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## VERBATIM REPORT

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## **SESSION 1**

**SUBJECT: SENTENCING PHILOSOPHIES**

**RESOURCE PERSONS: PROF. K. CHOCKALINGAM**

**CHAIR: JUSTICE GYAN SUDHA MISRA**

**Dr. Geeta Oberoi:** Welcome back to National Judicial Academy. I know it's very difficult to come back, to travel especially if you are not from Bombay, Delhi. Then it's a long travel for some of you. So we have this three days program and I will just introduce something about today's programme. We have justice Gyan Sudha Misra she will be joining us, she will be chairing this three day programme all sessions. We have for 1st session Prof.K .Chokalingam of course I need not introduce about Justice Gyan Sudha Misra you know all of her all of you as a former judge of Supreme Court of India as for Pro. K. Chokalingam, he is a former Vice Chancellor of M.S university in Tamil Nadu. He will say more about himself. He was the first chair professor in criminal law in criminal law at National Law University, Delhi. He has worked in many countries. He will say more about himself. Then we have Mr V. Ramesh Nathan, and also Dr. Usha Ramanathan who is internationally recognised expert on law and poverty. She will be joining us. We have V. Ramesh Nathan who is actually activist and he has a CSO which works on rights of cast based atrocities basically he studies caste based atrocities and what kind of sentencing issues are there, so he will present that study and Justice Gyan Sudha Misra will of course take her session which is about gender related atrocities and of course we have judges who have undergone extensive courses on gender related training from university of Warwick and other places may be they will also share their experiences, by this all of you are welcome to share your experiences in this seminar. What we will have a you know strategy is that we will hear the speaker for 40-45 minutes and then we will have that last 15minutes for questions and answers. Then we also have Advocate. Sanjog Parab from Bombay. He will be doing tomorrow's session but he would like to hear the deliberations, so he is also be part of the conference now. As is the practise, before we start what we do we do round the table introduction because all of you are from different jurisdictions so we should know each other first so if you don't mind if we spend 5minutes in that. So, may be sir we can start from your side. Sorry this A/c is really noisy. Ladies first, okay.

**Justice Gyan Sudha Misra:** Good morning everybody.

**Dr.Geeta Oberoi:** Ma'am I told them to introduce themselves. They said ladies first so let's...

**Justice Gyan Sudha Misra:** yes

**Participants :** Pratibha Rani from Delhi High Court, Shalini , from Bombay High Court, U. Durga Prasad Rao from High Court of Hyderabad, Jaiswal from Hydrebad, Ramesh Sinha from High Court of Allahabad, Inder Singh Uboweja from Chattisgarh, Ghansyam Udwani form Gujarat, B.Sreenivase Gowda, from Karanataka High Court, Banglore, Babu. Mathew P. Joseph from Kerala, Siddhartha Chattopadhyay from Calcutta, Ranjit Kumar Bag from Calcutta, P.S. Rana from Himachal, P. Devadass, from Madras High Court.

**Justice Gyan Sudha Misra:** Myself, I am Gyan sudha Misra, you can fill in the blanks if your G.K is good.

**Dr.Geeta Oberoi:** Professor Chokalingam would you like to say something and start the session.

**Prof. K. Chockalingam:** I am Professor Chokalingam. I was heading the department of university of Madras for about 23 years. Then I became the Vice Chancellor of the University in Thirunal Veli, the southern district southernmost district of Tamil Nadu Manomaniam Sundara University, there after my term of vice chancellor was over. I was invited by a Japanese University to work as a Professor in the field of victimology at the Tokio International Victimology Institute. I worked there for 6 long years and then returned then when I came to India the National Law University invited there to be their first K.L Arora chair professor in criminal law. So, I accepted the position for about two years and then after that I wanted to stay at home, stay at my home town as I missed many, many functions particularly our families were very displeased at... now I am settled at Kanyakumari district in our home town and now I am a freelancer, sharing and taking knowledge from distinguished people like you. Thank you very much.

**Justice Gyan Sudha Misra:** Fortunately there's no ceremonial function. I don't need to introduce the subject as you all know it. So, let us get down to subject straight away.

**Prof. K. Chockalingam:** Thankyou .. Professor Geeta Oberoi, our distinguished judge Hon'ble Justice Gyan Sudha Misra, distinguished judges of the various high courts, young friend Mr.Milind , Dr. Usha Ramanathan who I know for several decades. Friends, Geeta

Oberoi, the director of the institute said that you will have about 45 minutes talk by the visiting lecturer and about 15 minutes question answers or discussions. Already the time is 10:10. I have these slide materials for more than 45 minutes but I would like to, you can read it later I would like to restrict it and as per her advice and suggestion and straightaway we will go to the topic.

The topic today I am going to discuss with you is sentencing philosophies. What is sentencing? A sentence is a decree of punishment and it forms the final explicit act of a judgement process and also the symbolic principle act connected to his judicial function. Criminal penalties are called sentences in criminal justice administration. Criminal sentences comprises of fines, community supervision such as probation, incarceration and in extreme cases death penalty in criminal justice administration. The quantum of sentence for an offender imposed with a judge reflects the degree of condemnation of the society towards the type and nature of crime committed. The punishment system and types of sentences awarded in a country could also be considered as an indicator of sentencing philosophy followed by the particular criminal justice system. The different actors in a criminal justice system namely the prosecution, defence, judiciary besides the accused and the victim who are directly connected to the act may have different expectations from the system and hence cannot be expected to react in the same manner to the act of crime. For example, the victim who actually suffered experience the consequence of the crime might express strong emotions. So there will be different expectations from the different players in the criminal justice system for example the victim who actually experienced in the crimes suffered because of the crimes might express stronger emotions than a prosecutor and a judge who are total strangers to both the opposing parties. In such a scenario, to arrive at a consensus and remembering justice is a delicate and complicated task for judges and other legal players. The decision in a criminal case is not confined to aspect of the accused being guilty or not but more significantly about the handling of the offender. Because, the evidences will say whoever the offender whether the accused person could be found guilty or not but the most important thing is what to do with the offender if he is found guilty. That's the most delicate task because the type of treatment the type of handling which the judges make decides the outcome of the offender in his future. In case of a victim oriented justice system the most opted solution would be restoration of victim to same position before the crime occurred. Rest is too difficult in cases of physical, emotional and psychological harm where full restoration is not possible. If somebody dies or if somebody has been raped or if some person is disabled completely. Now these things cannot be fully restored. What are the

goals of sentencing? Over the years, 4 major goals of sentencing has been identified-deterrence, incapacitation , treatment, rehabilitation and retribution and restoration which is an additional purpose in the emerged in the recent years. You all you must be familiar with the restorative justice concept which has been now talked about by many researchers in the field of criminal justice. These goals explain the selection of sentences either alone or in combination with other goals. Some scholars view that if we abolish all law enforcement agencies and remove all sanctions the consequence would be a crime wave of unprecedented proportions. The first and the foremost objective or role of sentencing is deterrence. The very existence of the criminal justice system has a strong general deterrent effect ensuring obedience in those who otherwise who would commit crime. So it would make the potential offenders refraining from crime the basic principle underline the deterrence theory is that all people will refrain from engaging in criminal activity. Not all people, many people would it is assumed that many people would refrain from committing crime because of the consequences associated with the detection . The goal of deterrence is to prevent future crimes by a threat of punishment. The theory of deterrence assumes the human are rational beings who will refrain from committing crimes. If the sentence imposed causes more pain than the pleasure derived in committing crimes. The famous theory of classical school of criminology by Casare Beccaria. If the pleasure is lesser than the pain associated with the punishment then the persons would be tend not to commit crime that is the theory. There have been objections for that. There have been other theories that say that all crimes are not committed by the individuals making a calculation like this. There are occasions were people do not think about all these things and commit the crime but in major instances this pleasure pain principle is a very important theory. There are two types of deterrence- general deterrence and specific deterrence or special deterrence. General deterrence refers to the effect that the criminal law with its punishments has on the people in general. Potential offenders will be deterred by the criminal law which prohibits certain behaviours and those who have broken the law paid penalty for it. It aims at convincing others not to commit similar crimes by punishing a particular offender as far as special deterrence is concerned it refers to the person who has committed the crime already and the punishment inflicted on him. So the specific or special deterrence is relating to the particular offender who is reminded that if you commit the crime again you will repeat meeting the same fate. Effectiveness of deterrence, if the advocates of deterrence are correct potential offenders should be affected by the relative certainty. The punishment will result from the commission of a



crime. Researches show that certainty of punishment is more important than either severity or swiftness of sanction in achieving the goal of deterrence; generally people think that by increasing the punishment we can deter the people. But studies have revealed it is not so. The second goal of sentencing is incapacitation the word itself makes it clear that it is to make the offender incapacitates from committing the crime. Whether through incarceration or community supervision or some other method like deterrence incapacitation suggests that sentencing should act to reduce or prevent future crimes so the aim is to prevent future crimes but here the method adopted is that the person is physically removed from the community and he is detained so that he cannot commit any crime. Yet, according to some scholars long symptoms imposed for the purpose of incapacitation may be unjust, unnecessary, counterproductive and inappropriate. So, it is just like medicine. If the overdose of medicine is given to patients, though medicine is useful to correct the deceased but overdose is dangerous it will decant the product. So, if incapacitation is not properly administered then producing these consequences like it is unjust if other offenders who have committed the same crime receive shorter sentences. This is quite possible that we are seeing lot of areas where people are trying to remove the disparities in sentencing similar offenders similar crimes and it is unnecessary if the offender is not likely to offend again now it's a sure case it's understood that what he has done is wrong. He comes from a good family the whole school the community give certificate then there is no point for him to undergo imprisonment or any other kind of intervention it is counterproductive when ever present increases the risk of subsequent habitual criminal behaviour. Justice Krishna Iyer and many other judges have said that our prisons aggravate the situation because our situations conditions in most of the prisons are not really suitable for making the psychological and sociological transformation so as far as possible if the offender is already repentant is already thinking that what he has committed the crime what has done is wrong then it is better to keep him in this society by giving a warning. To avoid repetition of habitual criminality it is inappropriate if the offender is committed an offence entailing an insignificant home to the community. The home is very small very small home not a very danger he is not a very dangerous person to society imprisonment or any harsher punishment is inappropriate so it's a symptom which makes him behave like that so treating the problems should solve the problem. As sentencing rationing treatment rehabilitation through this change or transformation should result in the offender's ability to return to society in some productive meaningful capacity in some meaningful capacity. Consequently, sentences

must be individualised if you want to achieve the goal of transformation of the offender there cannot be a uniform punishment for all kinds of offences. Though it is required under the law that certain kinds of offences should be treated or kinds of offences that has to be punished in a similar way but so there must be an individualisation of punishment. A judge might select a sentence that includes probation or imprisonment. In the 1970's, the researchers in U.S attacked the rehabilitation of treatment ideal as colossal practical failure. Mainly because there was a crime wave in 60's and 70's in the United States of America. They said that criminals don't get reformed in the presence therefore the punishments should be more severe that is what made the American legislations legislatures make punishment more severe. Examination of some 400 evaluations of treatment programmes published in a the most important article called 'what works' concluded that with few and isolated exceptions the rehabilitative efforts that have been reported so far no appreciable effect on recidivism so they remain they made a review more than 400 evaluations of the treatment programmes and concluded that it is not much effective. In short, the answer to the question what works was nothing. There is still no agreement on the effectiveness of rehabilitation but more recent analysis of treatment evaluation conclude that some programmes do in fact work, if only, for a selected number of offenders. So, it works in the case of selected number of offenders it's a most difficult task that who are the selected offenders, who would be beneficial, who would get benefited and become reformed but successful programmes require a careful matching of individual needs, the offenders needs and program attributes what during the intervention programmes what exactly we are going to concentrate. So, if these two things are matching then the possibility of reformation is higher. Finally, I am dealing with retribution which has three elements. The proportionate penalty every crime should be given a punishment in proportion to the gravity of the crime that is one of the principles of retribution. A penalty that is deserved the offender is deserving the punishment because he has committed the crime and the penalty that expresses the moral contamination of the society. The society abhors it. Society contempt's it. Society does not approve it at all. Disapproval of the society is shown so these are the three essential principles of concept of retribution. The four knowledge that the criminal would never commit another crime would obviously need to sentence that person for treatment. Incapacitation or deterrent purposes so there is no need. But retribution received require that offenders need to be punished in part because the law promises to punish those who commit crimes and in part because the society holds that every crime demands payment in the form of punishment. Unlike, the first

three goals retribution is backward looking that means the judge looks at the crime which has been committed earlier than before he stands at the court for the trial. So, it is backward looking, it punishes the criminal act regardless of its impact on future criminality. Even if he becomes or even he promises to become a turned 'newleaf' he has to be punished under the principle of retribution because the commission of crime has already taken place. Sometimes retribution is called just desserts and stated in biblical terms 'An Eye For An Eye' principle retribution fixes the degree for that those who break the law should be punished because of the nature of the criminal act itself. Underlining the concept of just desserts is proportion that punishment must be based on the gravity of offence and the culpability of the perpetrator. Gravity of the offence how grave what kind of consequences it produced in the society and to the victim and the culpability of the perpetrator. Just dessert advocates argue the courts simply do not have the capacity to determine who can be successfully deterred or reformed and who cannot. Extremely difficult. Court cannot simply, even the trained psychologist are unable to find out what would work certainly. In such circumstances, it is very, very difficult for the courts to ascertain that which offender would benefit out which kind of treatment or punishment. The notion of rehabilitation was premised on the ability of correctional Institutions to correct or rehabilitate. But they failed to do so in most cases therefore he argues there are few choices but to return to a system of retribution which guarantees like sentences or like crimes. Like sentences for like crimes at least it will avoid the disparity. Just dessert has been successful in minimising disparities in sentences and curbing judicial arbitrariness. It has also some problems. It has been blamed for prison overcrowding if all of them are on the basis of retributory principle, just dessert principle if they all are sent to prison, the prison would be overcrowded. It is also caps for its insensitivity to the social problem that lead large proportion of offenders to crime. Many people who are committing crime because of various factors. Factors which are beyond our individuals control. Sociologists always say that crime is a product of the interaction between the individual and society. We all are what we are today is because of the best homes we had, best education we had, best friends we had, best colleges we had been sent to and best profession we are and all these things are making what you are today. Unfortunately in case of most of the offenders, they have missed all these things. They have lost all these things therefore, there are many factors which push them to commit crime therefore this also has to be considered just desserts are retribution does not consider that. It can also be called unscientific because of its rejection of the scientific efforts to identify and

selectively incapacitate habitual chronic offenders. Critiques have this just desserts have characterised the concept as superficial for its rejection of the rehabilitative ideal. Rehabilitation cannot be completely thrown away. It is not correct to say that rehabilitation does not work at all. At the end of the lecture, I am going to talk about the Finland model where they have achieved remarkable success by resorting to new methods of sentencing, new philosophy of sentencing, just desserts theories are reasonable answers to these criticisms. They all are insensitive to these criticisms the social problems that promote crime but feel strongly that offenders should be sentenced on the basis of the crime that they have committed rather than their social background. We are not bothered by the social background. According to just desserts, they have committed the crime which is prohibited by law; we have a law of the land which says that nobody should commit a crime. If they commit the crime they will be punished on the basis of the crime they have to be punished they are not insensitive to utility of education but content that defendant's ability to grow intellectually should not influence sentence decision he may turn a good leaf later but what about the past action which he has committed. Why judges should forward looking in fashioning a sanction when the sentence must reflect a crime that was committed in the past.

