reporters in fact virtually in ..... blackmailing individuals or blackmailing the business houses ..... i quite see that but the exactly was the contention of the industrial house you know when pitted against one of the channels the channel was zee channel and the industry house was this jindal correct they were actually giving the news that jindal steel and everybody has been castigated in cag report now their version was that it is not so therefore the entire sort of the avalanche is nothing but defamatory and they were able to prove it at least on the first occasion so as to secure an injunctive relief .....that is a different i what i said is on the private front first and foremost pre publication censorship is no no correct triple sort of zero correct nothing post act or post incident correcting or punitive measures yes in that context i have a specific question see the the present day context of the society and the way it is happening we should also take the judicial notice of it in that context only how do you adjudicate the ... of the act i will very very good question see in rk anand's case what happened was there was a sting operation under which what was shown in tv was that witness was getting approached by the side of the defense in order to dilute the version to be given the next day in a court of law in rk anand was appearing as a defense counsel was actually subject matter of the that particular sting operation it was shown in tv and in the judgment justice aftab alam actually refers to that and says that perhaps the tapes which are being shown are not coming from credible source correct we don't know who was the first one who actually did this what happened to the original because if you go by the evidence act it is the original which is very very crucial the primary evidence is not forthcoming before the court we don't know if anybody has actually interpolated or some such thing but leave aside these questions this particular sting operation has done immense public good and this is my paraphrasing of that judgment that this is what the judgment of justice aftab alam speaking for the court is there you are right you know at times it may happen that the sting operation may perhaps be calculated to harm the reputation of somebody it could be it could not be in the interest of public in that sense it could be completely motivated and orchestrated as well but then perhaps we will have to have a clearer case to go into deeper into that issue there have been number of sting operations one happened in that ajit jogi's matter where correct from madhya pradesh or chhattisgarh so these are issues which have happened one happened with that school teacher from delhi it was completely sort of fake but these matters need to be taken up by the court of law of course it is the balancing act of course the private individuals reputation is no doubt sacrosanct it must be maintained no doubt about it but if we go by rk anand view public good is also something which needs to be balanced in that sense if the idea of yours is to harm or

calculating to put the entire case of prosecution at a reduced level that you are trying to influence a witness in a very sensational matter then that is also something which the public have a right to know and that's why the judgment does deal with this issue and they say perhaps in a later case we may consider that there are also lines to the effect that this also needs to be looked into as some kind of an in-house management for all the channels to devise as a methodology or come out with mechanics but then the court left it at that. One more case to be mentioned here in a case where the traitor wanted to limit the duration of the advertisement in the case of TV there also the matter is before the Delhi High Court 19 1A has been used that is freedom of speech I think the Indian Express the Sakal cases this thing of its under litigation ..... that is more or less over because Barc has been formed the industry body has been formed .....supposing if let's say .. wants to have a television channel... that amounts to free speech of course yes nothing wrong with that absolutely nothing see that is precisely why so many Aastha channel so many channels which are there correct they are there is nothing wrong with that every individual has a right of free expression and dissemination of his idea correct ..propagate his views nothing wrong in that see so long as you are within the confines of the established sort of parameters there is a recommendation they made a recommendation is a different thing whether it stands the test of law is another thank you gentlemen this brings us to the end of the day which has been heavy can we have a big round of applause I must congratulate everyone you know I enjoyed these sessions like anything thank you so much and before we part we must congratulate the lady who actually did this wonderful job

## **Session 15**

J. VS Sirpurkar: A very good morning on the first session of the last day of the seminar which has gone on for 4 days, thanks to the Director and thanks to Shruti. The public utilities and natural resources, public utilities have always been the subject of discussion particularly in the middle class, upper class is alright, the down trodden in this country well they are hardly cared for in so far as the utilities are concerned but the scene is changing very fast, it's not as if a particular class is away or has no means to reach the public utilities. In so far as the natural resources are concerned, the natural resources is essentially an issue for the general public, the first among the natural resources is air, the second is water. There were days when the public used to say Mr. So and so spent money in his daughter's marriage like water and lo and behold water became scarce day by day, people then could have said that so and so sold the money like Air, Air has also become a rare commodity rather the pure air has become a very rare commodity. Water when we speak about the water, air pollution we will come to that, come to Delhi and you will realise what air pollution is when you start coughing the moment step on the terminal of the Airport and start breathing, they say now death by breath is the new concept now. What I would invite your attention is particularly in relation to my state the state of Maharashtra. It so happened that the area of Vidarbha was put along with Maharashtra. In Fazal Ali commission of 1956 in that report, two areas two states that is Vidarbha and Saurashtra, they were recommended to be independent states.

in the election Vidarbha gave 66 MLAs to the then ruling party but the ruling party did not do so well in rest of the maharashtra with the result that if the ruling party had to survive in the Maharashtra Assembly, till then it was not Maharashtra, it was a bilingual state of Gujarat and Bombay, it was all a fight over Bombay and all that culminated into the 1960, the re organisation of State's Act, created this Bilingual state but ultimately thanks to the agitation in which 105 died at Flora fountains Firing, in those days they used to say Morarji Desai Bumbai ka kasai, it used to be the.. and sanyukt Maharashtra Samiti was in full power, thanks to its agitation, State of Maharashtra came into being but in the act Vidarbha joined the state of Maharashtra or rather was persuaded by the senior Congress leaders to join, I am telling there is reason why I am stating all this. It so happened then, even marathwada which was earlier the part of the Nizam's state,... was also persuaded to join and a total Marathi speaking area , one language, one state was the formula i dont know for what reasons because it doesnt apply to hindi there are as many as about 4-5 states which speak hindi, vidarbha was predominantly a hindi speaking area and a marathi speaking area be that as it may Vidarbha was persuaded almost coerced to join Maharashtra. There was a nagpur pact, under nagpur pact, they were to give the one session of ... which is still held in Nagpur and the status of a second capital to Nagpur. Fine, so far so fine, the main reason why vidarbha was joined because otherwise the congress party would have gone in minority in Maharashtra assembly had vidarbha been separated. on the bass of these 66 MLAs they ruled and they formed a ministry Y V Chawan became the first CM. Then the real game started, then the ministries basically irrigation ministry, irrigation ministry was kept with the ministers who came from western Maharashtra. They beautifully managed to turn all the water of Krishna, Godavari, which is even at times Ven Ganga towards the western with the result that Vidarbha and Marathwada became completely dry, entirely depending upon the dry crops. Practically no irrigation projects to Vidarbha and Marathwada. They started shouting and then they started getting some hera and there in the name only with the result that today the situation is that Vidarbha is completely dry, Marathwada is more dry. This actually comes, this raises the question of a natural resource water. Farmer suicides in Marathwada thousands of farmers have committed suicide and there was or looked after only for the sake of going there and paying say 5000-10000 to that widow and getting one self photograph with, its a stark reality. Even as regards this is all about water and why water to western Maharashtra because they had the sugar cane crop which drinks water. No proper coordination, no proper implementation of which crop should be taken in what proportion. 5 acres wala farmer in western maharashtra only relying on the sugar cane crop would keep bike, car whereas 5 acre wala farmer in Vidarbha would not be even able to send his son for education. This has impacted the whole, and therefore there was a need to not only manage agriculture but this one sided irrigation program somebody should have paid attention. Unfortunately, the leaders in Vidarbha failed miserably at that, they were only interested in getting the SDO transferred from one Taluk to another Taluk and they were happy if the transfer was effected as per the wish of the MLA. These are the stark realities of life. In so far as the environment is concerned, first it started being realized in Delhi thanks to the CNG judgment in SC Air, the natural resource. Then they started creating electricity from but the difficulty is that still till today we don't realize the effect

of pollution because it is like our blood pressure or diabetes which is a slow killer. I invite Professor Baxi to highlight these subjects as to what should have been the legislation, what should have been the degree of regulation, what should have been the direction in which our legislatures should have moved. Over to professor Baxi.

Professor Baxi: It is a very difficult assignment, he undertakes them and executes them and he expects others to do no less, that is difficult but I will try. Sorry I have to go little early because I have to catch a plane ...The judge said J. Sirpurkar said most important thing, think about natural resources, there are number of questions but the most important question which he discussed in relation to water but relates to Maharashtra and Vidarbha is what I call geographical injustice and ... How are these geographies created and there are in India, India is full of politically created geographies of righteousness and what should courts and other people do when politics is geared to create geographies of deprivation of rights deprivation of justice, this is a clear case, not a case where a small statutes like this act and that act remained unsolved, pollution act, or environment act, these are useful things but they are not the things designed to overcome the political geographies of injustice and this is a very important area how to interpret natural resources law to ...the central question is the ... very important even for a person like me who was not properly introduced rightly saw that I have introduced myself I would say I possess the ...none of you ever possessed its called MPP. MPP is an abbreviation for Master in Private performances even MPP cannot answer the question. I am a Master of private .. performances and I am very proud of that as a citizen. I personally can be interested in law of natural resources and the government monopoly over them. Way back before many of you were perhaps born in 1964...I met a professor, professor Zouro who was Japanese American and all his life professor Zouto had worked on big books on natural resources law. Our legal position that time there was not much to write... now the national law schools should be in progress some what but even then it did not much to write whole about in terms of natural resources. We have ... energy with that move is water simply pollution we dont think natural resources, we dont ask conceptual questions in classroom, we dont ask policy questions. There is a big and despite my positions of educational leadership, I was not able to persuade my colleagues and my former students, now who are leading institutions including national law schools to develop a niche market as it were, a niche area of scholarship for natural resources law and that's why you don't have any writing... worth the name , we have writing on constitutional law, IPR, international law all the nazi subjects but nobody touches the lower levels subjects, I would tell... lower level subjects. We get indirectly introduced and that's a small success, it is indirect introduce natural resources law, without calling as such, we introduce for example the Constitution, teaching of Constitution, researching constitution... not in the way J. Sirpurkar ... for example the qusetion of sharing equitable sharing of ... always interested me. Assam and Gujarat are two petroleum rich states,they are petroleum product rich states, the gulf of khambata in assam and then they get to the awards of finance commission a very meagre percentage of royalties from their won resources. The Gujarat in fact passed a law, then deeply certain royalties for petroleum product should come to the state and the law was cut down by the ...This morning I read a newspaoer item the GAIL and the union of India, I read the article on this prime minister who just

gone to Assam and there was something called Assam accord and then I as not so old I was young then. Okay the Assam accord was signed in the seventies, or late sixties, there have been seven prime ministers to have relaid the same foundations stone for Assam gas peppers ltd. and the project is estimated recently at 9999 crores, Assam Gas peppers ltd., a foundation stone was again laid by present prime minister and he said unlike the previous prime minister, I am going to switch off that this project is in the light of the day, 31 years as against the beautiful norms laid down by the SC that you are holding this in public trust, you are holding natural resources, state is holding in public trust, article 14 applies, article 39 applies, the executive does what it lacks it announces a project and does not fulfill it. The states are full of foundation stones laid down by prime ministers and chief ministers

Participant:...

Prof. Baxi: but only contribution as vice chancellor of both the universities which i have beheaded was never lay foundation stone. If you lay foundation stone you dont have time to construct a building, so I say I am not the political person I will not lay foundation stones, though my colleagues laid i, it is not my concern. Similarly SC while we are talking, they were ... your verdict on February 3rd or 4th...and then so SC said ...contact with the union government and GAIL. To lay down a pipe line across 6 states, Tamil Nadu has resented this pipeline on the grounds various grounds one of it being non compliance. Madras HC gave a judgment upholding the contact. SC also upheld, I want to know why you did what you did if you have liberty to tell me, because it is a fact that compensation... under the Manmohan Singh government, compensation is a requisite act which we teach so the SC took ... there is a contact sustained the HC which said well there is a contact between union government and GAIL, how does the state come in. The SC speak in 2016 this was a judgment given by J. Thakore. ...when he was still a judge of the SC, when both J.Thakore the very learned man speaks chaste urdu, he learnt urdu rather than Hindi in Kashmir, I did not know that he was the son of DD Thakore and ... So I met Thakore sahab and I said I am not a good anthropologist, not a very good lawyer I have very weak sense of kinship I don't remember relations who is related to whom but do you know a man who is ...he said I am his son and I said I am very embarrassed... because... so he is a very nice man, so judge Bhanumati, the three of them upheld the Madras HC decision, ignoring and what is more they say the appeal SLP or appeal against Madras HC... When since when did demand for compensation for land acquired by state populism, it appears to me that there is a law of land acquisition there is land law now 80% 70% I did not go to the judgment but in our SC betrays its own jurisprudence on natural resources that's the point I wish to make. HC say and the ...of the contract between a statutory agency, a regulatory agency and the union ministry, the conflict is only incidental to the question, it is what the contract does that is the question.

Participant: That was not

Prof. Baxi: the objection was to the price compensation paid which was in the market value of 21224 crores and the compensation was 215 lacs and this is the story of displacement. What does the ... I am not taking sides of the judgment, may be you are right but I am taking a view that the people cant to the HC and SC against the executive, where do they go? It is population to access justice, how can SC give smashing advisory opinion to 2g gave a 2g judgment and said state is liable under article 14, article 19, article 39, article 21 and everything suddenly withdraw into a shell saying that this is a conflict so there is a problem of land acquisition. I argued till I got ill and I couldn't go to the SC, now argued as citizen before the SC in Narmada case. The ... claimed that it cannot fulfill the Narmada award land for land because it had no land to give. Now this is the largest state in the world adjoining 7 other state, now chhattisgarh is carved out, I mean it is not how much land is institute, 62 acres that it has no land to give to persons whose rights it is, who are displaced by Narmada, so I argued as a citizen ...state cannot take the benefit then that will take the burden under the settlement, the state Madhya Pradesh, Maharashtra and Gujarat agreed to the narmada case that I will record the share and cash will never substitute for the land and what cash could you give. Madhya Pradesh HC investigating charges of corruption and introduced two depots and it has been found that there has been very little distribution, very little contribution that fake compensation receipts were taken for larger amount than actually cash money that was paid.

Participant: by the time money is made, the land is taken and the ...

Prof. Baxi: That's why Manmohan Singh or the NSE bill law which revised land bills now act 2013 is much more just law. Just to build the background Take one more instance I am too early in the morning but I cannot describe it in any other way is sovereignty all shit? In Madhya Pradesh HC judgment, by J Dixit, I was told by those who knew him not to publish articles, I did not publish its all sovereignty or shit. What the Lordship held or he is quiet in robust self, he would survive without my writing the article he would survive that also that is regularly survive what I write I write well established...I wrote an article on J. Dixit and Bhopal and Jabalpur his Lordship held and its a very interesting, minor forest produce under the forest act belongs to the state. Now I am a tribal, living in that area, I regularly collect the leaves which drop, cattle droppings I did and I live in there and fro the leaves I make ...so they are not taken from me resource they are dropped acttle shit, leaves dropping my ancestors, I did it my children will do it as tribals, that is my only source of ajivika source of income, the judge said no I have a committed a forest offence and I should go for 3 years to jail and I was sentenced. Now he was forwarding rationality that the state is the owner of the is the sovereign and state possesses ownership of the forest. I asked a question without the people living there are they not going to ...any right to live under article 21, has the state done anything to make them live with dignity and the answer is no, I mean this I dont keep it back, so it is a fact. So ... the first concept that many practical realities are ...to say sovereignty is a shit is a bit much. So in Montevideo convention in 1923, montevideo convention defined state, its main purpose is recognition of states and montevideo convention defined a state, to be defined by 4 components of international law subject to when does state become subject of international law, the monetvedio convention said based on territory population effective government a