Finally, these theories have not contempt rehabilitation on the basis of flawed evaluations rather they have dismissed rehabilitation on the basis of its irrelevance to the nature of crime that was committed and the culpability of offender at the time of the crime. So these are the only factors which are focused by the just desserts theory. Finally restoration, I said restoring the individual pack. Restoration of the victim focuses on the relationship between the offender, the victim and the community often known as the restorative justice set justice sentences aimed at serving this goal view crime as a dispute and work to mediate the conflict. Sentences aimed at seek to ensure that the offender takes responsibility for doing the wrong he has committed. The wrong so he has to come forward to correct it to repentant bring in some method by which the things have been committed all gone wrongs should be made right that the victims compensated compensation to the victim is one of the very important part of restoration and the breach of community peace is healed because all the stake holders revolved in restorative justice restorative sentences often include victim offender mediation restitution and some sort of community services. I am very happy that these days many of the judges are talking about restoration very seriously in many of the judgements in practice there are mixed goals for punishment. Though we have discussed many of the historically and to the current level these are not taken in an isolated manner but many of these

goals are mixture while using these while punishment is given to an offender in practise it is most sentencing systems are multiple goals but sentencing officials often favour different jurisdictions for different punishments for different offenders at different times. Judges often employ a combination or mix of sentencing philosophies in justifying their selection of a sanction. The organisation of many officials with sentencing power is known as the sentencing structure the choice of a sanction in all jurisdiction criminal sanctions at the discretion of judges or specified by legislations in India. The legislation says what should be the punishment of crimes under Indian Penal Code these forms include institutional sanctions that means sending a person to an institution maybe they time to be served in jail the non-institutional sanctions judges now have a variety of options death penalty, incarnation, probation, split sentences, restitution, community service, fine. Now, what factors determine the size of sanction? How the judge decides what are the factors to be taken into account while deciding the type of sentences for an offender within the range of options imposed by the Legislature. Judges recommend discretion guided by their preference or one or more of the enticing philosophies discussed but judges often subscribe different philosophies for different offenders. Faced by an offender who has a long record of arrests and conviction for heinal crimes. The judge may place greater emphasis on their incapacitative functions. The same judgement is there, an offender who with no prior record may very well succeed in being rehabilitated and therefore order a sentence that involves some type of treatment programme. Researches shown the most important factors affecting a judge's sentencing decision are the severity of offence and the criminal history of the offender. These are the most important factors taken into account by the judges while deciding the type of sentence offence severity is usually measured not only by statutory classification. Many times people think that the offence severity is measured by the statutory murder, rape, grievous hurt like the seriousness and gravity of offence but it also by non-statutory aspects of the crime such as amount of harm inflicted, value of property lost or damaged, the motive of the offender and whether deadly weapon was used. If, first time offender who committed an offence relatively minor offence likely to get more lenience sentence rather than repeated offender. Judges can receive information about the nature of the offence and the offender in the pre-sentence investigation report by a probation officer. If the probation officer is really serious in his work. A recent innovation growing out of the victims' rights movement in the sentencing process. At least, a few countries in is consideration of statements of the victim called victim impact statements. In of the states United States of

America and couple of other countries they have victim impact statements. The victims can also make recommendation about the type of sentence the offender should receive usually the 'VIS' is incorporated into the pre-sentence investigation report by the probation officer. Researches revealed that judges choice of sentence is influenced much more the legal considerations than by victim preferences in cases VIS is present. VIS taken into account but judges not bound by that at all. Structuring sentences in U.S legislators devised different methods to sentencing decision in different cases. Two types of sentencing structures exist in US, determinate sentences and indeterminate sentences. Determinate sentences is one were the offender knows exactly what punishment will be at the times entice indeterminate sentence judge imposes a range of penalty. The offender does not know the precise penalty until later for instance offender may be sentenced to prison for a term of 1 to 5 years at the end of 1 years the offender might be released or might be depending on number of factors continue to remain in prison, depending upon the progress he has shown during the one year. Indeterminate structure the legislature gives no power to release authority the exact sentence is known at the time of imposition by the judge In most cases, legislature allows the judges to choose between a sentence of incarceration community super in most serious cases the Legislature will publicly acquire incarceration usually by establishing mandatory minimum sentences. What the United Nations view about sentencing a punishment the UN standard minimum rules for the treatment of prisoners which many of you may be familiar passed by the United Nations general assembly in the year 1955, states that the ultimate purpose of imprisonment is to protect society against crime at the same time it should also aim at offenders reintegration in to society because the offender cannot be kept in imprisonment forever. He has to come back and facilitate their rehabilitation by allowing them continuous contacting with the community therefore that is why parole is encouraged so that he will not lose contact permanently. In the year1990,the United Nations adopted the UN standard minimum rules for non-custodial measures called the Tokyo rules, which stipulate guidelines and standards concerning various non-custodial measures. Since the 1990's, re-evaluation of programs that aims at the rehabilitation and re-inhabitation of offenders has been made from the point of view of what works not from the Pessimistic point of view of what works not from the Pessimistic point of view nothing works thus now a consensus is being established concerning the models of effective intervention that aim at the prevention or reduction of residuary that means repetition of crime. Such effective models are being implemented by the institutions such a prison and in community as a part of

probation. Reflecting sets in the UN adopted the Bangkok declaration on the occasion of the 11th UN Congress on crime prevention and criminal justice held in Bangkok in 2005. Bangkok declaration or just member states 2 recognise comprehensive and effective crime prevention strategies can significantly reduce crime and victim issue. An urge that the strategies and risk factors of crime member states first to use and apply the UN standards and norms in the national criminal justice training prison officials prosecutors the judiciary and other relevant professional groups taking into account those norms and standards and the best practise is at the international level. So, this is what I mainly wanted to convey to you about sentencing philosophy. Now, depending upon the time we will go ahead further now in any case I would ask the academy to give this to all the people to their e-mail address to look at the impact of sentencing on crime. Let us examine Finland and Europe and USA. I have chosen Finland, because Finland's human development index value for 2014 is 0.883 it's the most advanced country. One of the top 5 countries in the world with regard to treatment of women, the position of women in the country, gender balance, the crime and so many other positive factors which make a country advanced it positioned to was 24 out of 188 countries and territories in the in the human development category between 80 and 2014 Finland's HDI value increased from 0.744 -0.883 an increase of 18.6% on an average annual increase of about 0.50% the last decades of the experienced an unprecedented expansion of penal control in different parts of the world unprecedented expansion more punishment between 1975 and 2004 prisoner rates in USA have increased 320% in about 29 years this drastic change can be contrasted with Finland. Whatever happened in US did not take place in Finland the development of the US seems to have had a strong model effect in English speaking world because the same kind of same trend was found in English speaking world like not only US, England and veils Australia, New Zealand etc. During the two decades prior to 2005, Netherlands have increased in 6 fold in prisoner rate so in Europe also there are many other countries where this happen the prisoner rate increase in prisoner rate there is every reason to be morale by this development because in principle we are not for imprisonment. In principle I remember about 35 years ago I read the interview of one of the renowned criminologist of the world who is no more marvin ruiseguy he was asked by the students of criminology at the Pennsylvania university "what does he thinks about punishment"? He said he wants to live in a world where there is no punishment at all, because punishment does not improve. In the case of children, every day we are seeing children cannot be reformed cannot be changed by punishment but many of us satisfy

ourselves. If you ask me whether I have punished, I have done it because when we have no time to handle them in a peaceful way in a quiet way what science has taught me and not able to adopt in practice but if you want results punishment is not the answer. But we are still continuing to ask why do we have prisons. Prisons will continue to be there until we find an alternate. We don't have. Certain offenders have to be detained because we don't have any other way to find the ultimate goal of protection of society. So that is paramount, primary. So to do that when we are in the dark you do that so we are worried about the increasing trends in imprisonment. Japan in turn is often cited as an example of low crime and low imprisonment in a country. For a long period of time Japanese prison figures were the lowest of the industrialised countries even below that of (not clear). Now it appears that Japan too is experiencing increasing prisoner rates and rise of around 70% from the early 1990's though it is much below that of many of the western countries by the time. By the turn of millennium, the increase in prisoner rates seem to have taken hold also in these countries. There are many data to support that prisoner rates are increasing all over the world. Maldives have 350 per hundred thousand population are they just unavoidable and natural reflections have current levels of crime the tentative answer of the experts is a decisive 'no'. At the beginning of 1950's Finland had some 200 prisoners per hundred thousand inhabitants while figures in Denmark, Norway and in Japan around a 50. Even in the 1970's the Finland Prisoner rate was the highest in western Europe. Later the Finnish rates continued to decrease the Prisoner rates went down crimes went up. Prisoner rates went down crimes went up let us first look at the reasons and factors that contributed to the straight line how it happened Prisoner rate then consider whether and to what extent changes in prison rates have effected in crime rates long-term change in Finland covering almost half a century was affected both by macro level structural factors and ideological changes in penal theory as well as legal reforms and changing practices in sentences and enforcement this is a nutshell there is a total revolutionary change happened in the penal logical thinking and the practices of sentencing which resulted in the increase of imprisonment which is not resulted in increase of crime like in many of the countries criminal political thinking in Finland underwent profound changes in the late 1960's and 1970's the ideological turn was quiet defending in Finland compared to U.S only in U.S the fall of rehabilitative ideal lead subsequently to the renaissance of punishment so the fall of rehabilitative ideal resulting in the renaissance of increasing punishment in Finland the outcome was just the opposite in 1970 a reform movement against the excessive use of custodial sentence the movement was



there to oppose excessive sentences called label desk humane .. behind this shift in strategies and criminal policies were more profound changes in the way the entire problem of crime was perceived new strategies of crime prevention emerge in criminal political discussions under social situational strategies they adopted new strategies for crime prevention and crime reduction good social development policies is the best criminal policy because what the society is going to determine, how much crime you are going to have, they realise that they had lot of empirical evidence based researches also. The aim and justification of punishment were subjected to re-evaluation. They re-evaluated the whole thing. The shift was once again more towards general prevention. It was assumed the effect could be reached not through fear prevention could not be reached through fear but through morality creating and value shaping effect of punishments result of this process people refrain from illegal behaviour followed by unpleasant punishment behaviour itself is regarded as morally blame worthy it is an evolution of the society the view of the functions of penal system this view of the functions of penal system has a number of sanctions which maintains a moral character from early 1970's onwards there was general conviction in crime prevention that criminal law is the only means among many criminal law one of the means among many and other means were often far more important. That was the prevailing in prevailing conception in 1970 criminal law is one of the many and not the sole to deal with crimes. Between 70 and 1990, all the main parts of the Finish criminal law were reformed from this points having one thing in common , the reduction of the use of imprisonment. I have a lot of data, I have no time. How Finland has achieved the reduced crime with reduced imprisonment rate. Very significant and dramatic all these things you can go through. Now Iam going to the conclusion. Straightaway

**Participant:** inaudible

**Prof. K. Chokalingam:** It is only for the offenders, who are been. The total crimes have also been discussed that is different but in the case of people who have been sent to prison how dramatic changes have taken place with regard to punishment given. For example, earlier before 1970's more attention was given to sentences but they have brought about 60-70% of those sentences under fines. These submitters need not be sent to prison passing overcrowding and making them worse. Instead of that they can be dealt with imposing fine amount. So like that, conditions have been adopted. For the conclusion, protection of society against crime is the paramount duty of any government. To fulfil this duty government have been struggling

with various methods of handling the offenders. Making the Pena logical pendulum swinging from one end to another and still has not succeeded in finding categorical answer or solution to achieve its goal. By trial and error methods different forms and degrees of punishment have been tried but with no success. Over a period of more than a century, objectives of punishment and sentencing philosophies and practices have undergone radical changes. Before the evolution of scientific criminology and penology, evidence based research findings it is found that retribution or an eye for eye and tooth for a tooth principle was the primary goal of punishment. Gradually the society is evolved and ethology of crime was studied and more and more scientific knowledge on crime became available. Crime was considered as product of interaction between individuals and societal factors and it is a learned behaviour. Taking this aspect only Finland has said it is disgraceful for them to accept it as a nation imprisonment is very high many people are send to prison they have mentioned it and there is a lot of political consensus from all the stake holders like political thinkers, ministers and the government, the civil servants, the jurists and scholars. All of them unitedly work on this. Therefore, punishing the individual cruelly for the crime has been cast by the many factors perishing the individual cruelly and in barbaric manner, it is unjust and unproductive and punishment methods got changed significantly in the last two hundred years. Instead of resorting to cruel punishment, it was acknowledged that the conditions in the society which facilitates the commission of crime should be eliminated. Conditions in the society which are conduced to eliminate so that those people could not eliminate crime potential offenders would not commit crime. Advanced countries and societies believe on the basis of cruel punishment and long years of imprisonment would be rather counterproductive instead of positive. Punishment to be effective and to produce the desired goal should involve a combination of more than one theory depending on the needs of each individual. I don't want to put it in what it is compartments retribution. Sometimes you have to achieve this sentencing place of very important role and the judges have paramount responsibility in deciding what punishment suits whom. I congratulate the National Judicial Academy, for taking up this most important area, sentencing in criminal cases. Best practise of achieving desired results and treatment of individual criminal s from other advanced countries and from the UN could not only minimise the disparity in sentencing for similar crimes but would be helpful to bring in re-integration of the offenders into main stream of society after their treatment and rehabilitation. A balanced view of the role of criminal justice system as part of the criminal policy is the wider perspective could be summarised

firstly, the aims of criminal policy goes beyond crime prevention. Preventing crime is the fundamental importance with how to deal with the consequences of those crimes which has not been dealt with. Repairing the damage, taking care of compensation for the victims and supporting them is an important and is an equally important goal in criminal policy. All over the world now there has been a greater realisation that besides thinking about what to do with the offenders or criminals who have committed crimes, what to do with the victims who have suffered, however, crime and the reduction of the harm caused by the crime remains the main target in criminal policy still we must not forget that crime can also causes both material and immaterial losses for offenders their families and for society as a whole keeping those, these scars under control is required under rational grounds and decency and planning criminal justice system may well be the first technic of crime prevention. By their training, by their profession, they believe that criminal justice system is the only option for crime prevention. However, empirical evidence suggests that other measures including social and situational prevention are far more effective compared to criminal justice interventions. Successful crime prevention requires proper attention given to all means and strategies available. Crime prevention would be based on the criminal law would be both ineffective, expensive and inhuman. Finally, while using criminal punishment as a prevention device, we should not limit our imagination to common sense assumption mechanisms of prevention. Criminological theory strongly suggests that law abidingness is basically explained by internalised virtues and not by fear. Most people refrain from crime not because of fear of punishment but because the behaviour itself is regarded as morally blame worthy. Man, many people who have something in the society reputation, wealth, their position, family all these things they won't avoid committing crime because of fear of punishment alone. But because of the behaviour itself is regarded as morally blame worthy because of habit from childhood they have been taught it has gone it has internalised in the minds of people not to commit crimes. This partly explains why no researchers have been able to confirm that moderate changes in sentence integrity have long lost thing and visible effect on the level of criminality. Yeah Thankyou very much for your patient hearing.

**Justice Gyan Sudha Misra:** Not clear

**Prof. K. Chockalingam:** I don't know which he has to say about

**Mr. Milind:** 5-10mins we can have discussions about Indian Penal Code is based on retributive theory and we are talking about reformation how it can be put into Indian Penal Code.

**Justice Gyan Sudha Misra:** What was the striking when I was listening to Prof. Chokalingam, that you know this sentencing philosophy we are discussing but frankly speaking I am really a very furiously realist and I find that this topic basically would be more relevant for the legislators when judges have to work, which is already they have a statute. They have a codified law and they have to use their discretions within the parameters of the law that has been laid down. We have been looking at a like even while we confront a statute as judges as to how to implement sentences then the philosophy may be a little knowledge of philosophy of sentencing may be a little relevant in the sense that were you have discretion whether it is fine or whether it is imprisonment then how to really implement it and go about it would invite the

**Prof. K. Chockalingam:** I concur with you madam, to a large extent that it has to go really go into the minds of legislators, the law makers they have to make this but before that now these kind of researches have to be done in our country.

**Justice Gyan Sudha Misra :** Yes, I think

**Prof. K. Chockalingam:** That is most important these are experiences but not only in this country but many other researches support that punishment has not improved that the main philosophy- *punishment never improves a person*. Whether it in the context of relation between husband and wife at home or relation between parents and daughters and sons at home or outside punishment does not involve situations

**Justice Gyan Sudha Misra :** For this philosophy part could be relevant when you have a discretion as to whether while sentencing how the it is the imprisonment which we should really prevail upon the judges while using discretion, what exactly should be imposed and inflicted on the accused I think there it would become relevant because there are a large number of section where we have to use discretion

**Prof. K. Chockalingam:** Yes ma'am, I have only one comment to your derogation that though it is largely the task of the legislature to liberalise our thinking or policies on the sentencing policy in that within the existing law and procedure the judges can do that even that if they have the conviction or belief that these scientific evidences will work much better. Then

of course it is extremely difficult, you are the best people because it is time consuming in practical sense, whether a district judge magistrate particularly a magistrate the lowest level magistrate who decides the punishment of an offender. Now he has to use individualised method of treatment. Better he has time I don't know how much time but if he really wants to achieve the goal, if he wants to contribute a safe society for us I think he has to devote some time and more liberal use of probation. Long ago, I remember when I was a young research scholar the statement of Justice Sakri about the importance of I think he mentioned he made a statement on probation here. The importance of probation should consider not really use it whether the offender could be released on probation if there is a possibility because sentencing to imprisonment does not improve so this message convey through your judgements and may through your lectures.

**Justice Gyan Sudha Misra:** It is very relevant in the burdening example of UPAHAR case. What exactly be it whether its imprisonment or it should be fine. In Bhopal gas tragedy whether it should be fine which would the compensation and should be substituted by compensatory punishment that should be given definitely the philosophy is bound to inference the mind of judges It will be useful if we have a discussion on that

**Prof. K. Chockalingam:** I would like to have some quick comment before we concluded

**Justice Gyan Sudha Misra:** Give them a chance if they want to..

**Mr. Milind:** All of you are doing your appellate review of sentencing that is your basic rule. You are not having appellate review of sentencing ..

**Participant :**Inaudible

**Prof. K. Chockalingam:** Agreed sir but my question is whether agree with this

**Justice Gyan Sudha Misra:** That you can always overrule

**Mr. Milind:** How can you set aside the sentence passed by the trial judge whether it was appropriate or not.

**Participant:** inaudible

**Prof. K. Chockalingam:** I am more concerned about the question mainly because even the highly educated person in the society educated people at homes wives, mothers they think the immediate response why there are increasing crimes in different kinds of abduction, kidnapping, ransom etc. They say punishment is very less they should be increased punishment that is why it is not true there must be certainty of punishment. No doubt about it. Increase in severity of punishment is not going to achieve the results at all. Unless we have the mind set and the conclusive belief and conviction that it is true that we can't do anything. We may fail, let us try, let us experiment for 5 years and see what is going to happen. Whether it is going to increase the crime probably say 25% of offenders who have been imprisoned for petty crimes now they should be released on fine. If the high court people like you, order in your judgement and it will have an impact in the respective states, let us see what is going to happen. Whether after this policy has been adopted whether there is an increase in crime may be law academy, national law universities, criminologists make a research and find out if we have lessened crimes or at least no increase in crime after this policy is adopted probably we would continue that.

**Justice Gyan Sudha Misra:** I think what you are saying is that is by and large followed by lok adalats, mediations and you know even conciliation etc. and at that point of time it is given effect to contributory factor when we all sit and discuss and consensus is that it should take place while sentencing them it has a real value.

**Mr. Milind:** Sentencing is like just a chartering into water where you are all together judges are new they have to use their discretion according to the facts and circumstances and appellant level there are two gaps of policy of sentencing trying to be filled at the appellate level by the high court and supreme court. What happens at the appellate level all cases do not come therefore the policy of sentencing cannot be framed at the appellate level definitely it is required to be framed by that is the impediment in the framing of such policy in the appellate level. All cases do not come in the appeal even if few cases come they are not able to procure good lawyers so these kind of things may happen.

**Participant:** If they impose less punishment are they not seriously by the appellate court but also they have to think of now. In case of motor vehicles now less punishment is awarded. Where ever more compensation is awarded the appellate court start thinking that he is guilty of corruption.

**Justice Gyan Sudha Misra:** I think therefore you have to create a mindset

**Prof. K. Chockalingam:** Dr. Usha Ramanathan you have any quick comments

**Dr. Usha Ramanathan:** inaudible

**Justice Gyan Sudha Misra:** Policy you know if you say that there should only be if there is a statute in view of the consensus let us take a hypothetical situation that in view of the, there are some crimes in substantive law we can totally do away with imprisonment part then the policy would prevail but where there is a discretion whether it is you know punishment or imprisonment then there is no much scope to do away with the imprisonment. It might appeal to one judge that imprisonment is not good. Finally is good enough to know that other judge would agree. No, no so policy would not really prevail on the judges to do away with imprisonment. Then how do you distinguish between sentencing and punishment. I think they overlap. Punishment and sentencing is just two sides of the same coin. Anyway let us give direction . Let us try to evolve a mechanism as to how to implement the policy even in the given facts and circumstances and the statute which judge is bound.

**Participant :** Inaudible.

**Mr. Milind:** We take a small tea break and will come back a 10:30 will continue with the session.

**Participant:** Before we conclude, just one point. I want to bring to the notice of Chokalingam. Concluding remarks he has made a good noble sentence he used imposing sentence, judge should strike a balance and should see that the interest of the society victim as well as the accused should be served. It's a noble aim in the practical field imposing sentences in different kinds of punishment. We may balance; well balance rather the interest of all the part in a society, victim as well as the accused. I may say in a murder case if we find that I am talking in terms of a judge. If he finds out that the accused even with death or life imprisonment we are imposing there by giving a caveat to society that let others may not try this type of offences. So society will be happy and society's interest is preserved. Victim also apart from punishment compensation also victim may also be satisfied the accused he will never be satisfied by the punishment we give but as per law we are giving punishment. In different kinds of offences we may able maintain the balancing between all the people concerned but sometimes the judge

precarious position and predicament by awarding sentence in most of the matrimonial offences this is the experience we have come across in 304 let us say bride burning or wife died in a suspicious circumstances within 7 years of marriage and the trial court after finding that he is guilty by imposing sentence sometimes you may not believe even the victim side people coming and telling through the prosecutor that the victim had two small children. Nobody to look after them so the court may while imposing sentence look into the status of that man accused except being the father none others to look after them. So, he may not be visited with a harshest punishment. Sometimes in extreme cases u don't believe for the sake of children the victims who died, sister is being married to the accused. This is the harshest reality, then in the prosecution side, people coming to the court and the date of awarding sentence saying that a lesser punishment be imposed because it is not a compoundable offence. In such circumstance, if u request into consideration because we will be sending a message that let the husband commit these type of punishments and get away with a minimum punishment. If we do not here who will look after the children. Some cases there may not be anybody to look after this tender age of children so how to strike a balance between the interests of different types of people. Society on one hand victim on another hand and accused. Sometimes in I have recently sat in a criminal bench I have come across such a type of situation were the lower court though it has not in so many words but imposition is manifest with lesser punishment, though he deserves a higher punishment. What to do is a precarious situation I hope our learned brothers and sisters

**Justice Gyan Sudha Misra:** You would do it by finding reasons in your judgements you have

**Participant:** So in matrimonial cases we put in a this type of precarious situation law says that you should impose a higher punishment 7years is the minimum for 304B and life imprisonment upto, even though the case deserves life imprisonment he puts 10 years or 8 years which is like that which apparently looks not an adequate punishment. So this is where interest of one section of the society is being safe guarded that is what my feeling is how to strike a balance any of my learned brothers or sisters may comment on it that is the thing.

**Prof. K. Chockalingam:** I agree with you. I hope you are telling this as a comment and you are not looking for an answer from me the answer for me is that is the area where judges can exercise their discretion within the range of punishment. It is extremely difficult for the judges to say only judges the case to understand the situation but principle as a general principle I do



not believe that considering the pretext of children should not give a message in the society that the real criminals can escape by showing this that is the most important thing one has to keep it in mind .

**Justice Gyan Sudha Misra:** We have to disperse for the tea break because have to go by the instruction of .

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**SESSION:2**

**SUBJECT: TRADITIONAL AND EMERGING APPROACHES TO SENTENCING**

**RESOURCE PERSON: DR. USHA RAMNATHAN**

**CHAIR: JUSTICE GYAN SUDHA MISRA**

**Dr. Geeta Oberoi:** Now we have our second session which will be taken by Dr. Usha Ramanathan. She is internationally recognised expert in law and poverty. She studied law at Madras University, University Of Nagpur and Delhi University. More about herself she will be telling she has a huge big CV and whatever I saw would be less in her honour. So, now I give it to Dr. Usha Ramanathan for her views on second session which is actually traditional and emerging approaches to sentencing

**Dr.Usha Ramnathan:** I won't waste any time on introducing myself because at this point this is not really quiet relevant . I was very interested over the past 25 years I have been hearing him, following his work and we have been friends through this period. It was good for me to get refresher course from him on what the latest position is in thinking. What I will do will be slightly different from what Prof. Chokalingam did its derived from the work that you have done. Sir, but it's pulling out different strands, so in one sense before I say anything I have done a lot of work its true but I must say every time I am confronted with high court judges like this around. The best thing about the judges, they are excellent listeners because you don't

have choice. Never mind, what is thrown at you so I only hope that patience will extend to me because I know lawyers have trained you to hear just about anything so I am starting with a little bit of intimidation but I will get over it as time passes.

**Participant:** not audible

**Dr.Usha Ramnathan:** That's okay. That doesn't worry me in academics you don't expect everyone to be in agreement the moment we all agree on something we know we failed in some place so that's fine but reason I gave that prelude is much of the work that has been done in this area by groups that I work with. I travel around, a lot of meeting with other academicians like Prof. Chokalingam academics tend to do that this work is in progress in the sense and I took the liberty of coming here to speak about work in progress. Some of this is with the contributions we are making to global thinking how to approach this idea of sentencing. This is not an issue that is only worrying us. Indians give importance to academics at different places for a range of reasons one reason is of the Bacchan Singh judgement. Everybody talks about it everyone wants to know how to apply it. The idea that it is not just the crime but the crime and the criminal increasingly the idea that it is not just the crime and the criminal but the criminal and circumstance and I think that came out very in your presentation, sir. That when any sentence is going to be awarded to a person and the crime is being to be recognised having been committed by a certain kind of person and it is done that the crime and the criminal came from certain sets of circumstances. All these are important if we want to make the criminal justice system help in making the society a safer place. Because that like you said the basic idea we have to make the place where we stay a safer place. If it's only going to be about punishing a person and putting them away very often we are not punishing the person we are punishing a crime which we think is abhorrent and Indian jurisprudence has gone way beyond it. So I don't think it is necessary to labour that because between shifting from looking at the crime and in fact I must say that this is one of the place where a lot of American scholars feel they have a lot to learn from us. You know we are used to this we always refer to American judgements and we talk about how we can adopt it on criminal law. A large part of the American establishment is not really as advanced as the Indian jurists are. So Indian judges are so there's a lot of learning that happening in converse because the idea of crime and the criminal and increasingly especially in the context of the new kinds of issue that are being projected into law. The idea of circumstance is also become very important so what I thought I will flag some

of these issues and then we can discuss it overtime in this context the discussion I must confess in recent time has been around juvenile and the December 16th rape episode in Delhi, we all know how the case went but we also know that the idea of juvenile raised two, three things. One, it raised the pitch on saying juvenile, perhaps the worst offender and when this enters how public policy gets laid and how this influences public policy. When the statement got made, it got picked up and it was treated as if it was the truth that it had been said in that it was the truth. Those of us studied the case when the juvenile court has investigated what need to be done with the juvenile. They had said they have taken on record this (not clear) juvenile has been going on to be the worst offender and say that actually there was no evidence to say that and perhaps what was said outside of that understanding. Therefore, it perhaps it was said because the police were aware that the juvenile is not going to be brought into the regular judiciary and therefore if you push the blame on the juvenile even if they are not able to get convictions which would have been terrible for them. Given the nature of public protest during that period they could still say what we could do. The person who has worst offended is protected by law as in there was a lot of passing off the responsibility for the offence though the juvenile in the first instance and we found that public policy has been changed because of what was said. People who investigate and that's the kind of research that Pro. Chokalingam was talking about. The people who work on the ground with street children who work with children who moved away from home their experience over this years tells us that if you look at the statistics they will say women and children on street about 95% of them will have at some stage or the other been abused on the streets. So, there is no protection on the street for them we have a whole juvenile justice system but the juvenile justice system is not able to cater to even protecting the juveniles who are seen as children in need of care and protection and very often they tell us that what children will have to do to survive on the street is to leave themselves up with somebody who is the dadha on the street somebody who has got the mike to protect them. They might exploit them but at least they will be safe in the context of the rest of what happens in society and the other thing that they tell us in a place like Delhi there's extreme heat and extreme cold in the extreme cold substance abuse is a very common. A way of preserving life. So that's one way in which you would see in children really young children will be sniffing, will be using whitener- white fluid for sniffing because that one way of offending off the cold. This case actually taught us differently from what it taught the parliamentarians. What it taught us was that how do you look at the crime? how do you look

at a criminal? The person who committed a crime. How do you deal with the circumstance because at the end of all of these when we were having our discussions in women's group saying so, how do we need to treat this. The question that the young women around kept asking us was, okay. So you punish the 4,5,6 people the circumstances have been changed. So how does it help us? Are we supposed to feel a sense of retribution and therefore some 4 people have been hanged or put away and that's the end of the story or is there some other way in which we need to approach this issue and is this punishment the correct punishment for people who come from these circumstances because one other factor I must tell you is that within two days of the offence having been committed the police had visited the family of the boy in some village in Uttar Pradesh and said that he did go there only to investigate whether the boy was less than 18 or above 18. So in the period that he has spend on the street from the age of 8- 17 and a half there had been no hang in reaching what it showed to us the failure of juvenile justice system and there has been nothing done to shore that up in this process. So, we are not going to prevent crime because we have looked only on the horrific nature of offence. We have not looked beyond it that's one learning that we had. The second area that many of us are concerned about and this is an international issue to and this is a mass crime and a context of corporate crime. Mass crime is not even defined in our law so we don't even know. For instance, India is a signatory to genocide convention but we were supposed to have setup some systems in the country which will help us deal with such issues if it does come up we haven't had as far as I know we haven't had anything with in the definition of a genocide at least after the partition I don't think we had anything that would get defined with genocide but there is now an acknowledgement of things called crimes against humanity and war crimes, we need not worry about noble crimes against humanity which say, which talk about high threshold but where it is wide spread and it's systematic. Then the fear that has come in now is that states themselves may be shielding the perpetrators of some of these offences and then what do we do? How does the judiciary the reason that for some of us are important to talk to the judiciary is because we see the judiciary as the Bastian for us between state power and citizenry. State power does not always have to be abused a lot of the time. We appeal to state power so that it can help us protect our rights but there can be times state power and is especially polarised there are times when state power can be excessive. Sometimes it may even be used with good intentions but it may converse to what the constitution has been asking, should be the treatment of people so we see the judiciary as the fulcrum around which life and liberty circle. We don't

expect that to be done because the judiciary is not affected by the political movement you don't need to be affected, there the thing you value more than anything else therefore in the judiciary it is the independence of judiciary that we are independent not just of other institutions but also of the context in which politics is working and when I say politics I just don't mean political parties and the economic, social order that gets established. It is something that the judiciary does not have to be affected by it can still see what it mean for the last person the constitution is not majoritarian as we know the judiciary is the best anti-majoritarian institution that we have and it's the most important so when it comes to issues of being shielded by the state one of the ways in which it happens in the Indian context is power of sanction. Somebody commit an offence, if they have the protection of the state they may not have sanction to prosecute the person and then it just gets off. What do we do in the context of mass crime thinking all on what will happen if tomorrow is confronted with the situation of mass crime and you have to think in terms of sentence. International thinking has been that we should do away with the idea of death penalty and it is interesting that when you see what happened after the Tokyo war crimes tribunal and then in tribunal you can't think of worst crimes. The holocaust was terrible and Japanese during the war did not quit themselves well at all. There is one aspect of which is about victors justice. The Americans how the second atom bomb need not be dropped at all they knew what they wanted from the first one that the extent of devastation. Shouldn't they be tried for having done that? Today we know that American establishment is attacked much more in mass crimes in countries outside their jurisdiction than any other country is accused of committing a crime but the international way has gone. International Criminal Court and India is not a party to International Criminal Court we could have security council could refer a matter to them they have decided the maximum sentence for that should be 30 years because the idea like Pro. Chokalingam said is not that we will put people away for ever and ever and say okay, now we can forget about them. This is another area, this idea of putting people away is another area were the international scholars are interested in what has happened in India, because in the Indian context we have spend a lot of time breathing down those walls for a long time I think Justice Krishan Iyer with his team of people saw what is happening in Tihar Jail and came back and wrote those judgements. Most of us have thought of prisons as a place where you put people and you forget about them. What happens inside a prison is not important at all. We now know that the role of the judiciary neither begins nor ends with the judgement that is given. Because the judiciary in that sense has to be aware of where the criminal justice

system is deriving all its material from like the judiciary cannot be unaware of something that the NHRC has been saying for ever. Torture in police stations is endemic. We cannot run away from that. It's a fact. How do we deal with it? Now would that be something that you would account for in conviction and in sentencing would it be something that we would look for in seen how that evidence is being collected, gathered and what is being done. These are questions that have come up but the breaking down of the walls and it's not only of prisons it's of beggars homes. It's of homes for children, juvenile homes all these the walls have come down. It came down considerably, it has gone back up a little bit but the ability for non-inmates to reach in and try and figure out ways of dealing with what is happening within the prison system that has begun now. While it is true that in the US for instance the welfare model of reform has been virtually abandoned then they are trying desperately to bring it back. India has not gone down that route India still says that we will look for ways to engage with people are in prisons or in any of the other institutions and help they bring them back to liberty. That's one of the difference I think we still have. India is much more compassionate in humanitarian society in the sense than the Americans. Infact one factor we should say about American system now is the you might have heard of the innocence project . The innocence project is a remarkable thing because to my mind Justice Devdas was just saying how Madras High Court has not acquitted itself anywhere. The lawyers are constantly questioned about the state of lawyers of the court there in the US establishment it is a remarkable thing that where people normally enter the profession and they make their money or they do whatever there you have a set of lawyers who have been working and this is completely lawyer lead on the innocence project this started because people were put away into prisons for long years I mean they have sentences up to 999years. That's kind of like they play god in your next life also you will come in and you are going to be in prison. So, they found people who had been put away in long years in prison and in some cases people who are in death row people who executed were in fact founded to be innocent and when I say innocent I don't mean beyond reasonable doubt. They were established as having been innocent of the offence to a great extent through the entry of DNA evidence for purposes of establishing whether the person was on the scene or not one of the basic things which the innocence projects tells us is that one is that using DNA evidence for establishing that a person was not part of an offence is something DNA can be used for. DNA doesn't automatically doesn't make them guilty because of various ways DNA couldn't reach there especially if it's a violent offence. There is no DNA at all in that place

then the possibility of establishing acquittal is greater as DNA science has grown. They have been able to use this to establish it of course in many of those cases they would also have to be because the system is also to be very resistant to this kind of admission they had to be able to establish whose DNA it was and it always helped when that person commits another offence is sitting in prison and and their DNA's are on record and then the acquittal happens and it is not acquittal it is innocence so they have to they have done a brilliant job i will come to that in a minute the second thing that they found is about 27% of IT S ABOUT 1500 people they have got of on the basis of innocence from the various presence of US 27% of them had confessed to the crime so they were saying did they confess if they didn't do it they wouldn't even know about it so they have been doing a study on this and the people who have been the disciplined helping them a lot with this is a psychology and psychiatric profession who have so far in the studies continuing that there are various ways when a person is kept in a closed environment and there is this power disequilibrium between the questionnaire on which the person is being questioned it's not even about torture there it's about the way in which suggestions are planted in a person again and again and again and its part of interrogation that interrogation itself can produce things where a person says 8hrs or after 24 hrs has heard it so often that they themselves begin to think that its okay this is what I need to say and many of the things and back to the recording of what has been done they found that many of the things that this person said actually came from what has been said to them it has been suggested to them in various ways and an interrogation has to take on that mode the unreliability of confessions of instance and then there is an another thing that they found were these things I think should come into our way of sometimes you find what is before you have to `convict but it has to be part of our thinking how we sentence a person because it has implications . India we have a rule which says the prosecution only has to give that evidence which they are going to rely upon they don't have to give the rest of it this is not true in another countries if there is anything that is exculpated because the prosecution has holding what the investigation has given them so they have to give all of the especially if it is exculpatory before the court but you will find for instance the very well-known case of Gilfer for where 4 Irish people were put in for bombing terrorist bombing they were found to be innocent they been in prison for 15-17years by the time they were found to be innocent of they were charged it was found that and the lawyer accidently chanced upon it one of their father's case and she got access to the document which showed that its a not to be shown to the court and that document was an

exculpatory document which showed in fact these were not the people they were not there they were not the people who did it. So, the responsibility one of the things that became important over the period of time is what we expect the prosecution to do its the prosecutions job to try and get the conviction and then to get the maximum sentence possible or is it their job I mean in our context we have had in the Kasab case, you had Mr. Ujwal Nikum say while he was training some police men. He said that I deliberately said that Kasab had asked for biriyani because I felt that I needed to stop the fire against him more and therefore, I deliberately said it actually he never asked for anything like that. That turned the public opinion against him so acknowledging the factors that come in the judiciary will have to set itself against all these extraneous factors when it is going to be dealing with something like sentencing of a person but which brings me to the question of remote. I mean what is the idea of remotes and someone have expressed in a certain way before they are going to be the sentence is decided or is there someway in which remotes might get expressed in various kinds of ways and it might come over a period of time and the question is whether a person is capable of reform at all or not and the question about reform of course is not that change your whole life but that you will be able to learn to come back and live in society without being a threat to the world around you These are some questions that come up in this context on corporate criminality in fact Justice Gyan Sudha Misra raised the question of Bhopal we had these discussions many times I come from a very civil liberty oriented approach and so do the people with Bhopal victims but they been saying throughout that you can give us any amount of compensation you want that's not enough for us if people who are in the kinds of decision making positions like the corporate heads whether there was Warren Handerson there or the people here if they are not going to be punished then the message that we are giving that you make you profits if some of us die 20000 or 8000 or whatever you pay the compensation and you can carry on there is no other consequence in fact, Prof. Chokalingam was suggesting fine was thinking one reason for not being picked up very much is that lot of people who picked up for crimes are poor their ability to pay is minimal those who get picked up who are not poor can easily pay and walk off so the use that fine has as punishment or deterrent is suspect so we need to think about some of these things before we make these prescriptions and i think there are some very good Supreme Court judgements when they suggest fines it should depend upon the capacity of the person to pay to and both in the Bhopal case and in criminal case that has been this question that has come up how much fine would you levy on a person and what is fair and what males understanding