government which is ...legitimate monopoly of course, state is a legitimate monopoly for people and resources so state in order to exist, it was not a state till 1947 the power to British dominion, we became state when we began to control our territory our population, etc. so we define, so the courts and justices define state only its reference to legitimate monopoly of violence or should they define it in terms of natural resources who has the sovereignty over natural resources very early decision of the SC Budakor Coal Company Ltd v. Union, very early judgment,...I don't remember now, the decision was or later ... The SC very early made a distinction between legal sovereignty and popular sovereignty. The state is the legal sovereign of natural resources but people are the ultimate sovereign political sovereign over natural resources and there ...in 2g although they don't refer to the past judicial decisions. Laws don't read earlier decisions what can the judges do, they also don't try to, sometimes they do, sometimes they don't. So the question is if the state own legally the parliament on natural resources, what happens to the people, why does the state own it. Now one I said is vikas, development which law agrees and its decision of MAadras, Tamil Nadu, that in order to have a luck you must destroy, there is no development without destruction. You destroy the forest to build a dam, so somebody has to bear the cost of development, no vikas without vinash, agree? I agree with NJES logic. I agree with that No vinash no vikas, we must destroy, in fact capitalist... in 1930 has a system of creative destruction, creative destruction you can't have capital, you can't have roads, airplanes, Lordship has ... unless he destroy, unless you take not the banjar zameen but a real zameen from the farmers and then pay compensation or you deprive them of water and there could be suicide. Now these are free. Again I go back to the question, what is a just destruction, or what is just development. This is the question that we have to. All that Gandhi used to say and this is very important for me and for you I am sure it would come, he said I did not want and the emphasis is here on word freedom, I don't want just I want freedom, but he used to say I want just freedom. The emphasis is on just not freedom. I don't just want freedom I want just freedom for India. How do executive legislature and judiciary attain this just freedom, that's the question of development. Nobody is opposed to you your taking of my leg or lamp nobody is opposed to destruction if it is creative but when does it become creative and this is where the definitions in part 4 become very important...article 39 which gave in to just state. So I now come to conceptual questions, question of some importance, what is a natural resource? . Now there is no criteria, there is some definition given in the 2g case some approach to 2g case and the court lemons and we come to that. So conceptual question one what is natural resource, what are they, to whom do they belong, how are these to be classified, these are judicial questions and if you don't do your job then God help India and its Parliament, that's all I can say. What is renewable resource and what is non renewable resource, what is a scarce resource and what is an abundant resource. Is spectrum a resource at all, 2g case... and this spectrum is a scarce resource where do they get this from, I wanted to ask this question yesterday when TRAI was present, when I said I would not ...each spectrum at all as a resource, it doesn't exist in nature I think it comes as resource ... Can the state do anything it likes with natural resources or are there some constitutional limits on natural resources and what are these and how are these to be enforced, these are the concerned few questions with the judges I think do have to refer by in their judgments. There is also an article at

the ... I am not an old citizen, it is our fundamental duty so 51A and your third schedule also, you are both together in this. One man says, the professors can ask this question, there is a contact when this matter ends or I would like to decide this way, they are also.. I can only say thank you judge but if you want to reason with me, then you have to ask this question ... No body can say anything, citizens stop in that case when judicial powers begin, they declare the law that is the SC declares the law. So if we have to reason together, we must ask such questions. In 2g and slide 2 , there are 2 opinions, one was the judgment other was the re opinion, if I may rest on a secret... the advisory opinion is due to me, I ran into that law minister who is a good friend of mine, Salman khursid law minister in then union government and I said Salman what is this non sense of auction and duty and the coercion behind all that stuff, I am not a politician I said I am a civilian, this acknowledgement is entirely superfluous, you cannot ... evrybody is a politician or does not exist, so I said I am not a politician but why dont you if you are worried, I wrote an article good law but poor economics, said why join the Indian express on the 2g judgment, it was a good law. So I said if you are worried about first, preserve first first come first serve principle, an auction is not a principle for all matter, why didnt you go hold by the opinion, I certainly didnt buy of that opinion. So there are two things in 2g, judgment and advisory opinion. What did the judgment say, the first paragraph said and I emphasise the third line, every man is having immediate duty to mankind. Natural resources are elements having intrinsic utility to mankind. Now what thing is not a resource, what is that which is not of intrinsic usefulness human kind. There is only thing they say in natural resource value is lost but one ...rest is the amount of material available and demand for it so it is a market concept. A natural resource is not natural, it is the market uses. Further you look at the second quotation, natural resources belong to the people but ...natural resources can be considered as national assets so non market value now you should consider resource a national asset. You can regulate it because trust ones are market assest, you can regulate it if you consider it a national asset. What is differnce between the two I dont know but thats what the lordships say. The state is empowered to distribute natural resources, the state is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which is detrimental to public interest. And then they expound article , what is common good and what is common restraints. Article 39, this is the old indian theory, classical hindu theory to which your Lordship preferred which is the panch mahabudha, a land prithvi , jal vayu akash, land water air 5 is not relevant becuase 5 is not declared a national asset, national liability I dont know its used in industry as well so, I used to jokingly say panch maha bhuta as in ghost bhuta in sanskrit means ghost, so I dont know what is what but that's a diffrent matter but panch mahabhuta theory in classical hindu jurisprudence, early in the jurisprudence, it is said, the state is a king is a trustee, is sovereign not to do as he pleases, a sovereign is ultimately arbitrary but here the court says, yoy are sovereign, parliament is sovereign, state is sovereign, we dont come your domain provided you observe certain obligations of article 14 of transparency, of responsbilty of equality, of serving the common good and common detriment. Now what does the Lordships of Madras High Court sustain I dont know what does they sustain the market value idea, market resource idea or social reponse or natural resources idea I dont know I will have to read your judgment I have ot read it I just got

it from the newspaper. What do we sustain, do we sustain the idea of national asset or do we sustain the idea of market assets, that's the main issue here between vikas and vinash here. I will not engage in other stop here, it is an advisory opinion, this is for you to ... although I advised Salman I did not know he would be so quick to rush to the cabinet and get Manmohan Singh and the President's approval. I personally don't think that the way it was showing the petition is actually maintainable, it was argued by prominent lawyers before the court that this advisory opinion you should not entertain because it is the disguise of a review, let the state file a review, it ... I don't think it's maintainable as it was for, there are 6 or 7 questions that the president asked and it gives you a bad impression but I will not go into that. There is ... discussion on the opinion but which you must again look at if you look at it once, you look at it again again again because it is very important but I will not discuss it. It is about what is a law declared by the SC of India and your Lordship initially say law is a ratio of the case, what is the ratio of Keshvananda Bharti, your Lordship deliver what is the ratio of Royappa. I did not want to say that there is no such thing as ratio but I want to say with all the emphasis by command, there are multiple ratios of a case, as many ratios as ... there is nothing that is really binding on the court. So please look at this 12th paragraph of this opinion which is particularly important for HC. The court ... plus they say ratio means the principle of ... then he says the principle of the case which is different from the ratio the principle that you by the narrow holding, principle to stop prejudice but principles always buy that principle of the case. The you say you... I was really startled reading this opinion this morning, it says my worthy opinion, that is not mine, the President of India it's an opinion but it binds all the HC judges, now can advisory opinion of a SC bind HC? Does it declare law on the article 141, it's for you to consider because 143 of the Constitution, the SC can declare an opinion. It may accept the reference and give an opinion, it may accept some questions and answer some others and not answer some others so what is binding about advisory opinion, how does 143 relate to 141, the law declared by the SC. J. Sirourkar might have a different opinion on this but I am too saying that the SC is absolutely right in saying and the damages are we do not prescribe auctions as a principle for state divested all these resources. It can modulate, it can fashion its own principles and it says it can divest some resources dispose of some resources by first come first serve principle but not spectrum, it's a scarce resource, others you can dilute can devise your own principles on that. So what is then the meaning of public trust, if you are not willing to give a binding decision as to what constitutes public trust, then how does your observation on what is binding and not binding relate to me, it is the very task in the future with relation to natural resources and I am talking about public utilities because at that point of time public utilities also attract the like railways like postal service, attract the doctrine of public trust. When the doctrine of public trust possess natural resources law or public utilities law, conflict with other doctrine that Lordships have enunciated namely the doctrine of legitimate expectation which is to prevail, the doctrine of promissory estoppel, is the trust going to prevail, so these are very important issues, so I think ... and also before and to quote one more sentence there is a strong legisprudence of accountability which is growing not just jurisprudence and we should look at we will be aware of that legisprudence, for example Mr. Bansal who was an administrator in UP was made to resign on the ground that his nephew had moved... Sushma

Swaraj, Arun Jaitley were then leaders of opposition made as many as 5 cabinet ministers resign, not because they had done anything wrong but they were accountable to Parliament. Bansal was.. the Ashwini Kumar from punjab was a nice lawyer, ashwini was this law minister he read some affidavit in some case which was to be filed in the SC to the draft prepared and Sushma Swaraj said that this is very improper for law minister to read affidavits and correct them when the case is pending in the court. They wont let the Parliament function. That there is a growing jurisprudence, that did not work in the vyapam scam and did not work in the sushma swaraj and IPL case but there is a 5 ministers in one government had to resign where is that mechanism of accountability in legislature. Whatever the politics of it, in one time it affects that you must bear in mind that you take of natural resources because that is a very important way of exercising demands of accountability in the name of the people. So I would like to say 2 things one, if you try to develop natural resources law in the future and public utilities law in the future then I do not think good law will make more economics. There is something called constitutional economics and there is something called unconstitutional economics, unconstitutional economics is those who think of development, who worship development, ... you cant develop it as you fancy, there has to certain norms for that Article 79 government detriment, public trust, you share a passport , but there are two passports but you dont implement the policy in one of the article 38 says it shall be a fundamental duty of the state paramount to the constitutionality of state to implement this directives in making up laws and policy, that is the duty under 38 so I do not think judges amke good laws and poor ecomois, in both the 2g cases they have made good law and good economics, good constitutional economics and constitutional economics is normative economics which stands higher than economic economics. The economic series people do like Manmohan singh or Mr. Sen that it is normative theory of economics where economics cannot as science exist, it is second to the constitutional economics of article 39 and this is something that the SC does and secondly and finally, I was saying only this much. Whatever you may say about the SC and we can say a lot even in your presence but whatever we may say, in this area it remains a leader by and large, by and large it says its a padagorg for constitutional freedom and responsibility or all courts are paedagorgs, HCs as well, padaegorgs for freedom and responsibility both and once that is I think natural resources law will be fully constitutionalised it is in adequately constitutionalised now. Thank you.

Mr. Sinha: There is just one response. The issue was raised professor by you about the ratio and opinion and the value of a ratio as we understand is that it must be obeyed that is the law of the land, and if you look at article 144 of the constitution all civil authorities and judicial authorities are expected to act in aid of the SC of India and 144 professor subject to correction doesnt make a difference between either ratio or opinion therefore to that extent even an opinion in an advisory jurisdiction is executable as much as a ratio is.

Prof. Baxi: You have raised a very good question indeed, I dont know the answer Jaiprakash asked the same question I told ...is the defense of superior order justifiable to 144. Suppose I am in Kashmir, today my question in north east is a live question politically and people who raise it are

normally called traitors and that risk I would have to take just to analyse the problem, what does 144 mean is a very big question and there can be several... are you bound to follow the law declared by the SC then what is the law be called it is ratio it is considered orbiter ... SC manages to tie itself with the law start digging population only stare decisis.

Participant: ...

Prof. Baxi: in Keshvanand there is a very good discussion

Participant: it would make sense what is the interpretation, if really have to interpret the language what is there to interpret...

Prof. Baxi: there is a discussion as you can look at it, there are bounded 300 pages only in Keshvanand Bharti, just three Dwiwedi, Mathew and J. Chdrachud opinions, three very good opinions which discuss the basis of legal obligation to obey the law and they develop, they say my dear that you generally develop any social contract, there is social contract with people and the state. And Beg also very important and Prof, Marker four opinions very important. In that they are the Ray sixth, perhaps the dissenting because what is Kashvanaad is ... so despite the summary ratio...what is Keshvanad's advisory opinion I dont know because it says petitions before the SC there are brought in the Keshvanada, is disposed off in a corner, there were six petitions apart from Keshvanada and I had tried very hard to find ... now i stopped doing it... so it at least disguised it by the opinion I dont say it too loudly for political reasons but technically it is disguised by the opinion, the rope ... it does not bind anybody actually but without saying too loudly because we are all beleived in separation of power all things nice things, it does not matter why dont we say it but you are right, judges impose a constitutional discipline and that all taken at best to, constitutional discipline upon those win political power, that's the idea of the constitution. If judges decide not to impose constitutional discipline, then there should be no discipline on power, their lordships, are free to do that but there are problems with that procedure, there are clearly very many problem, article 3rd schedule is istelf is a problem then, what I have taken owes to uphold the constitution. What is the meaning of the constitution, I wanted ... but I ran out of time I am carrying this book the article by Jack... it is difficult to read many times, its impossible to read...he said what is a text and what is an interpretation of a text. He says a text is narration, and you can read it a story in several pages, a story ... interpretation is the heart of giving a structure to the text and he as a special bud which can use english also it about called deborderment. ...the interpretation is the art of debordering it to make it very different from what the text is... Long time ago I had to speak at Jamia Milia University on politics as destiny it is in my human rights book and I said not in the meaning of constitution it says that politics will not be destiny, destiny will be shaped by the constitution, my destiny as PM or CM cannot check or the governor, my destiny as a judge or student of law is shaped by the text, so what we have got our narrative rights, Article 21 is right to tell stories, its not what the text says it is, my article 14 I snot right to equality but my right to narrate my equality so Hardik Patel now says ... so narrative rights are the rights who I am what

do I want I can put under liberty and life whatever I want to put and it is for the lordships to decide... Interpretation occurs, I ... I 161, 163 constitutional law, constitutional interpretation, constitutional theory, its simple and other 9 I wouldnt take you there but I have decomposed 162 is constitutional interpretation, executive does the interpretation with constitution, ... media interprets the constitution, that is two, social movements interpret the constitution that is three, ... groups interpret the constitution, 160 districts have propounded...only so, you cannot imagine citizens interpret the constitution, Jaiprakash interpret the constitution, he was reading constitution, now the question before the class, my students and me is how is judicial interpretation different from this other comprehensive interpretation? The judges declare the law as they think fit, we declare what the law ought to be, is it possible to understand the american constitution in the 20th century without ...SC changed the law, it is Luther King and the small... who changed the law, is it possible to understand the Indian constitution without the Gandhi or Jayprakash Narayan, I said all have twin service today and i see many in their shoe are lineal descendants of Jay prakash Narayan, whether they agree or they are ... when they are progressive they listen to what people remind, people ... and what is yesterday's movement interpretation of citizens representation is tomorrow's constitutional law, demosprudence how did it arise, we went before the SC, we argued, other people's constitutional rights violated, my students argued, my colleagues argued, students and teachers, and journalist, the ...in the first PIL case, he said why are you here, how dare you write a letter to us and I was wearing a shirt and the chappals, I did not know how to dress before a judge, I was a citizen I kept my collar open and my pipe which I could not then smoke in the SC, its when ... complete contempt of not of the authority of the court but the different people, and what did Chandrachud ask me , he said why are you here and ...I said we have just written a letter to you its your wish to convert to writ petition but I said ...seven page letter for a good cause, legal aid and admire the sons in that letter, their stutigan I dont mention the judge, she was sitting judge, sh wrote letter to Mr. Gandhi and I said if judges can write letters to PM why cant citizens write letters to judge,the Lordship did not pursue the letter then I said My Lord you are mistaken in the interpretation of the constitution, I said look at the Preamble says our self to be a socialist, secular, republic now what, whole of common law is based on legation of republic, the common law or the standing law and what is the meaning of socialist. All the bourgeois law is ...a jduge could be a judge of the HC or Sc you have to have certain qualifications and about the qualification is you must be a citizen of India so why cant a citizen write to another citizen, a citizen judge or any citizen we are all citizens and that's why we are republic and that's how we grow up against the teeth of the existing jurisprudence, so in demosprudence we always innovate, there is no such thing, my colleagues Stainly Fish wrote a book 'is there a text in the curse', he is a ...and Stainly Fisg developed and then I edged him to turn to law as a ... it came to a law school and taught first year law students and he wrote a very nice book called 'there is no such thing as freedom of speech and its a good thing too', its a very good book and Stainly Fresh used to say that interpretation is ceaseless, it never stops, interpretation is ongoing in the society you cannot stop it, some body or the other ...interpretation is a seasonal activity and he said a post modernist is one, a good person is one who does not deny foundations but says that foundations are to be constantly renegotiated,

you must prepare and renegotiate the foundations not just assume that they are foundations, this deborderment interpretation judicial interpretation is never procedure bound, it relies on procedure here and there, law declared, law made but essentially, chalti ka nam gadi.

Participant: there is an interesting case in an Austraian court professor where a man's property was taken away and without paying earnest compensation and there was nothing in the written code which prevented the state from exercising its powers of eminent domain to take over the property so his counsel ultimately gave an argument which went down well with the courts and in favor of the person deprived, he says it goes gagingt the vibe of the constitution and that vibe of the constitution argument has prevailed and said that this is teh only document which doesn't not come with a users manual.

Prof. Baxi: ...

## **Session 16 & 17**

J. Sirpurkar: So welcome to the penultimate session of this seminar and I have to speak on role of sports and regulators. In India when we speak of sports, the first sport that comes to our mind is not cricket, hockey, football, soccer or kabaddi, the first sort that comes to my mind is politics. If there was, if politics was made a part of Olympics we would be running away with all the gold medals. that is not the sports in which Shruti wants us to address ourselves. Before going to cricket I would like to go the sporting history of India. In sporting history, our brightest period was winning of 8 gold medals in Olympic hockey, that was our brightest and golden era of history that in row we won 8 gold medals and then thanks to the politicians who started heading the sporting area, we lost a place last 8 to play Olympics also.

Participant: ...