of criminal law and sentencing other international trends I don't know whether it's a trend but definitely that happened in the international arena which could be of use to us especially in the context of mass crimes since you dealt with a lot else I thought I will focus on this is the truth and reconciliation commission in South Africa it's a very interesting. I think all of us as law people need to study because it came at a time of transition and in our country we have multiple transitions like that we had a transition in Punjab we need a transition in north east we are having problems in Chattisgarh and now we need transition in some stage the movement of transition is... Kashmir so when the transition is when two sets of people who been colliding whether it be the state and the people there might be two sets of people. Where they have been colliding and there is been a lot that has gone wrong. Punjab is a classic example when things are no longer as they were before how much do you need to use punishment and sentence as a method of dealing with the crimes that were committed before. How much do you need to use reconciliation as a method of helping them live together once again. This is a question that is often being asked and there are no easy answers to this. In the South African case, the African national congress would use the reconciliation method and said that if people come in, he says there are 4 kinds of truths he says one is deductive and inductive truth. There is logical truth where you arrive at logic. There is experiential truth like Gandhi tried to arrive at the truth through experimenting and then there is microscopic truth and there is dialogic truth. He says judges are very often concerned with dialogue with microscopic truth you have an evidence act before you. You have the offence before you and you have a person who is accused before you and you don't expect to look beyond that. So, you only look at that and within that there was an establishing of convicting of conviction or otherwise he says the dialogic truth the one truth that have multiple truths different people experience it in different ways and you need to know what all of it is before you know the extent of culpability of different people and that's what they try to establish through that. I find that in the Indian system, despite the existence of the evidence act and the limitation that it produces especially at the time of sentencing there is a lot more that can be taken on record and considered when we are looking at it at the time of sentencing so sentencing can be dialogic were the arriving at the guilt or innocence of the accused may be microscopic. So, the distinction you maintain as a process from conviction itself one of the very interesting leaping miles away now because I am just thing of the time and something's I just want to plant in your minds because they bother us. One of the very interesting things that's happening now is the idea of beggary as criminality when I work on

law and poverty and these things striking all the time. You may have noticed in paper recently there has been report of how the central government is thinking decriminalising beggary. When I looked at the beggary law, anti-beggary law to my mind of all the laws that I have read is perhaps the most unconstitutional law that I can find. It has remarkable features in it and way it is been practiced is also extremely unconstitutional and there has been nobody to speak up for it because they can't speak up for themselves and nobody else is watching it. One decision of the Delhi High Court changed the way in which many of the administrators started thinking about the beggary law and that a decision called Ramlakhan, it came in 2007 or 2008 and since then there has been a lot of discussion in the National Institute Of Social Defence And Social Justice And Empowerment various state governments various things have happened were they realised for instance that in Bangalore for instance in the beggars home you have some 248 people who have been picked up as beggars dying in the institution in a very short period of time and that caused people to sit up and take locals it was almost like hidden , 248people is lot of lives that we are losing but it didn't seem like it merited very much conversation all this made a difference then we had experiences like that in Delhi too I live in Delhi and I know that we had experiences like that in Delhi too and a couple of cases which has gone on in the court. These have helped in highlighting the way in which we treat the poorest of the poor and the idea of sentencing was a very strong part of this beggary act although it is called a beggars home. A person who enters that are 4 things that were there one is criminalising of poverty. Second was that it was judicialicing it. So, they will be produced before a magistrate. When a judge passes an order and somebody is taken into an institution, they will not dare to send them out until they receive an order from the judge to release them and then custodialisation. You put them into custody which means its incarceration and the intervention of the police rather than social justice. So these are the features that were there of that and people used to do rates and round and put people away. It was not even acknowledged that this was sentencing of people. That was being done it was just seen as a procedure under the beggars act people could put there 1-3 years in first instance and upto 10 years and it's the only law that provides for indefinite institution. All other, even if you commit a heinous crime. You are told, how many years you may have to be there but in this case, you can actually be put away for long periods of time without knowing how long will you be there. There is a talk for Prof. Chokalingam was saying that of decriminalising and finding other ways of dealing with it. What is happening now is that they are looking at it is as a case of destitution why do people put their hand out

and they ask and the law that now being fashioned is on destitution and not on beggary as criminality that's a process of thinking. So I just thought that u know people who have been involved in the system over the period of time are there rather feels which you encountered, which can afford to have this kind of treatment where the point is not about criminalising. The point is about helping people who are in different situations of distress. The other thing is that there are two other phenomenon that have been pointed out to us. One is the idea of you know while all these theories of punishments exist. They seem to be other reasons to why certain punishments are offered one is symbolic sentences, that is they are not as exemplary sentences but symbolic of the power of the state we are finding that the return of the criminal justice system. All of know that all of us say it in places but we are not quite sure how to confront it so we end up we have to validate the criminal justice we have to carry on with our work but we know that there are many glitches that happen for instance, for criminal investigation today is really not where it needs to be which is why every time there is an attempt to circumvent what the reason. Find something else like the Narco Analysis was one such case were they said we can't do regular investigation whatever do it through right detector let them speak for themselves then we can say they said it and that becomes simple. DNA unfortunately is emerging as another such episode we were saying okay if there is DNA that's it. Lets make it final with our lives. These are factors which have been used in creating symbolic sentences no state wants to see it as if failed in securing a population and there are it becomes important then to ascertain that for instance terror offences. terror offences I don't think anybody as an actual offence for instance which needs to be treated as a political offence. Here are offences where its undirected or untargeted just about anybody could be that it is only for the purpose of spreading fear. Those offences we find for example, just as an instance case in point we find that both in the. Let me take the parliament attack case, in the parliament attack case - 5 people stormed the compound of parliament. All of them were shot dead right there, then others were found as having been picked as conspirators and then they were charged with that and Afzal Guru is now been hanged. In what has happened after that has to be noted because one of the main pieces of evidence against him, whole thing was circumstantial. One of the main pieces of electronic evidence was the electronic evidence and the electronic evidence of his mobile phone. He has been denying that any of that but anyway they said no, no electronic evidence proves that his phone was here and there after he was hanged over a year and some time later another decision comes along which set 65(d) of the evidence act has to be strictly construed

because electronic evidence can easily be tampered and there are multiple ways by which it becomes unreliable evidence and therefore we cannot depend upon unless that system is strictly followed. So they set aside the judgement. They overruled the judgement in the Afzal case. Now much of the evidence is there against Afzal, was electronic and that evidence has been basically they are saying that this is not the way to have done it and then the court said they were aware but the execution has already happened. They say we assume that it was done in that case . When you read the decision in Afzal case you don't really, you won't be convinced that in fact it was fine and there was no problem. So what comes into people's mind when you see a decision like this is that why do you need to pick up the Rajiv Gandhi assassins. The kind of question that coming up now, don't let them out at all. All the main conspirators, everybody is already dead Prabhakaran is dead, LTTE is over. Now you have in this prison one of the four persons is paid a (not clear) and the investigating officer who investigated him is on record and he is on youtube I think by now saying that when he said in Tamil what he said and I recorded that in English, the only thing about him is that he bought a battery whether he knew that it was going to be used for the terror attack or not and he says I recorded it in a way which made it seem like he knew actually he didn't say that I didn't realise that would result in his being hanged and been put in this position and this is the investigating officer coming on record openly saying but there is no reaction to this at all its almost like he said anything. So the man is being put up away for ever and ever. I see it is part of growing body of people who are researching some of these issues as cases where symbolic sentences are being handed out because you can't get the main perpetrator. You find who you can and then you can't let them go because it's about the symbol of state power and I would like you to consider it the judiciary is not there to help the state in this kind of symbolisms. So we need to think about these cases, much more cases in most of these cases. We find the main person is not found at all and somebody and invariably it's in a conspiracy and then there are a whole host of things then you have the diluted law you have confessions you have electronic evidences it raises a lot of anxiety in people's mind. You know the agitations that have been going on in Delhi. For instance, you find that in those agitations people are agitated about Afzal case because they have seen many of these things come out what is the point you execute the man and then you say that may be that evidence was not properly taken. It doesn't help anybody so that's one kind of thing that has come up. The second is something that Gopal Krishna Gandhi spoke about in CBI talk he called it as scapegoating that's something we need to watch out for during

conviction certainly during sentencing he says that because the criminal justice has collapsed and because of so many of these cases they are kind of a resolution its almost like in some of these cases it become high profile and like Arushi Talwar case that's the example he gives in his talk. He says is almost like you have to find somebody and you will find somebody and pin it on them and you read the whole Arushi Talwar case you understand why he is saying what he is saying I think we seriously think about what this mean one of the anxieties he seem to have has because he came later and spoke at law commission when they were having the discussion on death penalty one of the anxiety was that an offence like this could also have been meted out the death penalty of the death penalty because now its become when you were saying certainty of punishment. The converse of certainty of punishment is were very likely, crimes are not going to be solved because when you pick them. You give them the highest sentence when you are able to find somebody. So there was the anxiety that people who perhaps have not done anything at all end up being given the death sentence and these are cautions that are being put in because people are standing on the street and asking for the death penalty not because of they want the death penalty, they are asking for it because the system has failed them this is an expression of frustration of people, who are out on the streets when they say okay, just catch them and string them up. We are sick and tired of having nobody. How is picked for these things so it's also to understand what the public needs when it says something and I think many of these things get discussed and some of these are things that the rest of the academic community speaking of I must say that one thing that the community is and I belong to that community too is very uncomfortable about and is unaccepting idea of collective conscience and this has come up again and again in death penalty cases where the judges give and explanation of why they are giving the death sentence and spinning it on collective conscience. Collective conscience is not about the crime, it's not about the criminal, it's not about the circumstances of the crime, it's about an imagined circumstance that has emerged after the crime has been committed and that iam not sure of the technics of good jurisprudence but I would really appreciate some discussions on that in fact I must say that the other case that has discussed by many of us is been opened up again that's the Dhananjay Chatterjee case, which was after a long time you had an execution in 2004 that was also completely motivating by creating a kind of. Mohanlal against Dhananjay Chatterjee in the public including on television and whatever after he was hanged in 2004, many years later there is a decision of Supreme Court which says that's in 2008 that the Dhananjay Chatterjee case

only looked at the crime in India. The way in which the law has developed. You have to look at the criminal you cannot have a sentence which does the sentence was to not look at the criminal and in Dhananjay case they did not look at the criminal and therefore that case was wrongly the sentence was wrongly given but of course the man had already been hanged. I think we need to ponder a little on some of these things because these really are matters of life and death. In a big way just a last thing, there are various themes that dominate the crime policy and sentencing policy. One is the theme of rational choice and the structures of control the presumption in many of these one of the things that we assume is that every person makes a rational choice when they commit an offence. We need to investigate this especially, when it comes to sentencing not on conviction. If the person has committed the crime, they committed the crime but when it comes to sentencing we need to see whether it has been done on rational choice and not by range of other things they have influenced. What the person do that's one. The second is some of the scholars say they attributed the way the market economy is going they say that because of the way it has gone you have the idea of the individual now beginning to dominate. Every individual takes responsibility for whatever they do in criminal law that we know that is not that accurate. We know that in criminal law the person is created out of circumstances, the idea of criminal law is just to punish and put away then we don't have to worry about any of these but if we have to worry, our concern is that we need to make a safer society then we need to think about all these issues. The third thing is the way in which the underclass is treated but now we know that there are various ways in which an underclass can get created. The underclass can get created as for instance the political class today is so badly damaged in reputation there is a tendency to accept to presume that they are accused of a crime and it gets complicated further. When the case is taken first over a writ or whatever to the Supreme Court and then the supreme court directs they should be a trial. Then it complicates because the lower judiciary. Then finds itself confronted with what the higher judiciary already said that's one kind of thing but there are multiple underclasses I think as in your different experiences you will know how the various underclasses get constructed and there is a sense to sometimes there is you know in someplace, it is the system is too lenient it need to be harder but we also need to watch what it is saying in the context of the women's movement for instance they have been asking for many of the offences to be recognised as offences many of the things that happen to women as been recognized as an offence for the longest time and even or if we take the case of child sexual abuse that is been denial among all of us when the evidence became

too much for us to turn away, we made on a law on it but the women's movement always said we want an acknowledgement that there is an offence we want people to so that they know that this is unacceptable behaviour. But we are not asking for dire punishment to be meted out everywhere. So onw of the things that they rejected before the Varma Committee for instance. They said we do not want the death penalty in these cases. Treat us better when you say the role of the victims and the treatment of the victim, if that doesn't change, how doe sit help me if you are going to sent someone to the gallows. So, recognise that you need to alter your procedures in a way where you respect the person who is being affected the automatic thing from there is not that you therefore visit the offender with dire punishment. What we want is a changed circumstance and punishment doesn't by itself change that. So thats broadly what has to come to you with.

Participant: Madam, when you pointed out that when the main perpetrators of the crime is dead as in parliamentary attack case and when the main the perpetrator of the crime is no more available as in Rajiv Gandhi murder case. The conspirators have been punished in the most severe way but the court. Now, unless conspiracy is made mere offence cannot be committed so conspirators make every great role in commission of the crime. Our present law under the Indian Penal code is in 120B. The conspirator gets the same punishment as the main perpetrator of the crime. Punishment will be send and unless that conspiracy was made the offence would not have been committed. Subsequent, public outcry is due to media reporting. Media reporting is done on the basis of sometimes when the investigating officer who investigated the case. He has given some statement before the media or for some reason something has come to the media that is highlighted in the media. But those things are not on record before the court when the initial sentence was imposed and subsequently that sentences was filled by the high court and affirmed by Supreme Court. At that time, evidence was not available. So it is rightly done. It is rightly done and the public outcry is due to subsequent media reporting which we do not know how far that is true or how far it is reliable or how far that should be taken into consideration. So what will be your comment.

**Dr. Usha Ramnathan:** Actually, the idea of conspiracy in law, see I was reading, I will just go back a bit. I was doing a paper on what happened between 1920-1950. I just wanted to see how the between colonial courts and post-colonial courts. What is the difference, Independent courts what is the difference . When I was looking at those cases, one of the things that occurred

to me. See most of the major cases where only in the lower courts. So they didn't come to the High Court at all. So you don't see them. One of the things that you find is the way in which the idea of offence that is if you take the IPC, every offence has to be sharply defined so that the person knows what they are defending themselves against. Now I find its very diffuse. It will be 306 plus this plus 304 plus , you don't know what you are defending yourself against and that becomes the one kind of a thing. Now, I find that when we say conspiracy, the way conspiracy has been defined has become so overblown. For instance, Perarivalan case. Now if the question is only whether he knew that his battery would contribute to what that dhanu is wearing or not. That's all. He is not part of any larger conspiracy but he has contributed to it through this ways. So, if you say that when they conspire for an offence the idea of conspiracy has to be very different from a contributed to an offence. My knowledge that may be something is going to happen would that give me the same punishment as the person who is sitting there and every part of it putting it together. Sending the person out actually going and inflicting the harm would it. Thats a question i my mind because I don't see conspiracy that broadly because then we are not accounting for most of the things that happen. Whether it is the kind of power relation. Take an organised crime case. Where there is a Dawood Ibrahim or whoever sitting there and there are a whole host of people who might be doing little things like picking up , getting liquor for them to, May be all of them would be part of the same thing. In a case like Perarivalan, because you have made the conspiracy so broad. All they needed to do was to say okay we will put in one thing which says that I brought this battery. It is true. Knowing it is going to be used for this thats it. This is the conspiracy for which the man has been given death sentence. I think when we are thinking sentencing. We need to think a little more about how we are going to define each of these offences and who is responsible. The second problem that I have is that because of the microscopic nature of how you look at as a court. The fact is that there were 5 other people who came in there who stormed. Who did whatever is there. That is one set of facts. Now we do not know who they are? What happened with them and till today that's all shrouded in history. Afzal Guru said that he knew Muhammed, one of the five. He said that the person who had helped him meet him was somebody in the STF. All these are on the record. He said that he met him in STF camp in Srinagar. He said they asked me to help me when he came here by helping him get a house. Get a place to stay. If you look at what he is supposed to have done on that day this is what peaked my mind and I started looking at the case more closely. He say that on the day of the offence, they were all already in parliament.



These men have already gone there. One of them, calls him up and say look at the television and tell what they are showing on the television. Then Afzal Guru calls him back and says I can't look at the television because no electricity in my house. So, he says go to the market and look. Now to my mind I would really as the question. Somebody, who is central to the crime, it sounds like a very odd role. The problem is since, the court is only expected to look at the allegations that Afzal Guru has made about what has happened. They are not allegations. They are part of his statement where he says that the special task force introduced me now shouldn't that be investigated? So what happens, is that the narrowness with which the court and I am happy about that. The role of the court should be narrow, you can't be expected to go in to the politics and social and economic of everything through out. That should put caution into us about how sentencing is actually done at the end of the day which is why I am saying that there should be a distinction between the conviction and the sentence. That dialogic truth which will have to come out may in fact make one thing differently about the conviction itself. But that can be for a higher court like your court. The difficulty is this that because of the microscopic nature we are not asking all these other questions which we as a people are asking and that's was raising. See, we normally expect what happens in the judiciary to be the end of our problems but when the way in which it happens it can become are a problem. Thats not a very good thing because then that results to under rates in society around us . Iam just saying the way Iam really looking for the day when we return to what happens , it were wrong between 1920 and 1950. But this I really admired. The carefulness with which the idea of a crime is constructed and put into the definition in criminal law. It's very important. Iam thinking tomorrow, if Iam before a court and I have to defend myself I need to know what Iam defending myself against. Even that is difficult now.

**Justice Gyan Sudha Misra:** Anybody has any queries. I think we will have another tea break after this. So, do you want to have a tea break or. We can continue. So the consensus is that we should continue or you need a break, choice is yours.