J. Sirpurkar: That is still a record and Major Dhyanchand then was, his stick was seized by Hitler to see whether, how can he carry the ball like this, then I must say the contribution of Punjab, Ajit pal singh, Balbir Singh all the Stalwarts in the game of hockey is just unparallel. Similar is the contribution of the Orissa players, what I want to urge is Dhanraj Pillai for that matter, even Maharashtra for that matter, Bandu Patil used to be our goal keeper in Olympics. But we dont really concentrate on Hockey, Hockey is after all a very few people know that the sport of Badminton was originated in India at Pune, very few people know this. The moment we started formulating Hockey Federation and the moment politicians and bg police officers like KPS Gill started heading those hockey federations we started sliding in hockey. The moment we started formulating Badminton association of India BAI, its only now that we have Saina Nehwal so on and so forth. That is not because of the federation, that is in spite of the Federation I would like to put it like that, that means in spite of the federation, our players are doing well. Sania is doing well

in tennis, similarly shooting also. In short, whenever there is any concentrated effort, I would call it concentrated effort to channelize and control the sports, the standard goes down. But that did not go down in cricket. Cricket is a stark exception to the rule that wherever the politicians entered the standard slid down, on the other hand, it was because of the money involved in cricket that the people started looking, the politicians started looking at the game. The first Politician I remember to pay attention was none else but the CM of Maharashtra then, Vilas Rao Deshmukh. Maharashtra stalwarts, NKP Salve, Vilas Rao Deshmukh, Manohar Joshi, Sharad Pawar, Arun Jaitley you can't believe the politicians, there was a huge following, there was a huge money and then number of questions started surfacing on the cricketing background the first case I remember is 1995 SC where J. Sawant for the first time wrote a judgment, a very landmark judgment that the transmission of waves belongs to the state not these organisations, they will have to regulate ... the Doordarshan rights so on and so forth, Sawant wrote a beautiful judgment in 1995 where he held that those waves were a natural resource were a property of the nation, then came the question further as to what is the status of these organisations, particularly the BCCI. Now you all will remember that the BCCI selects the Test team, the player who takes part in the tests has the India, he wears a blazer depicting colour India tricolour. The first such question came in Zee Telefilms case where it was claimed that BCCI is a state. Very truly the Government took the stand that BCCI is a state, they naturally pleaded that look, they are the sole controllers of the game, they play for India, the team is known as Indian team, they only select, they only pay, well we may not be paying anything to BCCI, we may not be spending anything but in so far as these players are concerned, they are known by their nationality, therefore it is called state, SC said no with 3 against 2 verdict. The plea that BCCI was a state and therefore the writ petition lay against it was shot dead. Fortunately enough there was no serious discussion as to whether, the writ petition lay against the BCCI, they stopped short of that. In his dissenting judgment J. Sinha very beautifully pressed that the BCCI is none other than a state. There is a beautiful paper that I came across thanks to Shruti and Geeta, by Aditya Sondhi, which commented about the judgment in ZEE telefilms. It is very strongly argued by the author that Zee Telefilms requires a reconsideration, that it is not correctly decided. The author has relied on the stand taken by the BCCI, he has also considered the stand taken by the Union of India in that case. The author has described the pro bonis in these words- in view of the preliminary comments about the hypothesis that one begins with is that the BCCI or any other organisation that officially governs and promoted cricket in India, ought to be a State and objective that can be directly achieved by government of India by enacting a law to deal with the establishment or recognition as the case may be of such body and its powers and functions this obviates the discussion that whether BCCI which is today the sole entity officially controlling cricket in India vis a vis the International Cricket Council that is ICC is state on account of its being any other authority within the meaning of Article 12 constitution of India. I must congratulate the author of this paper for the crystal clear ideas, if not for anything. He has given number of reasons as to why BCCI ought to be a state because the first reason that he gives and he relies on the judgment of Karnataka holding the BAIL, this was the subject I used to deal with once in my previous avatar as the Chairman of the Airport Economic Regulatory Authority where

the Karnataka HC has held that the Bangalore International Airport Limited though a company should be treated to be a state because it was doing a state function of running the Airport. Then the author moves and gives some other reasons which is regulation of the right of viewers to witness the match on television and other media and at the internet, b) right of public to attend and witness the match at the stadium by purchasing tickets for value including their right to enter the stadium upon complying with the security protocol and their right to remain in the stadium subject to compliance with ICC anti racism code, c) right of players to part take the match subject to the self imposed standards of fitness, competence and discipline, coupled with ICC regulations in respect of doping or using banned performance enhancing substances and general discipline as codified under the ICC code. The other 4 reasons are the provision of security for the players which has amused farfetched proportions, e) provision of security in order of the spectators in order of spectators with tens of thousands of lives and so on and so forth, control and management of infrastructure and regulation of ancillary activities such as awarding television contracts. For all these reasons the author argues finally that its a time that the government should come up with a law. Today there is no law as I have pointed out what is the structure of the other games? take any game Hockey, there is a national body, national body is selected on the basis if state representatives, state representatives get elected on the basis of the clubs which are affiliated to them in that particular state and that is how the games of the whole, then any tournament is recognised yes this is to be rated as a tournament which has been approved of by the national body and then this national body gets affiliated with the world body, I am not frankly aware of whether as to a world body of badminton is there or not, in all probability there is not, in hockey it may be because they keep changing the rules to use, to suit the European Hockey and not the Indian style hockey... but the fact of the matter is that though there is such an infrastructure in cricket, in cricket, the various interests created are conflicting at times with the BCCI. Now see how the anomaly comes, take Maharashtra, Maharashtra has three representatives, one representative from BCA present Mr. Shashank Manohar is representative from VCZ, Vidharbha Cricket Association, then there is Maharashtra Cricket association, MCA through which Vilas Rao Deshmukh frond its entry in the BCCI, and third is the Bombay itself. Bombay owns the Brabon stadium the famous brabon stadium where test matches used to take place. Andhra Pradesh two teams,Rajasthatn also two teams, Rajasthan Cricket club of which Lalit modi was the representative. In short, the whole thing depended upon as to whether these bodies could be clubbed, could be named, could be nomenclatured as a state. My personal opinion used to count and it doesnt count any more but my personal opinion is that it is a state. Then came the scams in cricket IPL and then there were writ petitions filed with the Bihar association in Bombay HC, where basically the two judges of the Madras HC Mr. Jairam Chuata, who was other, Srini

Participant: ...

J. Sirpurkar: No no no, I am not on that, i am on the IPL scam, then the BCCI appointed a two judge body, R. Balasubramanum and Jairaim Chuata, both my very close friends as they were my colleagues in the Madras HC. Bihar Association filed a writ petition before the Bomaby HC that

these two judges should be removed probably afraid that they were under the influence of Mr. Srinivasan probably. Apparently, they gave some other reason, they said the constitution of the inquiry committee is not proper, it is not in keeping with the various clauses of the governing document. Bombay HC agreed with that the constitution of the Committee is not proper, they retired both were retired, J. Balasubramaniam is a active practitioner now in SC, have appeared before me when I was there at least 10 times, if not more, he is an all rounder, particularly very good on criminal side, R. Balasubramaniam. Then it so happened that matters came to the SC, the bench headed by J. Lodha. J. Lodha beautifully found out the way to meet the Zee Telefilms judgment and J. Lodha in his long judgment considered this issue as to whether the question could be debated, the biggest obstacle was the Zee Telefilms judgment saying that this is not a state, if this is not a state the axiomatic answer was then the writ petitions could not have been entertained, this is what I found out a very beautiful way. J Lodha formulated seven questions and those 7 questions are to be found in the judgement and for our purpose, the only question number one is very important, whether the respondent board of cricket control of India BCCI is state within the meaning of Article 12 and if it is not whether it is amenable to the writ jurisdiction of the HC under article 226 of the constitution of India. If you turn to para 19, J. Lodha has actually formulated those questions and then in answering the question number one, J. Lodha relied on Sukhdev and ors. v. Bharatram Sardar Singh, then Alabama Marsh v. Alabama, then Rammanna Dayaram Shetty and International Airport Authority, then Ajay Hasia v. Khalid, then Pradeep Kumar biswas v. Indian Institute of Chemical Biology, Sabhajeet tiwari v. UoI, India and anr v. Netaji cricket club which was a very famous case from Bengal and lastly on Zee Telefilms itself. And then, the J. Lodha then relied on certain paragraphs in majority judgment in Zee Telefilms and ultimately came to the conclusion and gave answer to the question number one in the following terms I will read out-' the majority view thus favours the view that BCCI is amenable to the writ jurisdiction of the HC under article 226, even when it is not a state within the meaning of article 12' marks the words, the rationale underlying that view if we may say with utmost respect lies in the nature of duties and functions which the BCCI performs. It is common ground that the respondent Board has complete say over the cricket in this country, it regulates and controls the game to the exclusion of all others, it formulate rules, regulations, norms and standards covering all aspects of the game, it enjoys the power of choosing the members of the team and the umpires, it exercises the power of disqualifying players which were at times put an end to the sporting career of a person, it spends crores of rupees in building and maintaining infrastructure like stadiums, running the cricket academies, supporting the state associations, it frames pension schemes and incurs expenditures on coaches, trainers etc, it sells broadcast and telecast rights and collects admission fees to venues where the matches are played. All these activities are undertaken with the tacit concurrence of the state government and the government of India who are not only fully aware but supportive of the activities of the board, please mark these words, these are very important words. The state has not chosen to bring any law or taekn any step that would either deprive or dilute the Board's monopoly in the field of cricket. On the contrary, the Government of India has allowed the board to select the nationla team which is then recognised by al concerned and applauded by the entire nation,

including at times by the highest dignitaries when they win tournaments and bring laurels home, these distinguishing themselves in the international arena are considered highest civilian awards like Bharat Ratna, Tendulkar, Padma Vibhushan, Padma Shri apart from sporting awards instituted by the government such is the passion for the game in this country that cricketers are seen as icons by youngsters and therefore he gives ultimately the answer. Our answer to question number one therefore is in negative qua the first part and affirmative qua the second, BCCI may not be a state under article 12 of the constitution but is certainly amenable to the writ jurisdiction under article 226 of the constitution of India. A big responsibility is relieved, the SC has clarified the whole idea and in this paragraph 30 of the judgment comes really the whole what you call it, the whole consent rate as to how the sporting associations shall be governed, how the sporting or what will be their scope. If any sporting association fits into this category like Hockey Federation, football association which is a craze in Kerala, Goa and West Bengal and Orissa for sometimes, if not Maharashtra, if they fit into this, J. Lodha has provided a beautiful infrastructure of the legal principles as to how the sporting authorities can be and should be and would be governed by the government. The government recognition, yes we have in badminton Prakash Padukone, we have in badminton Gopi Chand we have so many in badminton who have been awarded who have been honoured by the government and the game which may not be as popular as the cricket is but the fact of the matter is that what may be made applicable to all these games of cricket in BCCI and BCCI in particular can be generally applied to all the games. Therefore to answer this judgment and more particularly the para 30 thereof, it is complete uncertainty to the proposition as to how and in what manner are we to control, are we to run, are we to consider, appreciate the sporting events and the sporting organisation in India. This is a beautiful judgment, in my opinion it clarifies the whole sport regulation, be it Kabaddi. Now they have started holding an IPL in Kabaddi and as a matter of fact it is gaining popularity, it's very popular, all the teams whether it be Punjab, in Punjab also it's a big name, Maharashtra when it began. Now there were serious efforts to enter Kabaddi in Asian games and they succeeded. Now the whole thing is it should be in the Olympic games also so that it has some prestige which it actually deserves, it's a national game of India practically, you go to any school there will be a Kabaddi ground, I have played Kabaddi in my childhood, who has not each one of you must have played Kabaddi, it is hututu in some other, bhelchalu in some Hindi speaking countries. This judgment has opened a whole vista and thus judgment has made it possible to control the game, to remain the tents from the game as in case of BCCI and that's precisely what J. Lodha did in writing the judgment that it took care of all the other six questions in respect of the individual players who were tainted, against whom there were allegations of match fixing, players against whom there were allegations of running to the tunes of, dancing to the tunes of the betting persons. In my opinion this is a very landmark judgment, I will not call it a landmark judgment, I will call it a path breaking judgment, a complete sector of the sport which was hitherto not clear. I remember one thing, what happened was I shouldn't be telling this I was a lawyer at that time and some persons came to me they acknowledged Ranji trophy players of Vidharbha, they said sir NKP Salve is going to represent the VCA in the meeting of BCCI which is to be held in Ooty. The annual meeting was to be held in Ooty, they have a lot of money they can hold their

meetings anywhere, so somehow or the other, he should be stopped because he is going to contest as the chairman of BCCI as it is all decided that he shall be elected, so stop it somehow or the other, how can it be stopped, so I examined the constitution of VCA, I examined the constitution, VCA constitution provided that a person in order to be a representative must be a club representative and to my horror I found that NKP Salve represented no club, if he represented no club, if he was not a member of any club, then he could not have been made a representative of VCA particularly at the BCCI meeting so I drafted an injunction suit, went to a civil judge junior division, valued it under 5000 rs, he said what is the valuation, I said 5000rs, 30rs ka court fee diya injunction ke liye, I was not a big lawyer, I never was a big lawyer but I could use all my eloquence on the learned judge to issue an injunction. It was an ad interim injunction. Then I told all those players, one of the players was the Vidarbha captain, Ashok Bhagwat, I can even tell the name, he was a fast bowler and its an anecdote, its a story that Hanumant Singh was the national selector and the tie was between Madan Singh and Ashok Bhagwat, both were fast bowlers, both were also the batsmen and when in the match it was being played Ashok Bhagwat used to shout at the players and used to give all the galis in pa fa ba bha ma you will realise that pa fa ba bha ma are all the galis. Hanumant Singh said, Mr. Ashok Bhagwat, why are you abusing the players like this, Ashok bhagwat was Ashok Bhagwat, he said kabhi bap janam me danda pakda hai hath me shanpana sikha rhe ho mujhe yha par, ek century kya bna li ek match me tum to ye sochne lage ki tum to cricket ke badshah ho gye. Hanumant Singh was the selectore no need to say that Ashok Bhagwat was dropped and Mandan singh was elected. This is what happens, in short I told the persons, I said Ashok look here, I will give you the humdast, we call it hamdast I dont know what is it called in another states, the packet, Hamdust, I will give you the humdast, but serve the humdast at Ooty when he tries to enters not before never not before that, it so happened ke injunction mil gaya, NKP Slave ke khilaf mil gaya, is khushi me khub pi pa liya sob logo ne. NKP Salve was to leave on the second day, jaha par pi pa liye vaha par NKP Salve ke ghar par jakar ab jaake dikha saale bole. I had told dekho sala kisi ko pta nahi chalna chaheye maine kaha bad mushkil se maine ad interim liya hai ye injunction kisi ko pata nahi chalna chahye tum bilkul ye karo mat, unke kaan khade ho gaye ke kya hua kya hai bhai, gaye court injunction issue hua are bap re, immediately they went, filed CMA, got it dismissed immediately self dismissed it, then went to the HC and went to the vacation court, got the injunction stayed, that is how NKP Salve became the chairman, otherwise there was whole mechanism brought in not to allow him to become and then maine unko ghar par bula kr khoob bhar ke, jee bhar k galiyan diya ke sale maine mar mar ke ye injunction liya aur tumne uska kabada kr diya. This shows the control of judiciary over the sporting bodies also. Section 9 of the CPC is the biggest ...this is how the whole thing happened and I am sorry to say that I could not stop but it was nice because he ultimately not only proved to be a right choice proved to be a Chairman a very successful Chairman then I went to Mr. Slave and told him this was the plan, he said acha ho gaya baba. Incidentally NKP Salve is the father of Mr. Harish Salve, so that is that.

Participant: ....

J. Sirpurkar: they have not given the whole judgment

Participant: ...

J. Sirpurkar: No no not Lodha, this is Thakur, Thakur and Khalifullah not Lodha, earlier judgment is Lodha now then in this judgment Lodha was appointed. I am sorry my mistake Thakur.

Participant: ...

J. Sirpurkar: J. Thakur has gone basically on the public duties aspect, its a public duty, its direct to the control, they have gone on public duty in the sense...

Participant: you take for instance say Walt Disney, Hollywood Walt Disney company, they have the muscle, they have the money, lets take that throughout India they are able to organize....

J.Sirpurkar: Kondanram you go through the judgment

particularly 1-30, J Thakur has taken the whole history of 226 right from the first case, he has gone right up to the dayaram shetty' s case, even earlier to that, Ajay Hasia, Dayaram shetty's case and hos whole concentration is on the duty in the public nature, its not a private duty, a duty which concerns the like in TNA Shetty's case J. Jeevan Reddy had also recognized this, the private institutions as doing though they were private institutions and not amenable, I dont know why Ramanna Shetty's judgment is quoted on this. There also J. Jeevan Reddy has gone on this aspect on public duty.

Participant: There is another judgment, Raman singh v . State of Bihar...