### **SESSION 3**

**SUBJECT: SENTENCING FOR CASTE BASED ATROCITIES**

**RESOURCE PERSONS: MR. V. RAMESH NATHAN**

**CHAIR: JUSTICE GYAN SUDHA MISRA**

**Justice Gyan Sudha Mishra :** The consensus is that we should continue or you need a break? Choice is yours. Okay, lets continue.

**Mr. V. Ramesh Nathan:** Honourable Chair of the seminar Justice Gyan Sudha Mishra, my distinguished co-panellists Pro. Chokalingam and Dr. Usha Ramanathan and honourable judges from various High Courts. Indeed Iam happy and privileged to be part of this seminar and it is a good opportunity to interact with the ground level realities of our experience and Iam thankful to National Judicial Academy particularly Dr. Geetha Oberoi, the director and Mr.Milind. We are hosting campaigns on Dalit human rights, working for protection and promotion of human rights of Dalit communities with networking of wide level for more than 15-17states. Since 1998, we have a very systematic monitoring of Dalit human rights by our trained human rights defenders and based on that we undertake fair and objective fact finding of various harsh atrocity cases and provide legal support and based on our experience last 7 years we also been engaged looking at schedule tribe, schedule caste atrocities act. We found there has been many gaps while we were implementing and we proposed amendments by drafting the amendments and submitted to social justice and empowerment ministry. The amendments passed as we all know from Jan 26 ,it is coming to the enforcement. Here Iam not going to discuss about the theoretical aspect of sentencing cast, cast based discrimination but Iam going to reflect based on the experience of our monitoring and implementing of schedule caste, schedule tribe atrocities act which raises many questions. Sometimes we feel frustrated because the kind of challenge that we face because we know that we got a very good constitution in the constitution practice of untouchability is abolished, practise of untouchability is an offence and many welfare legislations to promote the socio-economic development of schedule caste and schedule tribe. Despite all this, still caste system exist caste based discrimination exist and atrocities are rampant in the last 15-20 years against Dalit communities which is really disturbing . In a way, India is progressing, developing in science and technology even compared to developed countries but when we look at the various aspects related to large section of community schedule caste, schedule tribe which is almost 240 million

of people and day to day basis we come across many cruel forms of atrocities. Like any citizen we have a civil and political fundamental rights which permutes us to reside anywhere within the territory but from a Dalit village we cannot go and live in non -Dalit village such a geographical segregation also exist in the country and the schedule caste, schedule tribe atrocities act is very, very powerful act which has done both punishment as well as rehabilitation, compensation for the victims still there are lot of challenges. First of all, I would like to mention the extent of atrocities committed in the last few years. How this crimes are committed and conviction rate are sentencing done. This act is being implemented. This is the overall statistics I have taken from the national crime record bureau because Iam not bringing the kind of atrocities we have undertaken for monitoring but these all are the government statistics . From 2001-2012 we can see 3,70,234 crimes are against Dalit's out of which 15,917 Dalit women were raped and 7,999 were murdered 49,500 are brutally attacked and other forms of atrocities that one lakh fifty-nine. The other forms of atrocities mainly related to burning of houses, untouchability and honour killing. There are many other forms of atrocities but under this act during this period it is 24.8%is the conviction rate. And when it comes to the issue of Dalit women, they continue to face multiple forms of discrimination and multiple forms of atrocities and out of the previous number statistics that I presented on the crimes against the Dalit's these are the parts of the crimes committed against Dalit women. Verbal abuse, physical assault, sexual harassment and assault, domestic violence and rape and other forms of violence and in 2014, through over monitoring, we found in Rajasthan alone 50 murders were reported as a honour killing. I don't know how the society calls crimes as an honour killing. This is very peculiar. Crime is crime. Killing is really a crime but when it comes to the issues related to caste, caste based atrocities particularly in the inter-caste marriages; they call it as honour killing. So they painted very well and they are trying to honour killing. This particular photograph I think I brought it to show you that this is a Dalit from Tamil Nadu who fall in with non-dalit. She was studying in the college. She was murdered by her own parents. Imagine the caste based discrimination is not only killing of Dalit communities, it is also killing of the non-dalit community themselves and today in the changing context and Dr. B.R Ambedkar, he has been fighting for the elevation of the caste system in the country because which is a social crime in the country and in the changing context the youngsters, they are not really bothered about caste. They don't have that kind of value system they want to have their own choice. Particularly, the kind of discrimination women also faced in the country particularly with

regard to marriage they don't have choice traditionally. Today the youngsters they want to have their own choice in selecting their own life partners. What is happening is that there are many killings are happening not only Dalit's also non-dalit boys and girls are brutally murdered. I think these are the some of the crimes that % vice I have shown. I think very important is when you look at the conviction rate under IPC it is 40% and what we found is again in the death row it is 90%of the Dalit's are in the death penalty rows. So the point is what is disturbing for us is that the 22% of the prisoners are from the Dalit communities under the conviction rates is almost 1 in 4 of the Dalit population the population constitutes 17% but 22% of dalits are in the prison The Adivasi community, If you look at its 11%of the prisoners and their population is only 9%. So what it reveals is one side, the non-dalits who commit crime against the dalit and tribal communities but whereas the dalits and tribals who are on false charges mostly they are convicted and they are in the prison. Because, Iam saying this Iam also been appointed by national commission for schedule caste to study and come out with recommendations of the police atrocities against particular community-Kurava in Tamil Nadu. This particular community being treated as a de-notified

Participant: which community.

**Mr. V. Ramesh Nathan:** Kurava community. Communities during the period of British, now you know what is the status of legislation but even today the police consider them as habitual offenders in fact these communities constituted about 10 lakh people which have been in very, very poor condition and they are sincerely earning for their own livelihood by doing basket making and so on but wherever the theft particularly, jewel theft is taking place are chain snatching is taking place. Immediately the police will consider this is the community who are committing the crimes and immediately they go and arrest. The point is almost all the male in the community starting from age of 25, they may be having 25-30 cases against them and throughout their life they will be in prison or under trials. The women, they will work hard and earn money to pay the fees to the advocates taking bails. The police will be waiting in front of the court when they come out on bail immediately they will arrest. These people may not be travelled to many districts but the cases are fabricated and booked against them in many states and illegal detentions happens in almost all the cases. They will arrest and keep in the illegal custody. Third degree treatment is provided. They been tortured for 10 days, 15days, 40 days sometimes especially women have been arrested and tortured, molested and even they throw

chilly powder on their private part in search of the accused but no evidences. When 3 member we went our own to 15 districts and collected almost all the cases which are filed against this community but we don't have any evidence for the kind of the custodial violence that took place but only what we have the evidence is that the medical certificate or medical bills and today their physical conditions and how their legs and hands were broken only that physical condition is there. But we have got a very good evidence from the police CSR that is the case record. When we studied all the record we found how the police systematically fabricated case against this community. I just quote 2 examples. Number1, in one of the theft case, a school teacher, she has given a complaint on the month of January that early morning when she was returning from toilet to room, 2 unknown people attacked me, she fell down and 8 sovereign chain was snatched and then on the same year in the end of December the teacher has given again restatement stating that after coming back from police station leisurely, I went and checked where the place I fell down I found 4 sovereigns chain piece. There so, I lost only 4 sovereign chain. She has given statement in the month of December. The incident occurred during the month of December. In December she has given statement so what happens between January to December investigation and so on not only this in the same case many places with same confession statement many people are included. So the point is in many of the cases we found police shown some recoveries from the jewellery shop. Where ever the recurring are taking place those people should be added as accused. No place, no case is included them as accused. and very importantly when a person was disposing case in front of the national commission for schedule caste, 24 September 2014 and the same day they was occurrence there were police and particular place was booked against this person. So like this, I can keep on quoting many evidence. We have collected how it is been systematically fabricated and these community every time they were sold in a way they will catch 10 people 15 people take to the custodies and they will distribute to many districts to the police stations with this one particular confessions statement they will book many cases. Why Iam saying this is one classical example in one particular state like this we come across the Dalit communities similar cases many of the states are also facing kind of false charges and they are also convicted on false charges. By seeing this figure one of the reporter called me and asked one of the leading reporter newspaper in Delhi. He was asking is it because Dalit's are living in poor conditions they commit so much of crime Dalit and tribes. By looking at this figure he was asking is it because of the vulnerability because they live in poor condition economic condition they commit so much of

crimes. So it means even the top level reporter also have the same kind of mind set that because of the poverty conditions poor people are dalits people commit kind of crimes you know very well so called educated people top level people doesn't matter how much economic crime they commit in the country how many cases are pending in corruption cases are pending cruel forms of crimes have been committed by many of the educated people in the societies. I agree that the poor are in very vulnerable situation but that doesn't mean that because of the poverty they commit that type of crimes. So the problem is many of the cases that we come across, we intervene the under trials also. We have not really committed the crimes because they are not able to pay the kind of cash it involves in accessing justice still they are in the prisons, still they are not able to come out under the bails that is the kind of situation. So which means, what is the problem we have been facing in accessing justice for the Dalit communities particularly in the caste atrocities and other criminal cases the fair and public hearing is not been properly taken place in under the sc/st act also even filing a case it is a great struggle for us to with the police station we have to struggle to file a case. After filing a case we know that the appropriate session will not be used and investigation takes place by the investigation officers and they will not record the victim statement properly. They will not go to the village and investigation is delayed. Filing of charge sheet is delayed, so since it's been delayed the process, the procedural law aspect and the victim and witness also turn into hostile and meanwhile there is also intimidation by the dominant caste. There has been kind of(not clear). They force into turn into hostile because they are dependant they are vulnerable again they have to go for the daily labour work in the same village. So it means the prevention of the re-occurrence. So again and again people commit the same kind of crime and Dalit's continue to face the problem. I would like to bring to your attention some of the massacre killing. Major incidents which draw the attention at the national level in the country. All these cases are convicted in the Session Court but all the cases are acquitted in the High Court which is still very much disturbing for all of us. One side, I totally agree with the our distinguished panellists about the reform and the sentencing. I totally agree that because the social policies still we need to be improved that's outside, that's one side but at the same time Iam also partly agree that there should be kind of punishment for the people who have committing crimes but what contradictory we are looking at is the people who are really committing crimes are outside, people who are not committing crime they are inside. That is our real experience and especially on the caste based discrimination. So, this is the kind of status in almost all massacre killings all the accused will

be acquitted by the High Court starting from the (keelkanmani case from-check) case from Tamil Nadu 44 Dalits were burned alive. I was that time, a small student I knew very well still it is deeply affected case what the crime they committed. They asked only the price, the wages to be increased. I would say one case to another case. There was a traditional measurement with that they asked one measurement to our two measurement that's the only demand but 44 dalits were burned alive. All these accused have been acquitted by the high court on the benefit of doubt in favour of the land law. Like this, recently the massacre killing in Sintoor again the case has been convicted in the sessions court but the accused been acquitted in the high court which has dawned the national attention of the Kuruvan forms of atrocities in the Gundur district of Andra Pradesh and the series of offences killing of dalits in the states of Bihar during the 19's many incident took place by Ranveer Sena, army more than 1000 dalits were killed and especially in the Lashwantpur bathei case 58 dalits were been gunned down in the midnight 27 women , 16 children and one child was not even one year old, that time our president K.R Narayan he made a statement its a natural shame all those accused been convicted in the session court in 2013 September, all the accused were acquitted in the Patna high court. Iam just showing the pictures. Now I would like to connect one side, what we struggle is in the court providing evidences. The evidences mostly the investigating officer have to provide such evidences which means the prosecution side have to be more strong to provide evidences in the court. Based on the evidences judges make a judgement. But here what we found in most of the case in our monitoring because the investigating officer not done properly his job the proper investigation, proper evidences are not provided in the court, thats one of the big gap we have formed. Even the witness may not know under what sections the case has been booked even they have not been briefed properly but here in the Patna Highcourt in the Lashween Bhatei case and the benefit of doubt all those accused been acquitted then later on in Delhi based investigative media called cobra post what they did is they had a kind of sting operation what they did is they invented video document of the accused particularly Ranveer Sena, top level leaders, leader of the Ranveer Sena commander and the cadres they did what you call interviews documented video, many people they made confession statement. They confessed how they committed these crimes, how many people and on what time how they went how they committed the crime. They made a confession statement. It is been recorded and not only this, they also proudly said who has given money who sponsored the money for this particular event. They also named the persons named the retired army officer who was given the training

for them and also they named the person who has send the person to provide that kind of training obtaining to Ranvir Sena and they also named the person who has visited on the spot, when he was a minister given the money to the war and not only that also the weapons were been supplied from the army they have been proudly confessed and it is been recently last year it was released October 7th in the press club of India, so it means it is clearly evident how the crimes are committed against the dalit communities but with a various influences various nexus they have been acquitted that is the fact that we are able to see. So I already suggested what are the common factors why the conviction rate is very, very low these which leads to acquittal during the sentencing there are many issues that we are facing practically that part of the criminal justice system not only the system also the system also depending on the kind of people who have been implementing (not clear) is very, very important. And recently we also conduct a study on the functions of the special court which is established under the schedule caste schedule tribe atrocities act we documented the victims problems the problems that we face. What we found is in most of these 5 states you know very well the special public prosecutor is a political appointment and most of the times and most of the times appointed special public prosecutors have a kind of nexus between the defence lawyer and the perpetrators and because of the nexus and many of the cases are not been properly conducted and they don't produce proper evidences and they don't brief the victim and the witnesses and they don't even give information and when it is coming for trial or whether it's a postponed no information are given and even the summons issues reaches to people very late two days, three days after the year, there are many problems& not only that in state of Haryana we also recently found in one of the rape cases a girl was raped and murdered and in that particular case the hearing is taking place in the special court were in how the victims will be freely in the court and there are not able number of non dalit communities enter into court and they are sitting on the chair were fear of victims of the witness are standing on the corner emerging there is a direct intimidation within the court. How a victim will be free deposed in the court and they are not able to depose and directly they will intimidate and it will and they threatened and they may not know the consequence of the deposed. This is the kind of situation which exist in many of the court and discrimination also taking place and the experience of the victim and the witnesses in the court. So finally what would like to share with you is the question raised by the survivors of the Lashween Bhatei village. When the case was acquitted in 2013 September we went to the village we found still the community living under the fear. The boy who was



very small who was 7 years, today is an adult. He is still roaming around with the bullet. The bullet is still in his knee and rehabilitation has not properly taken place. The socio economic condition is still very bad in the particular village. The people said okay we agree, we respect the judgement that these people were acquitted were not guilty and then tell us who killed us. so that is the question they raised and this particular question is not only applicable to Lashween Bhatei, case in almost all the massacre killing case. What I listed there are only few lists in all the cases the fact remains the same. The incident took place, people are killed, many cruel forms of atrocities are taking place but on those cases the accused are acquitted then fine tell who killed so many thousands of dalit people.

**Justice Gyan Sudha Misra:** I think you are very, very relevant point and I think its high time that the consensus should be arrived at that in certain class of cases the owner should also learn the defence to establish how the crime has happened, may be not in all cases because we all are following this adverse system (not clear) may be also all of us may not agree ultimately they may not agree at times I quiet agree. Any human with any logic will think who killed somebody should explain who killed? how do they kill? buy we follow a jurisprudence that if you establish that the accused persons have not committed the offence the matter ends.

**Mr. V. Ramesh Nathan:** I totally agree with u and my question is like the point is Prof. Chokalingam raised is also I agree see I am not bothered that they should be punished. My question is what is justice? Justice is that it should not be apparent. This particular crimes not be repeated in the country the question remains, the victims remain in the same condition and the person like me for defenders we also faces that kind of challenge. We don't know what to do? how to change the situation. I agree with you it's really cast mind set but also the system should also be responsible to ensure justice to the communities.

**Participant:** For your information you have mentioned that the prosecution has to be conducted by the special Public Prosecutor under the SC/ST act before special court. In few places the special courts were constituted session courts were also designated as special court a case came from Coimbatore there is a provision that the complainant is a Dalit, he gave a petition to collector to appoint a an advocate to conduct the prosecution it was rejected by the session judge matter came before me under section 482 Crpc there is particular position SC ST act that a victim wants that an advocate to be appointed the collector, district magistrate has

to find and the fees has to be paid by the government. That judgement I have passed is available in MLJ last week. The very same judgement has been followed by Madurai bench relating to the SC/ST act, prosecution made against an accused who is the brothers of the senior most minister it is available in MLJ and the law weekly also how in that case the victim wanted the appointment (not clear) of Tamil Nadu we appointed him and the rules were specifically mentioned. and then I contempt cases the session judge asked Public Prosecutor, prosecutor also demanded the case. where they filed a contempt petition and they were asked by the session judges for the judgement you can the complainant can petition to be collector the rules that...

**Mr. V. Ramesh Nathan:** section 4 and 5 there is a

**Participant:** The point is that the fees has to be paid by the government in that case special prosecutor did not conduct the case but the prosecutor chosen by the victim will conduct

**Mr. V. Ramesh Nathan:** yes, correct sir sections 4 and 5.

**Participant:** not audible

**Participant:** Two days ago, I had to allow two criminal appeals that is the SC/ST act, investigation has to be done by police officer not Below the rank of rules 7 (A). It should be special but empowered officer, invariably specific written order should be passed that order has not been passed in the record it seem that it did not take any steps party orders. The order because of that the other Appeal has to be allowed. One paragraph I have written the failure....

**Mr. V. Ramesh Nathan:** Yes, thank you sir. Our experience is also the same because that's the challenge that we face starting from the investigation, then trial in all these procedure we face same kind of problems and also the appointment of special Public Prosecutor & the choice of victim Section 4 and 5 are the rule in many of the collectors they refuse. They want appoint like- Pomogan, in this case he goes to the court and gets the direction but imagine ordinary victims for every case they cannot go to the High Court and get directions but rules says it very clearly and the choice of victim the SPP can be appointed.

**Participants:** Sir, why request of appointment of lawyer of his choice used to be refused by the persons involved in such offence will be in the well known offence as my friend said therefore they don't allow investigation to take for properly and did not allow request for appointment is granted so that they from then states of registration of the case they will be acquitted. Therefore they don't allow investigation to take place properly and didn't allow

request for appointment of lawyer is granted so that from the stage of registration of case till the end they will be following up the case see that they are acquitted because they are involved in such criminal cases. One more thing I would like to bring to your notice. Registration of cases against persons belongs to SC/ST are increasing day by day. The reason is, the moment the case is registered the complainant will be paid compensation and the special provision includes for payment of compensation to ST/SC persons who are complaining the result in increasing or instigating the complaints both dalit and non dalit go to police station together. Non-dalit wait outside and dalit go inside, register case and when they come out they go to court together and they compound offence. With the payment of compensation should be at the level of at the end of the trial it should be only subject to conviction. It should not be, the moment case is registered, compensation has to be paid that may not be a correct thing.