J. Sirpurkar: Khodanram playing game may not be a public duty but doing it Mr. NKP Salve never held a bat in his hand never, the organization a voluntary organisation doing its own controlling the game, getting the national recognition for its team as a national team, national team, that's where the public element comes in, even chess associations, now chess associations could be and would be recognised. Same thing happened in respect of the badminton team, I was a very popular lawyer in the sporting circles because I was myself a badminton captain of my college so they all came, my erstwhile colleagues, the selection which has just taken place is atrocious selections this man ought to have been selected, that man ought to have been selected, this is what he has done and when some third grade fellows who know nothing of the badminton are now being selected as the Vidarbha team why should it be, again same thing happened, we obtained the injunction, this time fortunately I had told injunction means injunction no hanky panky about the injunction with the result that but then what happened was they got the news of injunction, there was an appeal, the appeal went before a judge who was himself a table tennis champion and knew the whole affairs, so he, he allowed you better consider them and make the selections otherwise I am going to write out the order.

Participant: ...

J. Sirpurkar: Logic has been created to, no no, to provide the remedy. ultimately an interpretation has to be in favour of creation of a remedy. What would happen when just imagine the kind of money involved in all those IPL tournaments, yesterday some players have been sold for 12 crores, 12 crores 1 crore average per month, what will happen to all those money, its stinking money.

Participant: ...

J. Sirpurkar: See it is to be understood, yes its a very million dollar question. In private duty you may not be able to involve the public element. If its private duty its a private duty in the sense its a duty you to other private persons. Its the question of the intermingling of the inter sea rise between you and that person or you and that institution and it may not even a private looking, apparently private duty may amount to a public duty, may amount sometimes, but it all depends upon the facts and you are all able judges to decide upon the facts.

Participant: ...

J. Sirpurkar: It all depends upon the circumstances,

Participant: ...

J. Sirpurkar: No I dont think so, see the BCCI and the Cooperative societies, BCCI is also a society under Tamil Nadu administration Act.

Participant: ...

J. Sirpurkar: Yes yes in that Alabama J. Thakur has even taken stock of the foreign judgment, its an American judgment.

Participant: ...

J. Sirpurkar: J. Thakur has quoted a paragraph in Zee Telefilms and that paragraph is this which ultimately clinches the issue para 31 of the judgment of the Zee Telefilms - be that as it may it cannot be denied that Board does discharge some duties like the selection of an Indian Cricket team, controlling the activities of players and others involved in the game of cricket, these activities can be said to be akin to public duties or state functions and if there is any violation of any constitutional or statutory obligations or rights of the other citizens, the aggrieved party may not have relief by way of petition under article 32 but that does not mean that the violator of such right would go caught free merely because it is not a state under the Indian jurisprudence, there is always a just remedy for violation of right of a citizen. Though remedy under 32 is not available, an aggrieved party can always seek a remedy under 226. The bench relied heavily on this to hold that

its a public duty and so.. This paragraph was lifted from Zee Television in order to support that it is a public duty and therefore amenable to the...majority

Participant: ...

J. Sirpurkar: No I don't agree with you,

Participant: ...

J. Sirpurkar: its a public welfare, our constitution mainly depends upon the public welfare philosophy, its not governance one way or the that just, it is governance also, its not as if its not on governance, it is only on the but its a good mixture, firstly I dont agree with you that its the hotch poch of various ideas, no. Our constitution, no we did not borrow, what we think we borrowed and what is, take simple example, simple example, I have always been giving this example, take the SC motto, what is the SC motto what is written in the SC,no dont, what is the motto of the SC, SC motto is Yatho dharmasya sato jaya its not saytamev jayate, satyamev jayate is government of India not SC. Where does it come from, all people think that we have drawn the rule of law stream from England say from European and this country and from this country and from western country, no, its in Mahabharat, Yatho dharmasya tatho jaya, it is not even in Geeta, Yatho Dharmasya Tatho Jaya is not there in Geeta, who said this to whom and when,? this was when Duryodhan went for the blessings of victory before the War began, Gandhari was the ultimate, he went to his mother, had she said vijayi bhava Duryodhan had definitely won the war because Gandhari had that much of power, she had even the power to Lord Shri Krishna and then her shrapa vani came to be true, her curse came to be true that your whole clan will be demolished, it will be finished and it did. See the basic principle that she said was, she did not discriminate between her sons and Kunti's sons, article 14 no discrimination. She said she did not show any bias towards her sons or any bias against Kunti's sons, theory of bias, this is how a judge should behave and top of it Yato dharmas tatho jaya, where there is the law favours whom it will be, this is directly against the British principle of King Can Do No Wrong. As a matter of fact this is the basis of our rule of law, not some western philosophies and this is whosoever has made it a motto for SC has done it very thoughtfully, there are so many legal principles, coming out of that theory once I spoke to Dr. Oberoi on this. She also agreed that this needs to be highlighted.

Participant: Even sir at the end of the Mahabharat war when Yudhishtir was going to touch Gandhari's feet I think Krishna prevented him because they would burn because of the kind of powers he had developed. there is a beautiful book I came across of course I can share my views, The palace of Illusions by Chitra Banerjee Devikurni, it is Mahabharat's story through the mouth of Draupadi, so its a beautiful adaptation sir, if you ever find time in your busy schedule

J. Sirpurkar: In Mahabharat so many concepts have been created, is woman a chattel, this is what Draupadi raised a question, she was the first women to raise this question and if you yourself used your liberty can you stake me in the dyuta.

Participant: If you loose yourself ...

J. Sirpurkar: Shall we move to the next session brother, we have to conclude now.

## **SESSION 17**

Yes in this regulation, in this role of judiciary in regulatory regime, I would rather have your ideas than giving a lecture with you, I would rather have your ideas, what is the role that judiciary plays in regulatory regime as a matter of fact, if you ask me according to me, judiciary alone plays the role judiciary alone controls the regulatory regime, what is a regulatory regime, what is the regulation first? Regulation is in essence a control of the rights, it channelizes the rights, it doesn't control or it doesn't deny the rights, it channelize the rights that it is in this way that the things would take place. Unfortunately, the legislators do not take adequate care in controlling, in regulatory regimes. I have yesterday also given that example of competition commission of India, its such a important commission which takes into account all the trading and this and that and everything of the commercial world, it also takes adequate care in that the government, the legislature has left it completely blank to provide the judicial members to the. Now it so happened that when the tax tribunal was to be created, Madras HC Bar association, filed a petition. In that it was generally agreed that the persons who sit to decide the taxing questions same as CAT same as Airport Economic regulatory Authority where I have worked, same as electricity where my good friend Kalpvinayakam was heading ... they must have some knowledge of law. The stark reality gentleman is that in CCI, there was at a point of time, no judge no body all are either IAS or IRS or IPS or whatever it is, how would they decide then the punishments, the harsh punishments which are to be handed out for anti competitive practices, for abuse of dominance in the market. A company, take any company, it has the maximum market share, I decided the case of NSE v... what happened in that case was very peculiar. I will tell you the story, see ... NSE till then, National Stock Exchanges was holding all the licenses, stocks, F&O, WDM, then it also had the licence in a product called currency derivatives, its a very big market, I have to pay in three months to that party say 1000\$. Today the rate of currency is this, that day according to me currency rate will be this. So what I do, I go to the bank because if the currency rate is 60 rs today and if it becomes 70rs that day, I will have to shell out at the rate of 70, so I go on a hedge with the bank, bank purchases that, that which used to be done by the banks previously was then an exchange was created which was called currency derivatives exchange, it was a product so that you could bid to a broker that according to me it will not be 60 rs but 55rs, somebody will jump at that yes I purchase that. This si how the whole market went, huge money was involved; the license of currency derivatives was only with NSE, mind you. This was in August, 2008, note the dates. Then it so happened that MCXSX another company they also applied for license, they also wanted to MCSX