**Mr. V. Ramesh Nathan:** Sir, the false case may be very, very minimal I know because we are monitoring the case, 1000's of cases may be monitored

**Participant :** not audible..

**Mr. V. Ramesh Nathan:** Sir, what is our experience is I also stated because the victim witnesses turning grass child why because one is the delay second is the intimidation the village they cannot continue fight. in the court because their livelihood is depended on the dominant for the victim and witnesses no protection. So naturally, they have to go for compromise otherwise they cannot live in the village

**Participant:** not audible

**Mr. V. Ramesh Nathan:** Thats one of the reasons we have seen, iam not for the false cases because 1000's of cases that we have taken monitoring we did fact finding, the reports are available documents are available real incidents are taking place, may be there are one or two cases, false cases, some cases are false charges like in India. Any such legislations are misused we know very well not only this act, many acts are misused including Income Tax Act. So, Iam not for defending for their rights, Iam defending for the rights of the really the victims who are affected by the caste atrocities.

**Participants:** not audible

**Mr. V. Ramesh Nathan:** Which act sir?

**Participants:** not audible.

**Participants:** Implementation of act in Kerala.

**Mr. V. Ramesh Nathan:** Kerala less incidents are reported

**Participant:** not audible

**Mr. V. Ramesh Nathan:** How sir? I can't understand.

**Participant:** Not audible.

**Mr. V. Ramesh Nathan:** It's because of the education. I think we should rely upon this experience and the judge's experience may be one part and he is representing us give him a patient hearing on what he has to say. Otherwise if he let you to cross examination..

**Everyone laughing**

**Mr. V. Ramesh Nathan:** No, no not cross examination, Kerala situation is totally different their socio-economic background is different, there the strong left oriented movements are very strong. They are totally different society, educated.

**Participants:** High rate of literacy

**Mr. V. Ramesh Nathan:** In Tamil Nadu, Orissa, Bihar even in Haryana there are many states there are still problems

**Participants:** not audible

**Mr. V. Ramesh Nathan:** If the act is not there the situation would have been worse at least now because of this act there is some kind of year

**Participants:** Not audible

**Justice Gyan Sudha Misra:** That happens like, action would be like might be in false cases ..(not clear)

**Mr. V. Ramesh Nathan:** I would say that there are many cases of (not clear)

**Participant:** It is saying when men are ..

**Participants:** not clear

**Justice Gyan Sudha Misra:** no clear.. High Court has the power to.....(not clear)..i would appreciate lot of focus has to be on the investigation because the state agency due to (not clear)

**Participant:** Not audiable

**Dr. Usha Ramnathan:** I wanted to tell you that first part we did our part of the committee which look at the tribal communities and gave a report to( not clear) when we were doing that we found that there are those who were under the criminal tribes act. In 1951-52, when they had the criminal tribes act being de-notified, they then started getting called de-notified tribes, which when they in were the same as the criminal tribes act. But along with the criminalising they also did the thing of bringing the habitual offender's act and what we found in our study was that all those people who were the part of criminal tribes who were supposed to have tried in stop treating them as tribes see in criminal law, we say an individual permit of crime but here the community is treated as a community of people who commit crime. So, the major demand they had please remove the habitual offenders act it is killing us. They just puts us under their control and social prejudice is so strong that they are able to fight back.

**Mr. V. Ramesh Nathan:** All the incidents narrated and atrocities against dalits are to a large extent true. I fully agree with you but as our friend distinguished Judge from Kerala said that there are possibilities of abuse of act. In this connection, I would like to share I had never said it in any forum, it's an academic session that's why I would like to share in the year 2002 when I was the Vice-Chancellor of the University. A young man who was in a non- teaching position in the university came to me and requested me to convert him to faculty position. I said it's not possible though he was fully qualified, it is not possible to just switch over because anybody who is working in the administrative session who has a Ph.d or who has the required qualification would ask that I will be a wrong precedents and UGC does not permit it but I said that this is a private conversation in my office. I sympathised with him. The post when its advertised we will give you top most priority because you fulfil all the qualifications required. He was arguing saying if you want you can (not clear ) I said I could not do that then I left my office for a convocation in some college. He was with me about half an hour. Then I had to go for lunch and then rush to the college. After about 4,5 days about a week later, I got a registered letter, a copy of it was marked to 10 people. I was the 11th person he has addressed to President of India, the Prime Minister of India, Home Minsiter of India and also the Chief Minister of Tamil Nadu and the Director General of Police and SC/ST Commission saying that he came to me and he was asking for promotion and I have used him calling by his name and I must be arrested and I must be prosecuted for that. It was a strange type of incident for me luckily the governor of Tamil Nadu full was a former police man of Andhra Pradesh.

**Participant:** Ram mohan rao

**Mr. V. Ramesh Nathan:** Ram mohan rao and he knows me very well as I was a criminology professor in Madras University for more than 2 decades. he knew me and he has special affection for me asked a couple of Syndicate members what to do as soon as I got it, I did not send any explanatory letter to anybody including the chief minister but as the chancellor of the university the governor's I thought I must write a letter about what exactly happened proactive one. I said the whole thing and within a week time the governor's office send a letter back saying it cannot be accepted as he has exceeded his limit writing to the Prime Minister of India, the President of India etc and the matter was to be placed before the Syndicate and the Syndicate should contempt this act of the person falsely making complaint and it must be recorded and the minutes should be sent to the candidate not to repeat it and if he does it again, it will be viewed very seriously. We did all these things also she filed a case in the High Court of Madras that he was denied promotion, at the time all these things also he quoted so the High Court very strongly contempt and dismissed this petition saying that all these things were taken note of it. It is a very rare incident it doesn't happen to many people and also personally in Madras University. 23 years I was a member of the Senate and 2 times I was the member of the Syndicate. All along, I was a very strong defender of the rights of colleagues, all these things were recorded. In the senate proceeding, I was telling all these things are already there. 3% of the faculty were from scheduled caste whereas we require under the constitution 18 percent have to be there Now things are proved remarkably all these things I have pleaded and in my own department there are out of 5 people four faculty members belong to the scheduled caste community and one of the very famous leaders of dalit party was my pet student in Tamil Nadu. So I also called him and said about it he said sir this is, we know that these are false things because to get promotion out frustration they do that. My point here is organisation like yours also should establish credibility by finding out some of the miscreants who abuse the Law. So that what is a security for honest people to function fearlessly that's the only thing on the other hand, I fully agree with you at the lower level right from Keila Venmani, murder case my deepest sympathy is for them. Something very drastic has to be done to uplift their position. As in United States of America, how researchers have revealed how the percentage of blacks were in all kinds of discrimination there has been a number of people on the death row number of poor people prosecuted and sentenced to prison. When compared to the whites almost similar things are happening in India with regard to dalits no doubt about that my question is totally different do you agree with me

**Mr. V. Ramesh Nathan:** I agree with you that's what I already said misusing of legislation. I feel very sad and sorry for your experience one of my old colleague, who has come from Non-dalit is a well known Human Rights Defender. He also charged all these false charges that he has been abused of the cast then I went and met him and I said I expressed my confidence on his leadership. No, no we are fighting for the justice and let the police file an FIRI will face it. let him file a case and I will say face it. so there are people who are very genuine and I really respect that but it's very,very minimum you know that all acts are being abused in large number but this also been abused but anyway the investigation officer the prosecutor the revenue officers who are supposed to everybody misuse that's why there is no access to justice I am speaking the other side this is not being properly implemented in a way it is misused abused by the police investigation officers prosecutors and finally the victim have not got the justice I am bringing to you in front of you the major massacre killing. T well-known cases.

That is why we are very much frustrated not only this we have thousands of cases everyday recently in Uttar Pradesh one of the dalit women was raped and murdered a piece of sugar cane was inserted in her private part even the media is not following the ethics they need to put in the newspaper. But imagine what can we doing the last 1 months around 20 cases rape gang rape and murder case in Haryana. I am speaking from that perspective Rajput level perspective.280 lakhs of land being grabbed by non dalits. In the State of Haryana. The people they don't have land. They are living in the particular collector's campus. Two years, the family they shifted from village they are living in the collectors campus and they don't have means of livelihood the men they go for raggicking and collectivng of beer bottles from the wine shops and they kept in the collector's campus is like mountain. and they are selling and with that money they are living their livelihood and the particular dominant caste how dare you to struggle continue fight against us four dalit women were raped I am speaking from experience that several incidents several caste atrocities have taking place whereas we are struggling to get the justice. There only we have problem, there only we are struggling at the point of . I am not saying that it is not been misused thats very, very minimal. Tomorrow somebody may file a case against me if rape case I am saying there will be misusing of law. If somebody wants to charge a law they can do it. But I am speaking the large number of cases and today we are not able to access to justice.

Panelist: I fully reiterate what Mr. Ramesh has said that a large number of cases are real victims Dalits (not clear) unfortunately many acquittals happen mainly the cause of lack of

evidence improper investigation very poor investigation all these things so why does it happen? why such poor investigations happen. wrong results out of the investigations happen. It is socially(not clear) the police men themselves in collaborations collusion with the local people local leaders or upper caste people. The (not clear) so a lot of things have to be done to work in this field no doubt about it.

**Dr. UshaRamnathan :** Good part of your story nothing has happened to you. where that's not true when it happens to a dalit. If there is that difference too but I was also thinking that when your saying why doesn't it happen we don't even see it as wrong when it happens to a dalit that why it happens. They have had the manual scavenging law for eradication. How many years now? now after the 2013 act they have also added the sewage cleaning. How many people die and it was always dalits who were dying. It continuous to happen till today it is now in the atrocities act. It makes no difference. I haven't heard of a single case were they would have registered, they registered an FIR and also we will register it so that you can get your 10 lakhs compensation but there is no idea that it is wrong to put a person in there and get them killed so they have to get around all over the country and say don't kill us. It's not like we want the compensation we need to live. I don't think as a community we have acknowledged that this is a problem. So I see the importance of the Act and action under the act as first of all taking away the denial that there is a problem. so I completely agree with both of you that it is true that every law gets abused I don't know a single law that doesn't get abused I haven't heard of anybody asking that except on women and on dalits I haven't heard anybody asking that these laws should be you know either diluted or thrown out because there is (not clear). Show me at least on law that is not abused. I think that idea of abusing may we just have to revisit depending on how to our experiences in other fields also.

**Participant:** Not clear

**Mr. V. Ramesh Nathan:** Thats what I have been also repeatedly saying, the same act also there is a collective fine can be imposed why should the government give compensation for a dalit women who was raped. The non-dalits men who are committing crime they are freely roaming around. There are many crimes that can be (not clear) People can be fined who are committing crimes. Like 100's of houses are being burned in Dharmapuri districts. Its open truth, there can be good judgement that the community can be fined collectively like recent in



one of the Chennai High Court Judgement I have seen that one of the case the judgement given the police have to repay from the salaries the compensation.

**Justice Gyan Sudha Misra:** So, at least for the session we have not indulged in any discrimination because we have devoted more than the allotted time and the responsibility and the owners life more on the judiciary that the investigation at least should be done by an officer below the rank of DSP at least that much can be ensured but you have to bring it and point it out because after all the credibility of the investigation is much more important.

I leave the copy of our report on access to justice, the recent study and our study report on the special court functions and anybody wants the copy and I am happy to also send you directly.

**Mr.Milind:** We will meet after lunch.

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## **SESSION 4**

### **SUBJECT: SENTENCING FOR GENDER RELATED ATROCITIES**

#### **RESOURCE PERSON: JUSTICE GYAN SUDHA MISRA**

**Justice Gyan Sudha Misra:** Long, long ago somebody said friend and country men, lend me your ears. Now, I have to say my dear brothers and very dear sisters lend me not only your ears but your attention and your thought. So, I was just mentioning just a few minutes ago, grievance issues are generally bracketed with the downtrodden. So, in the pre-session we have discussed the sentencing of caste based atrocities and now we have to discuss the sentencing for gender related atrocities. Fortunately, I have a think tank who is not really loaded with 2 hour session. And after the lunch session, I am quite sure and hopeful that I will have a vibrant and very participating audience it's me because I don't quite relish the monologue, I would really entertain and take pleasure in having a dialogue with you because monologue is generally about talking to yourself without knowing what exactly with the reaction but before I do that I just want to. I would like to say that I had heard and all of this is very common as patient as a judge but Judge may not be too patient in a court of law. Their patience is really tested when we have a gathering like this. All of us generally, go into ex-Parte deliberations and I don't understand what is going and what is the reaction in the other person's mind. So I would suggest Dr. Geeta Oberoi and Mr. Milind that it's a small suggestion that I am trying to put across that we must make an endeavour like the owners, when the judges write the judgement, they own us the ratio of the judgement. They have to be very particular about it as from the judgement one has to make out what is the ratio and when we discuss a particular subject, I have a small suggestion that if the speakers could also focus what exactly is the ratio of what we are trying to convey I think it will go a long way in putting across the point and putting across all of us to understand what exactly has been conveyed. I may sound a little partial about that but I guess you know the judicial mind is generally trained to focus and express what one has to say about the issue, but an academician has a much more wider horizon and may be a more varied experience because they interact right from the students up to the highest level and therefore they may have more versatile in what they have to say but judges by nature are tuned to listening what exactly has been put across. So, I would like to focus and like to impress upon that the subject should really focus the speakers ought to focus what exactly they have to convey. Because many time when functioning as a judge and writing a judgement articulating what the lawyer has argued became a difficulty and in the High Court many a times I would say you have argued is you better dictate to my steno what you have argued because I cant

decipher what you are saying. I think this area or rather this problem many at times is you know bothers us That in a specialised and such matured mind so one has to focus on what one has to say. So the theme of the seminar is sentence before that a week before, I had to attend a gathering and one speaker said the judges write 500 pages judgements, 1000 judgements but the litigant is not able to understand what exactly is the judgement. There the subject was different that was on the regional languages, role of link in regional languages in courts that was a different subject. But yes that happens after 1000 judgement and 500 page judgement the party has to ask( may jeeta ke heira hai) have I won or lost. So, I think we should because the utility part of all these conferences would really prove to be useful if we focus on what exactly after deliberations we have put across, so that we can make an improvement on what one has to say in future or what is that is to be used and what is to be read out. Now reverting to the subject this sentencing for gender related atrocities I think we all of us as judges have encountered this predicament while functioning as a judge. Speaking from my own experience one of my recent past like a few years ago a woman was gang raped but the facts were whether it was a gang rape or not a gang rape could not be established because some kind of element of consent was sort to be proved by the defence because it was a village and the girl was enticed by a boy and later on the situation was misused. So, now after 17 years when the question came up they were on bail. Also, the accused person and the girl was married. The accused married. The accused was having children. The girl was also having children and the question came up before the court, what is to be done. My co-judge was quite in favour of period undergone etc and few 1000rs or may be lakh for compensation. The girl had given her consent for that, now the dilemma before the bench was that in a case of gang rape generally, the you cannot decrease the sentence but the provision says that in a given circumstance for the specific reasons that may be condoned. Now, I was after every time you cannot disagree so sometimes we have to build our consensus. Very reluctantly I said, if there is a provision under the section that for very, very specific the sentence can be modified and 17 years have passed, they both are having children and they are married so we increased the compensation and to the period undergone we had acquitted that accused. Then came the reaction, next day in the media how could a woman's honour be compensated with money specially when a woman judge was on the bench. So it really compelled me to ponder that its not that I can dismiss this criticism totally outright but when a judge functions I think these are very difficult situations that comes up before the court that when you have a discretion when you have only one aspect only the conviction is

there and there is no difficulty, it is a unanimous verdict that the conviction should be upheld but there you have discretion. A person might get 7 years, person might get 3 years, person might get 2 years or 10 years or lets just for a few seconds if you forget the women related like even in a case of murder like you can put him to gallow or you can put him to life sentence. So, this is a very complex issue that when it comes to the discretion of the judge as to what punishment is to be imposed for an offence which stands proved you can't really judge it from somebody else's point of view. You have got to balance the scales of justice were the offence on account of it gets punished so that the feelings and expectation of society that it gets (not clear) that is taken care of and at the same time you have to see the human aspect as to what is his you know. How an accused would be affected by such sentence and that is why this subject is extremely important the sentencing part. I would say that it is the delimma of the judge as to how to impose punishment. Very recently you must have read it that UPAHAR judgement because it is slightly overlapping in the sense that UPAHAR is a different fact it is the responsibility of the management were the fire broke out and 59 people were killed but when then trial court says that yes its a most heinous crime that has been committed and there has been a failure on the part of the management and the maximum punishment that could be imposed under 304(A) is 2years and with fine and that get reduced at the appellate state I and then at the Supreme Court level it's still gets reduced like period undergone, compensated by fine. Then how do we go about it and I think these are the areas where we need to ponder. I have always felt somebody is in the Supreme Court, somebody is in the High Court, somebody is in the trial court. It doesn't mean that we have all become grahaspattis, you might be having that vanity. That you know everything but ultimately to focus on the reasoning the trial court has imposed a particular punishment then of course you know the reading material that was given by the Academy has given a lot of quotations from the Justice Verma Committee and you will get a lot of quotations as to how a sentence is to be imposed but the key point is when a particular sentence has been imposed for a particular offence then what could be the reason for that judge before it is interfered by the appellate court. When you are at the High Court level. Now, you have the trial court judgement for you, then obviously you have to think that whether it should require interference. Interference with reasoning and reducing also with reasoning, if you apply reason because I have always felt that you know there is a judge in each one of us. Even if you are not a judge you are a judge of your own cause so, this cause which you are writing a judgement on a particular subject and you interfering then you can't

just really go because it is discretion and you will exercise discretion for no reason. You will have to take it because in the forenoon session one of the participants has said it is the trial court which has to address the issue and basically is the trial court to address itself of the sentencing but trial court of course hears specifically on the question of sentence but when it comes before the appellate forum then in the appellate forum if you are not interfering then what could be the reason you cannot or rather we cannot take it just casually that all right like in "ini mini mina mo" we have to see it very seriously because it has whole lot of impact. As I said, you know I gave you that instance at that point of time, alright 17 years have passed and both of them has agreed and suppose now the man is pushed to the bar behind the bars. What would be the impact on the children and then there the most delicate situation just confront in a situation of this nature were you also have to see that crime should be adequately punished and at the same time you have also to think of rehabilitation or the after effects of punishment he is put behind the bars . I think Pro. Chokalingam when he spoke about this part I think he made a very valid point that you have also have to think about the reformatory part of a particular accused and he gave instance of Finland that you know mostly it is the focus on the fine but there are because here if you make a comparison between the compensation that was paid to the women on account of the rape committed on her, may be that satisfies ingredient. You can compensate with money but there are situations when money cannot compensate the sentence. The expectation of the society if we take a very, very liberal view that alright let us not follow the theory an 'eye for an eye' therefore, it should be a different view, should be taken and compensation may be paid like compensation has been paid in(not clear) tragedy case also but the UPAHAR association is fighting tooth and nail because they have filed a review also. So how to balance I am emphasizing that when we collectively assemble and discuss an issue of this nature I think we need to deliberate how to and that is why I said you know we must share our experience what are the situation where you have confronted when you have encountered which has put you in a dilemma to take up a different view because you know in a profession of such a nature we all learn from each other when we follow the precedents after all we are learning from the experience of predecessors. So, also if you are interfering with the High Court judgement there also we are learning from the reasoning that has been given but if you think you have a more better reason then I think you need to specify. So the point that I am trying to make is when we interfere with the particular I am not talking because I presume that the conviction has been upheld because that's a different aspect

conviction has been upheld and thereafter when you impose the sentence then you have to be equally serious about it because it has whole lot of repercussion on other cases and the question of the society that you know for 326 in one matter you have given 3 years in another it is 6 months sometimes our arguments are also in advance and those arguments will brush aside. Article 14 doesn't apply in a criminal case. The so and so has got it therefore I also get it but then some where some reasoning, some rational reasoning has to be there and it's not that you all have readymade answer because we confront a particular situation and that is why the purpose of this seminar and conference are to speak out that speak your mind what according to you should be because, of course we write articles, we also read journals etc. But when you interact and share your experience I think it improves insight as I said we all learn from each other so any of you who have I will start from here and set the ball rolling that if anyone would like to share your experience of a predicament or a dilemma where you have been put in a difficult situation like I have given you one example may be I can give before like you know before I say another example I was sharing view with Justice Prathibha yesterday I had a matter in the Supreme Court in the special leave petition section 494 says that if a women is made to believe that she is a legally married wife of that accused and then he co habits with her and there after she is abandoned and the man is booked for under 494 then whether he would be held guilty of that 494 section or not. This question came up before us again, we had my co-judge had a view I said I am not going to interfere and he was punished by the High Court and he had appealed against his conviction. I had taken the view that I am not going to interfere with this judgement but my brother judge had a view that sister I don't agree with you because the lady was a major and she knew that she is not formally married with this ,and she lived with him for long number of years and that means she knowingly lived with him without marriage and therefore 494 offence is not made out now the distinction between I had a view that brother if you were a magistrate because generally there is some difference between the appellate forum and specially like supreme court which has constitutional authority and constitutional power of constitutional interpretation so they have a greater scope interpret I said brother if you were a magistrate may be I would have said your judgement is right because you have gone as per the letter of law but sitting in the Supreme Court that merely because she had a registered marriage or she didn't go into marriage in a temple like some sort of a form where she had the reason to believe that she is the legally married wife . Here, the man has done much more to make her believe that she is his legally married wife so what more is

required for 494, .Unfortunately, we didn't agree and it went before the larger bench and a three judge bench had upheld my view. I am sharing something which has nothing to do with the subject, in one of my interviews , the TV reporter has put this question to me what are your moments of joy and your moments of regret. I said my moments joy may be many but my moment of regret is why is it when my judgement goes before a larger bench only then it gets approved when two men judges can agree with each other then why a woman needs 3rd judge a larger bench to get her judgement approved. May be that is a moment of joy ,oh! my view has been upheld but a just judge wont think like that but it's a moment of regret why I need a 3 judge bench to get my view upheld. That was just in a lighter way so of course a gender perception is there and please take care I would refer to as my younger brother, his mind set should not prevail on the judges that not of that I am saying on the judges but it happens we have an enlightened judiciary. In this country and very matured mind but many at times it does happens that we go through this kind of experiences the point I want to put across when situation of waiver comes, then the judges may be also in the highest court in the High Court I think the difficulty is no less than what is faced by a trial court judge and therefore I now try to I want to know from any one of you would like to share any experience of this nature where you are gone in a question of sentence were you had a problem it would be a pleasure listening to you because I have that you know professors and academicians have a wide canvass but we are so focused on the subject that we focus on the subject we need to address how to go about it would anyone like to say anything on this. I would like to have an interactive session with you all and please don't feel shy because we all grow when we disagree. You want to say something.

**Participant:** Not audible

**Participant:** Senior judge asked me to write the judgement because the senior judge, did not have much experience in dealing with tribunal matters. Death sentence were imposed by the sessions court, the appellant who was 30yrs, he used to give coaching to the students both boys and girls in a remote corner of Andaman and Nicobar islands, the place is called is Diglipur. The coaching centre, the appellant married and his wife also used to give coaching. Wife is about 25,26 something. Initially appellants allured a girl about 14years, her father was a rickshaw puller. In a very planned manner the girl was taken to a rented accommodation. Rent was given in the name of an NGO, one hired vehicle was collected and the vehicle was having

the name of the NGO and the appellant collected one self-phone in the name of another person not in his name and that was collected from a place about 150 Kms away from their place. Then he used to allure the girls by using that self-phone the girl was taken to the rented accommodation. She was raped and then was murdered. After murder her father, rickshaw puller he gave complaint in the police station but nothing happened. About one month lapse, after one month another girl, a girl who was 15years she was also allured and she was taken to the rented accommodation and then she was raped completely and the dead body was kept in a place near the sea in a forest when the driver who gave the car driver who was loitering on the next day near the coaching centre and this girl second girl, her mother was school mistress and father was contractor slightly influential person then they contacted with the higher police officer their relative was the public prosecutor in Port Blair district court so somehow the police become active and police captured the driver's call details. The self-phones were collected and ultimately everything was discovered and appellant was arrested and interrogated and did what I(not clear). The was convicted with reference to the murder of the second girl was and murder of the first girl was established rape could not be established because the dead body was recovered after one month we decided that sentence can be imposed or not now there was case of rape and murder of two young in a very calculated manner conspiracy of the thing was oden three of the minor of the coaching centre three of the minor students were also involved in the incident they were also taken to the rented apartment for..along with their teacher so they were brought before the juvenile board and highest punishment 3 years in special home so we considered about the happening judgements of the supreme court of the rape and murder . Rape and murder of young girls and we found that Supreme Court is consistent in sentence in case of rape and murder of young here the victim is the young

**Justice Gyan Sudha Misra:** I would say that generally normally rape and murder in cases of circumstantial evidence whether death sentence should be given or not sometimes I think that.

**Participant:** most of the cases were based on circumstantial evidence because after death there is no question of direct evidence all these were .(not audible ) In similar situation we found that accused was about 32 -33years old and rape was committed in a brutal manner after the murder was done dead body was discovered.



**Justice Gyan Sudha Misra:** Let us forget about Supreme Court let us be original thinkers what is your saying what should be done.

**Participant:** we were slightly confused what should be done then as the juvenile.

**Justice Gyan Sudha Misra:** We have to address that area whenever there is a confusion then what should be then you know I think as judges we come across in another case one of the co-judge when I was in High Court co-judge took view that he had committed, she gave capital punishment both of us were women judges, so she had come from the services she said she had given capital punishment and I disagree only on the question of sentence because I said you know the trial witness on whose basis the conviction was made there was some doubt about it so I said you know that it is not about case he has out of so many accused one of them had murdered whether it is he or somebody else could not be decided so I converted the capital punishment into life sentence then it went before the third judge and the third judge said if the judge feels that it is not a case where capital punishment should be awarded because of the doubt then why conviction. It's a case of acquittal this is how to really address a situation should be predicament and what should be viewed that's one part and the other is you know if there are you know discretion with the judge in matters of discretion as I gave you this I know that there should be fine or he can be put behind the bar in what would be the correct view and iam quiet sure that the answer is simple if the legal answer would have been so simple this software put in get a judgement that is why these conferences these seminar are relevant to improve our insight but the key point according to me is that need to be focused is that where you have discretion that I would again give an example of (not clear) or in Bhopal case when a man is convicted for reckless driving there also (not clear) for a (not clear) and if a man has committed for a colossal loss of life there also the maximum sentence is two years with fine and that also gets reduced two years to one year or may be period undergone then do you think like what is the consensus that there should be an amendment because after all we all are discussing but ultimately with fine and that also gets reduced two years to one year or may be period undergone, then do you think what is the consensus do you think that there should be an amendment after all we were all discussing. Judges don't have much discussion beyond the statute whatever punishment is prescribed under the IPC we cannot go beyond that. But even to that punishment should be imposed or not or there should be further amendment that I mean to bracket it that if this is so then the judge will not have any discretion I was put a question

that how is it that you know the I mean what was going on was yes the subject of discussion was that the rich and poor get sorry the high and the mighty get away with any kind of crime that they commit so it is only the poor that get committed and they have to suffer the message that is going from this incident is that it is high and mighty who get away from the news and its only the weaker people who get punished that we as embers of judiciary as owners to eradicate and how to bring about a uniformity as to what should be the uniformity so should there be further amendment or some kind of a change after all the president of India also has expressed his view that the IPC needs to be changed my view is that Crpc also needs a change because I am very strong(not clear) that at least there should be a third category of cases and I would suggest that you better have a conference on that because that will be we will have a very drastic cases effect on the speedy trial because after that Nirbhaya case I am of the view that (not clear) 161 Crpc should not be used right now we have warrant cases and summons cases let there be a third category of cases in the Crpc where the evidence should not be recorded by the police straight away the evidence of the witnesses will be recorded and it is of no use except for contradiction so the idea is when we come across a situation what will be the consensus like when you confronted as you were discussing that matter how did you come to a conclusion? Did you uphold the capital punishment .

**Participant:** Both of us agreed to commute death sentence we imposed like imprisonment but what we did there are two cases we imposed that life imprisonment means it will be served for entire natural life of the country and after completion of the first punishment second punishment(not clear) it will not be concurrent one after another .

**Justice Gyan Sudha Misra:** matter must have travelled upto supreme court what view was taken by the supreme court any idea

**Participant:** The party has not gone to the Supreme Court.

**Justice Gyan Sudha Misra:** Oh! the party has not gone to the Supreme Court. Very contented one. Party did not go to the Supreme Court. So far as I know so did it consecutively so whenever a person is punished for 3,4 offences general term is that under section 32/33 of Crpc there is provision that did the judge does not give, does not give the mandates specifically that the sentences will run concurrently. Then it will run consecutively but generally our judges pass the order that all the sentences will run concurrently .The sentence is reduced. If the entire

sentence is for 10yrs that is reduced to 2 years. In(not clear) we tried to that if life means life as the Supreme Court has said yet I don't know of any case where life means life has already been granted even if we say life but under they (not clear) code there is provision state has the authority. State has the power to.

**Participant:.....**

**Justice Gyan Sudha Misra:** no no life means life without remission and then how will the judgement has got into that jail manual will not prevail . But can the court curtail the discretion of legislation .That is debatable.

**Participant:** Can the court curtail the discretion of executive which is given by the statute.

**Justice Gyan Sudha Misra:** Perhaps no. Now reverting to question number 1 because philosophy of sentence was addressed by Prof. Chockalingam and this reformatory query was focused so but we have to deliberate how to strike a balance between the expectation of the society, where there are certain class of crimes like you know in a , motor vehicle jumping a red light and you know that you can do by imposing a fine. But, if there is a crime against such a heinous crime against any member of the society or a woman then can that be compensated like these are very complex thing but take for instance Iam taking a slightly smaller example right now I will take a simpler example like you know in molestation case may be in 498 case. Do you think even those cases what should be the sentencing criteria should they be compensated I don't think any lady would agree to that so the law makers has also the law enforcement. The judges who have to deal with such cases how can you shut your eyes that element of punishment has to be there 498 cases is common knowledge these days. They know that at least if it is not a false case definitely there are cases of over implication if the husband has done something then the whole family is dropped in so how to decipher and I think to my mind there is a consensus need to be build up that all these criminal law amendment should be introduced whether it is Crpc or IPC but with a lot of care and circumspection because we can't really endeavour to improve the justice system we also tinker with it and land up into further trouble otherwise sometimes if it fills me with a bit of scepticism you all deliberate such a huge massive academy is here but how do we contribute to the system. Are we doing just ceremonial exercise or we really mean it and like you know I really belong to a category of utilitarian theorist so as I was mentioning somewhere that you know there was a time when I attended a

conference for domestic violence that was in 97 somewhere under the organisation of UNICEF. I felt very negative about it that what are we doing, you know there is all lot of international delegates are here and we are staying in a five star hotel, we are eating drinking, after 4 days we will forget everything nothing will happen. Of course the director of UNICEF and I went to the extend of expressing myself from the public platform also, do you think we can expect anything out of this. She had a point then onwards iam very optimistic about these because she said no it create a voice if we don't discuss a problem, it will never get addressed if we discuss a problem if you speak out if you collectively think that something should be done obviously it is bound to create an impact and I had a pleasant surprise when in 2005 this domestic violence act came into existence in India and even if it is a scarecrow at least scarecrow also is worth. Something at least it can scare the husband from beating and bashing the wives so at least even the scarecrows are at times essential. The first question is what should be the sentencing policy in a situation where we cannot do merely by giving compensatory benefits of course here are a lot of debates are going on abolition of death penalty that's separate issue. So not even in smaller areas where there should be you know, discretionary power should be left to the court or it should be totally you know trying to codify it as crisply as possible. So we need to build a consensus on this and I would really say that this academy which works throughout the year and has the best of minds in the country I need we need to build a consensus eye for one we feel that we know when this long ago this place fills me with nostalgia so we had a conference here and our late president Dr. A.P.J Abdul Kalam, as he was scientist I felt prompted and put a question to him that you know we as laymen get lot of opportunity to hear many at times scientific investigation this genetically modified is good sometimes it is not good, drinking coffee is good not drinking is bad etc etc. So do you think that the scientists who do all these investigation why they are not allowed to participate at the time of enactment of the statutes and why this feedbacks should come only through the bureaucrats. So, president they must be having the CD iam very sure. He gave me an excellent answer when he said and very smart answer also, he said when scientific investigations are done it percolates through so many stages and finally when it is done then it is established and scientists are very bad mediators, they are bad conciliators so it's better that is not let to enter into the parliamentary debates that is how he handled it .So also judges might not participate in the parliamentary debates but their opinion should percolate and must have some force in the amendment part. Right now it is only through the legislators and percolates like a drop sometimes it has an impact sometimes it may

not have an impact whatever is mentioned in Act we have to follow so I would impress a pond at letters consolidate and make an Endeavour that we should become forceful voice of change and compel it wherever amendments are required. That's 500rupees was given as maintenance to the ladies now it has increased.

**Participants:.....**

**Justice Gyan Sudha Misra:** At least Mr. Milind, I would suggest at least the simple amendments that require, let us make this institution vibrant and forceful that it has an impact and does not have the stigma of having the ceremonial Institution we must make a difference then I am quite sure we can do it we have to energize so at least you may make out a note of all amendments.

**Participant: .....**

**Justice Gyan Sudha Misra:** Without amendments you have said we have indulged and passive Euthanasia even without amendment. Now the government is considering. It is a compulsion for the Supreme Court to legislate they can't remain but at least but at least when we have agencies like this we must try to impress that it should have an impact . There was a time when I felt elated, sometimes I feel after the(not clear) just having a trip to Bhopal and just doing nothing, why not tie up with law commission let it be tied up with law commission it must have a force it is much more than general justice gender sensitizing but all of us must contribute a bit in the actual change. Do you do our bit, by writing observations in our judgements now I am deprived of that pleasure also.SO anyone of you would like to add your input?

**Participants:.....**

**Justice Gyan Sudha Misra:** Why ladies only Iam talking go ahead, again the whole dilemma how to balance the scale of justice.

**Participant: .....**

**Justice Gyan Sudha Misra:** Would you like to react professor ?

Professor: Several decades ago justice Krishna Iyer pointed out the same thing

**Participant: .....**

**Another Participant:** .....

**Justice Gyan Sudha Misra:** Yeah, Yeah. I was about to add you know because tomorrow somebody might say that this is your creation because why didn't you take so long to do decide the matter yes

**participant:** not audible

**Justice Gyan Sudha Misra:** Many a times the judge has to say . I have become wiser so I did commit a.....

**Participant:** .....

**Justice Gyan Sudha Misra:** These are the ironical situations after all, the problem that we deal are not mathematical problems so human aspects are involved and therefore and that is why the judges are there to use their wisdom and their discretion.

**Participants:** .....

**Participant:** .....

**Justice Gyan Sudha Misra:** Facts and circumstances of each case I say.

**Participant:** .....

**Justice Gyan Sudha Misra:** in circumstantial case...

**Participant:** .....

**Justice Gyan Sudha Misra:** problems are bound to arise the most delicate I guess is the circumstantial evidence matter when judge set aside death sentence I think still its lack of confidence so at least let him liv, So anyone would like to add any new experience

**Participant:.....**

**Justice Gyan Sudha Misra:** Problems are bound to arise the most delicate I guess is the circumstantial evidence matter when judge set aside death sentence i think still its lack of confidence so at least let him liv, So anyone would like to add any new experience

**Participant:** .....

**Justice Gyan Sudha Misra:** Because, we need to address 498 matter now. These sections if the police doesn't arrest he has to record the reason. So, the women organisation and anyone who is concerned with atrocities on women. They think 498 has been rendered it has lost its power for the purpose which it was enacted. Ultimately, let all of us take an endeavour that what we have discussed should create impact somewhere. What have we contributed? Think about it. How to contribute? How to contribute to bring a real change and none has an answer so all of us have to think and like a head master I can put you on discussion what is the answer that you have got. Ponder over it, think about it and come out with your thought.