is multi commodity exchange, they also wanted to open an exchange, it so happened that NSE which was the dominant player, I don't know what happened but they did not get the licence for all the trading activities, they did not get the licence, they got the licence from SEBI only for currency derivatives, this license was also granted in October 2008, mind you I am giving you the date particularly, October 2008, they started operating, the moment they got the license the NSE said that we will not charge any transaction fee on any transaction made with us, this was slow bleeding of MCX SX, because if MCX SX then charges on the transaction then who will go to them. But their credibility was very high, they said sir, they came to the CCI and complained and this amounts to an abuse of domination, but when did they come, they bled themselves, up to 20th of May 2009 because section 3&4 abuse of domination sections, became operative only from 20th of May 2009, they suffered the injury right from October 2008 that's why I was giving the dates. This law Competition law which was originally passed in 2002, the real sections were 3,4,5, and 6, they were implemented only on 20th of May 2009. Then the question came as to whether fortunately the CCI held in favour of and held that NSE is at a dominant position because they have everything, they have stock exchange F&O, they have WDM, besides they have these. Whether these persons have only currency derivatives so how will they survive, in spite of this MCX SX picked up the business, even at the cost of being bled, but they came to CCI, they sent the investigation and ultimately CCI came out with the fine of 56 crores against NSE. Appeal, appeal comes to me, now it was pointed out by them that sir see today you are deciding the appeal today, today the market share of MCX SX is more than NSE in currency derivatives markets, so today they are dominant, we are not dominant, so where is the question of abuse of our dominance in the market, a very interesting argument, Kapil Sibbal's son argued this and very beautifully argued this, so where is the question of our dominance, they had given the whole reports by genesis and all those companies to show that this was a dominant company at least in so far as, this was the question, then they also said that sir what is a market? Market is of two kinds, markets of the goods or geographical market, there is no question of geographic market here but the market of goods, it's only the market of this, the answer to this argument was sir market is not only currency derivatives, market is the whole business of the stocks, everything concluding the market will be there and if you consider the market, and if you consider the market power of NSE in all these then NSE becomes the dominant player because NSE has everything and we have none, in the meantime what happened was against the rejection of their application for getting the stock exchange license, they went to SC, they went to Bombay HC, then they went to SC, in SC they won ultimately they got the license of the stock exchange etc etc etc. This was the whole affair. What I held was I asked the NSE that you have a pricing committee, you take stocks of your pricing committee every three months, I said I want the report of your pricing committee. How have you priced, it was a question of pricing, if somebody charges zero price, it's ultimately beneficial to the customer and that was also argument sir we are not charging anything, beneficial to the customers, you consider the customers fake and therefore then I invited their pricing reports. From August onward they had said no need to change our zero price policy, but that could not be done, after September after May 2009 because by then market domination ideas, the abuse of domination ideas, the anti competition

practices, they had come on the law. I said have you changed your policies, have you at least considered that this is now the law and to my horror I found there was nothing, no consideration, three experts were the members of the pricing committee and yet there was no consideration, they had not even mentioned the competition law, they had not even mentioned sections 3 and 4 and therefore I said this mala fide and therefore I dismissed the appeal and maintained the sentence also, the punishment also. Another aspect was how do you do the pricing when do you say that it is a zero pricing, when do you say because one of the practices is the cutting of cost, I cut my cost so much that it is actually an unfair trading practice, unfair selling practice. We found out, then I said but you are this career this cash this currency derivatives, we will cost you something, you have to purchase the computers, you have to purchase the staff, you give me your expenditure then I will come to know as to whether this zero pricing is affordable to you or not or whether it amounts to unfair practice. The answer of NSE was then we don't maintain any separate account in respect of currency derivatives, our whole accounting is only one, I said fine, but let me see those accounts then as to how much has been spent in this currency derivatives area, he said we have not separately maintained it staff all the staff, I said give me the number of staff that you have, he said we have all our staff, in short we will not cooperate with you, I don't know what happened to it in SC now, they must have gone to the SC but this is what happens, this is what the judicial aspect, the judiciary can do and this will be the role of the judiciary where I was acting as an appellate tribunal and therefore in my judicial capacity.

Participant: ...

J. Sirpurkar: I don't know about that but I only know one thing that after I took over the appellate authority I brought down the pendency by half.

Participant:...

J. Sirpurkar: No no we were dealing with MRTP, we were also dealing with Airport regulatory authority

Participant: ...

J. Sirpurkar: Yes maximum appeals come from Bombay because there are 3-4 electricity producing companies, Tatas, Birlas and what

Participant: ...

J. Sirpurkar: they are more particular about the tariffs, they are regulatory, they regulate the tariffs

Participant: ...

J. Sirpurkar: Commission is not doing that Kodanram, appellate tribunal is doing that, commission is only deciding after hearing the concerned players stake holders.

Participant: ...

J. Sirpurkar: That is the unfortunate part but that is the result, no dont say that because CRC is headed either by CJ or a SC judge, now Mrs. Desai is the ... but what do you say is correct in respect of CCI, they outsource it, there experts write the orders and they put their signatures.

Participant: ...

J. Sirpurkar: He will draft the orders.... not two it used to be only one, J. Dhingra used to work I mean I dont know how he accepted working under Ashok Chawla but this was a game to man all the tribunals with practically only IAS persons, it was a cushy heaven for the retired IAS persons to come and join and to have a cushy life somehow the other but the role of judiciary is practically control all the fierce spheres, where there is a direct appeal provided to the SC still 226 is open.

Participant: ...

J. Sirpurkar: Now in the matter of where I am presently, they say each and every order need not brought to us, you can go to the 226 matter to the concerned HC so at times it is daily, as somebody pointed out in Whatsapp joke if you loose before the district judge you file an appeal to the HC if you file an appeal and if you loose an appeal then you go to the SC, if you loose an appeal to the SC where do you go, they said you go to Arnab Goswami

Participant: ...

J. Sirpurkar: But that happens, even in the competition law there is a direct appeal provided to the SC under section 56 of the competition act, yet people used to go to the SC. I am going to tell you a different story, under the OMDA Operation Management development Agreement, they wanted private players to run the major airports, major airports being Bombay Madras, Bangalore, Hyderabad, Delhi, so they floated the contract, this is all in 1905, floated a tender, we will take Delhi now. Delhi was by GMR and they defeat, as you all know they defeated Reliance, so then there was an OMDA and SSA state support agreement, these are the abbreviations, but what happened was in that OMDA, it was decided that we will create a company, the company will be GMR on one part and AAI Airport Authority of India, they will be joining each other. AAI would be 26% whereas GMR will be 74% and the equity to be raised by this, GMR will raise 76% of equity and AAI will be raising 26% of equity, work started, eventually it was found by GMR that they are not being able to raise the liquidity of 76%. Now there is something called the Air act also, In their Airports Act section 22 which provides for development fee, there is a procedure, there is a mechanism for that, so they quietly go to the then government and say we are not able to

get our returns, so please allow us to raise the development fees. A simple letter comes from the under secretary or deputy secretary and they are allowed to raise the, 1200 per international flight per hundred tourists, 100rs per Indian tourist, so whenever I fly from Delhi I have to pay 100rs extra. the fees in one year 3458 crores. Now where is the requirement for other concerned to bring any liquidity and things are still going on unabated and I dont know how many thousands of crores of rupees are still being muzzled guzzled and, this is the unfortunately, if there is no proper control, when the matter came to me Mr. Lalit was arguing, sir this is all, how can this happen, I said alright I will hear you so I started hearing one day two days three days four days, Bombaywala also jumped are bap re if the development fees is gone then what will happen to us also and 5th day stay from the Delhi HC, why because, Mr Rahul Sareen who was the VP, ... but mr Rahul sareen is continuing for more than 3 years so he cant continue to be on the Airport Appellate Authority, stay stay gone. I did not decide the matter, the appeal is still there, I dont know what has J. Singhvi done about it and the matters remain under development fees is flowing. This is what happens when there is no vigilance from the judiciary and the judiciary is the main thing which has to regulate the whole regulatory regime. If the regulatory regime is not regulated then it cancerously grows, the injustice grows cancerously, I have already told you about the suits, various suits, day in and day out there are suits, section 9 jurisdiction has not gone anywhere merely because 226 and the only thing is that if I am a lawyer, I am practising mainly in the HC I advice my client to file a writ petition but of I am in district court, I advice my client to file a civil suit, it is so simple as that and we all know about it.

Participant: ...

J. sirpurakar: only exception is Fraud, file a suit, section 9. If some gullible judge is there usko ullu bnao aur lelo.

Participant: ...

J. Sirpurkar: No no this is also, there is an interesting story, I was going along with my wife, newly married wife in an area called sitabardi in nagpur... nahi sir there is a dispute going on, I said what dispute, I have been served with a ... no no sir I have joined the best lawyer in the city, I said what do you sell here, he said clocks, very good, sir who is that lawyer best lawyer in the city, I said tell you later on, but you tell me the best shop to purchase the ladies wear, he said this is the best shop and this is the best lawyer and you never came to me, I am afraid you have not gone to the best lawyer.

Thankyou gentleman, thank you very much for such active participation, for churning of thoughts the only things in churning of thoughts is like demons and gods they churned shirsagar, 14 things came out, out of that was a halahal also and the amrit also, the halahal in this churning is the confusion, please dont carry the confusion.