**Participant:** .....

**Justice Gyan Sudha Misra:** the world will go on whether we do it or not but let us endeavour to make a better place and better delivery justice system. So thanks everybody after hard days contribution you have a lot of patience.

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**SESSION:5 SUBJECT: SENTENCING OBJECTIVELY**  
**CHAIR: JUSTICE GYAN SUDHA MISRA**  
**RESOURCE PERSON: ADV. R BASANT**

**Justice Gyan Sudha Mishra :** So we are now taking it forward on the second day . All of you are aware that I think today's topic is relevant objectively because the discrimination what we were discussing yesterday that the statute book gives us the leverage and the discretion to impose punishment and then the perception is there that it is not very uniform for the same kind of offence. Somebody is given a higher punishment even in the same matter. So we have here very eminent speaker Justice Bhasant, former judge of Highcourt Of

Kerala and he doesn't need an introduction because fortunately, I had a very long interaction with him, so he will enlighten us on the subject.

**Adv. R. Basant:** Good morning mam and everyone else. Thank you very much for this opportunity. It is been my pleasure to associate with the National Judicial Academy from the days when I was a district judge. I remember those initial days when we started. Mr Madhava Menon was here. This was the only place where we had to have conferences. Nostalgic memories come to my mind and I am so happy to be back again. Now if you won't mind can I have a piece of self-introduction. So that I know where I stand, how experienced you are in sentencing are into appellate review of sentencing alone or have you been a trial judge. I would like to have some inputs so that I will know how people are. So can you please , can you please kindly say that in which High Court you are in. It will be nice to have the introduction.

**Participants:** not audible

**Adv. R. Basant:** Are you the one who wrote that bail order?

**Justice Gyan Sudha Mishra :** She was a celebrity then.

**Adv. R. Basant:** I have read that therefore I have not appeared before you

**Participants:** Not audible

**Adv. R. Basant:** Now sentencing you must tell me now not me

**Participants:** Not audible

**Adv. R. Basant:** Thank you. Thank you very much. A word about me also. I only claim that I can make a long interaction with the system, very long years of interaction. They call it donkey's years in bad English. Three years as a law student in 1970-1973. 1973-1988 at district court level. Then 1988 -2002 as a session's judge. In 2002- 2012 as judge of High Court and after 2012 last three years reincarnation as a lawyer practicing now in the Supreme Court that's what I am. I said so because there's been a long period of interaction and then any fool must have gathered something rich by this long experience. My tension is only to share them with you as I think length of experience is important and I find most of you are having very long experience as trial judges and sentencing has been your game for all these



years. Now let's put our heads together except one or two. I find, there is no trial judge available before me but in let's put our heads together to find out whether there are areas of revenues which are not really chartered and then whether Madam has already told you and I asked your programme co-ordinator he said he has been consistently inconsistent which we used yesterday. That's what he said that's what he told me. Isn't it? Sentencing has been consistently inconsistent and having been in the division bench I can say, I agree and I be done with it. It will become very easy and then but see I remember earlier directors used to say NJA must be the think tank for the Indian Judiciary. An academy is a place where ideas clash and then hopefully things new come out sometimes. It may be a very wasteful experience but still the academy time is well spend because you get exposed to a lot of ideas. Some which you don't agree at all some which you partly agree, some which you completely agree some which you know everyone agree but you know there won't be any modification of the system. I have been here with a system for about 46 years now from 70-2016 and my real grievance with the system is there is no attempt to innovate. There is no attempt to improve STARE DECISIS has been applied to follow very strictly so far as the structure of the judiciary is constrained. There is no change coming about I think it's time that jurisprudence is evolved as you all know law must be the (not clear) or common sense of the community and if that is so blindly following the (not clear)invoked for a long period of time. It is not going to help us at I certainly think the (not clear)which is a product of the traumatic experience of star chambers. You must have known, star chamber should be continuing without that is a question which functionaries. At all levels must think and my grievance is there is no thinking parliament has no time for it. The jurists, we as jurists, as judges we follow the 'stare decisis' dictum and there is no attempt to modify, no attempt to innovate, no attempt to synchronise with the times and that is perhaps what discussion in a group like this. Iam not here to refer to various precedents and say this and that you know that better than me. Iam not going to do that at all. But what I want to know is can we look at things differently from macro perceptions. Can we look at the manner in which the things are being done. We can do that if at our levels. As a constitutional court level I can do a lot to improve the whole system that's the perspective in which I would like to address you. Now

**Justice Gyan Sudha Mishra :** I would like to add the bigger question is that how to implement your ideas and the think tank which most of the time you know even if you agree and even if you have faith in what is percolated from the think tank. The larger question and the most difficult one is how to bring it into the system and how to make a change that you know that is a difficult part. How to impress upon the legislators rather than parliamentarians that please introduce the change I think that we need to think about it how to introduce it.

**Adv. R. Basant:** I completely agree with you but one thing I would like to add is, have we really exhausted the elbow space that is still available. I completely agree that a lot of law require to be changed but I can't do it as a judge. I can't do it my primary question is that if is there an elbow space available for us as judges, have we completely made use of it? Utilised it, exploited the elbow space available. Assuming that law does not change. I am conscious that the Indian parliament does not have time for law making much within the four walls. Not to go out because I would be committing contempt because its fact that they don't have time. There is no periodic updating of laws. So that in any democratic system as you know needs of society comes first. The needs of society as public opinion, needs of society is perceived by public opinion impacts on the legislatures. Legislatures makes or alters law and that is enforced later adjudicated that is when people ultimately get laws. There is any inevitable long needs of society and the law in its application or operation that is on the needs of society perceived in public opinion reflected in flows of the legislative assembly enforced by the executive, interpreted by the judges and then only people get law ultimately. So look at the distance now. It is unavoidable. It is unavoidable in a modern democratic society. Any democratic society more in a case where the parliament is more of walk outs, more of acrimony and less legislative functioning. I am not trying to make a value judgement on those who are there but I can tell you we have to consciously realise that we wait for the law to change. I think normally 10 years of the judge gets, our ten years will go and we would have contributed anything but would have sat back and complained about want of legislative modification. Well this I call the National Judicial Academy. I call the cradle of a modern Indian judge. This is the cradle of a modern Indian judge. I have been seeing the activity going on here and the mind-set changes we can introduce that we can introduce that is the greatest service that the academy can do and for those mind-set changes I think a lot of ideas

have to clash. Let 1000 ideas clash so that something will take us forward but not as madam said as a meaning less hyper technical discussion on certain aspects which is not producing results we must always know from every opinion expressed here. I must become a better judge. Tomorrow can I accept something that is said by the entire thing and can I make a very small improvement in the performance as a judge. Can I influence subordinate judiciary to make modification. Your role is not only your modification you have got a very effective role in modernising, changing, transforming the subordinate judiciary that is I think the whole exercise in this cradle for a modern Indian Judge should happen. I am not straight away going to take you to sentencing and discretion. I think it's my conviction that every person occupying a slot must understand a macro system and the micro role that he has. Have I made myself clear that we must know the macro system. We are all part of macro system as a lawyer, as a judge, as a senior counsel, as a judge of the High Court, judge of Supreme Court, judge of Sessions Court. We all are part of a large system and we have a micro role to play. So understand the macro system. Understand your slot and the micro role which each one has to perform that I think would be understanding the system better and better carrying us forward. Now madam yesterday told me like she is the student of political science. In political science state is a concept. It is the contract theory of state as a citizen. I enter into contract with state and what do I tell the state I will give you my surrender to your jurisdiction. Give me something in return. What is the something in return that a citizen expects from the street I believe that two irreducible minimum modern welfare state takes up more responsibility but the minimum that we must expect us to 1) prevent external aggression that be can very conventional in the period of history. These two are inevitable. First, one is from external aggression. I want I should not be trembled upon I must have a certain peace that nobody outside will come and intrude into my area of comfort that is to prevent external aggression. Two, prevent internal disturbances these two are the irreducible responsibilities of a modern state. Well, will not take you to the other fundamental rights. Article 21 also says give me as a state expect from the state that concession of my right to live and right to live the greatest contribution to supreme court to the Indian conventional law is the expansion of the right to life. Right to life is mere animal existence. It's a life with dignity. It's life with honour and therefore in the modern constitutional perspective the state must prevent external aggression. It must prevent internal disturbances and the constitutional state, the republic that we have. We the people gave unto ourselves are republic and that republic is to ensure my

right to life. A citizen's right to life, well once we have these broad parameters of the state said I would like you to look at the criminal law in a different perspective. What do we think of criminal law? Ordinarily it is the law to punish in Kenny's celebrated work said what the sovereign prohibits and makes punishable is a crime, well in the modern society to look at this may be inadequate. The state is to assure to the citizen his right to life and therefore preventing crime is not only part of the duty of a state it's a guaranteed protection for the citizens that I must have a crime free state. A crime free state is the ideal destination. Final ultimate goals of criminal law of state and criminal law primarily ensures that there is not internal disturbance when I get out from my home in the morning. I would like to come back in peace. I would not like my peace to be disturbed peace may not be disturbed but I do not live in the fear of the peace being disturbed well that is why I say, the conventional role of the modern state is to prevent crime and thus assure a citizen freedom from fear. Freedom from fear of crime, freedom from threat of crime, freedom from crime. May I try to summarise idea by saying that a crime free state is the assurance with a modern state has to give to his citizens. Freedom from crime, freedom from fear of crime, fear is a very dangerous feeling which destroys the dignity of life. If every day when I send my son, my grandson out of the house. The peace may be disturbed and they may be crime afflicting him. It's not a life of dignity, we have to eliminate the fear from the minds of the citizens that is the great role with the criminal justice system as to play if I ask for answers I have always got this answer. What is the purpose of criminal justice system I am, I little free to ask questions to judges. Isn't it as in supreme court for last 3 years and then whenever a question says what is the result of this. Then immediately he says I am asking myself because you should never ask a question to the judge appears to be the general idea prevailing because questions claims you. Questions make you introspective, encourage questions by the lawyers you can do that encourage question by the lawyers that will put on right track. There is no harm in questioning in a democratic polity, I am part of the judiciary in a democratic polity and questioning must be encouraged. There is no harm in questioning and therefore please understand ultimate end of the system is a crime free state where freedom from fear to live in dignity will be ensured right. All modern states and the criminal justice system in the modern world. What is a criminal justice system? A system is made up of many members in the school. We have studied about the same the digestive system it starts from the buccal cavity, it runs up to the anus. It's a system, the system has certain functions to

perform. The function of the criminal justice system I told you is to prevent crimes prevention of crime is the aim of the system and then you have the law maker the legislatures. You have the law enforcers the police investigators. You have the adjudicators the judiciary and you have the enforcement systems the what do you call it the rehabilitatory system or the penal detention systems entirely we call ourselves as system and the system job is to prevent crimes and I am sure that the dignity of the individual that is the modern concept of crime you have to adjudicate. The police have to adjudicate, the police have to investigate the judges have to adjudicate the tiers of appeal will also be there but all that is not merely to punish an individual or exonerate an innocent. The ultimate goal is the assurance of a crime free state. Well once we have the modern outlook were the intention or the purpose is not merely adjudication of guilt not merely punishment of the guilty but assuring to the polity the ultimate destination when we will reach I don't know we may never reach human nature being what it is. It may be utopian expect a day when the society will be free of crime but it tends to calculus will say the concept of tends to where the crime tends to zero that is the ultimate objective that we have to make. In the system, the legislature defines the crime again, Kenny sovereign what sovereign thinks is so objectionable that it must be visited by a punishment is crime. It must be so objectionable, you have civil discretions but the criminal indiscretions are those which the sovereign detects and says such violations of the norms of conduct will be visited with punishment of either deprivation of life or deprivation of liberty or deprivation of property. These are the three things and getting nearer to our sentence part. These are the 3 sentence part of it and therefore legislatures defines crime and adjudication takes place. We are not on adjudication, we are at the post adjudication stage of sentence only therefore I carefully avoid any discussion on adjudication I have great disappointment with our adjudication system. I have great disappointment with the manner in which Indian criminal law is postulated and great disappointment with the perpetual, distressed or the police by the system. I have great disappointment with the manner in which the police in this country function I have great disappointment in the manner in which judges approach the police well. One digression, the Britisher (not clear) they call their police as 'bobby'. They trust them. When they came to India, they were told do not trust the police because Indian police is very dangerous. They have no regard for truth and therefore don't trust them we continue in the relic of the British past. The Americans trust their cops. I got an opportunity as in 1985 to go to the United States in rotary exchange programme. You could live with the

lawyers there. Very interestingly I thought I should ask my host, he was criminal lawyer, I was also practising criminal law so I told him do you trust your police. Do you think your police are trustable and he tells me 99 times out of 100. Mr. Bhasant our police men speak truth in court. My god, if that happens I was practising lawyer at that time then I would be out of work if the system can trust the police and I can have a police system constructed in which we all would feel that the police can be trusted. Please gentlemen, gentlemen includes ladies I am not an MCP please, please understand. Trust, responsibility are two sides of the same coin. Today the Indian policemen knows whatever he writes you are not going to believe him and you have no sense of responsibility. Well we ought to think after how many years its about 70 years can we not have an independent democratic police force which is trustable. Please don't say that today they are trustable. I am not on that Introspective to say it's not 70 years sufficient time to build up a sufficient police force at least is it not time make an attempt to begin I ask you questions now so that I want to disturb your conscience so that you will realise the American police men, the English police men can record the confession statements of an accused provided the Miranda rule is followed. You know the Miranda rule? Miranda rule is followed you can record the statement and it is admissible in evidence and what about the poor Indian policemen, the witness statement you can take and obtain a signature if we don't trust him to obtain a witness statement well on investigation, adjudication I leave it there i dont want to take more of your time some disturbing thought which is disturbing me after having been in the 46 years in the system. I am really giving expression to I am giving expression to that my frustration with the system. I don't have too long a time left. I am conscious about that and I don't think today, I hope when I joined the judiciary in 1988 as a district judge I hope by the time I retire they have only gone back and not one real step forward and I don't have a hope that I live up to 120 years. I don't think unless there is a very conscious attempt to renovate indigence. Avoid the pitfalls of blindly aping systems from the west. Something better we look towards the east. I think we ought to study the Singapore penal law better. I am overstepping my time coming to sentencing.

**Justice Gyan Sudha Mishra :** That is why I have been(not clear) if you can't change the police at least change the system exempt 161 and straight away come to 164 for coding of evidence at least in certain cases.

**Adv. R. Basant:** I have read your judgements on that ma'am. I really appreciate that. I would think that entrusting the judiciary with the police functions its putting the square (not clear ) in a round hole.

**Justice Gyan Sudha Mishra :** I just want to interrupt you. The function will ultimately will be of the like the even now it is the judiciary which records the evidence but it recorded in trial which is admissible and what ever statement is recorded by the police at the stage of 161 as you rightly said it's not admissible except for contradiction then we need to change the system from (not clear).

**Adv. R. Basant:** Right, right

**Justice Gyan Sudha Mishra :** Where we can it's not that I have come out with something extraordinary. I must pay my compliments and my gratitude to justice Mallimat committee who has mentioned about the aspect in his report or I don't even say that you straight away introduce let us deliberate whether it is acceptable such kind of change should be at all given a place into the Crpc at least for some kind of offences so I just have a, Iam passionate about it that let us have some kind of change where we can trust the witnesses and we don't have to confront those situations when the witnesses die, when the witnesses turn hostile, when the police records the statement so it's not that they something very extraordinary why do we record the statement of a dying person which is admissible in the dying declaration because nobody has time to wait the police to record the statement so if he is dying and is taken to the magistrate and that is admissible so in order to instill trustworthiness of the evidence of the witnesses in my view it is the first and foremost instant recording of evidence we should be made admissible in the system. When the Britishers drafted this Crpc then they I would say by temperament we are a bit suspicious that the Britisher's deliberately introduce this 161 so that when the court when the evidence is recorded in the court later on at the trial stage there is a scope some kind of you know what we call in an hindi adage(.....) You know some escape route . So it may not be practical under all situations but maybe we can introduce for some kind of very heinous offences and I dont say that you accept my point of view but I say that let us have a dialogue. Let us deliberate whether the system is to be introduced of course that we are derigating from ...

**Adv. R. Basant:** Right mam, but still I think it may be relevant whenever I go to a university or a I say why don't you have a chair for a model code of criminal procedure for India. Why don't you have a chair we have got a lot of criticism but what us the constructive alternative that we offer lets somebody think of the entire thing and offer so that it will be available for discussion we don't have that I would think that the substituting the judiciary with the police in recording statements might not be the final answer. We will discuss that further because without cross examination if a statement is recorded and later the system feels bound by it. It can be made admissible as mam said rightly acceptable is different. There is a difference between acceptable and admissible that can still be covered in the course of trial.

**Justice Gyan Sudha Mishra :** I will share something personal experience about it no lesser person than Justice Verma, who prepared the report after that Nirbhaya case, he phoned me, he complimented me and said why do we don't believe people is because we have this perception that the police extracts the statement and bring changes to it or records the evidence by torturing the witnesses whose statement is recorded. So, if we introduce something into the system where this kind of scope is not left as the police personal I am quiet sure this can be acceptable and I was very hopeful that he would prepare a report perhaps he would introduce. My greatest regard to the departed soul. Then initially I thought why he has not touched upon that subject when he went to the extent of complimenting on this but when I read the report then the question itself was not referred to him on this there were two different questions which was referred to the committee so perhaps they didn't have any occasion. He didn't have to deal about the changes to be introduced into the Crpc. So I guess you know that is why he didn't have any occasion to touch up on the (not clear). But if something you know, something appeals to logic, something appeals to the reasoning then I would you now impress upon the august fraternity, our legal fraternity that at least expressed our views. In fact, sitting on the bench I had issued notice to all the state law commissions. But 3/4 of them did not respond and I didn't have time as I had to (not clear) and when A.P SHA was there he also didn't have a very positive reaction on it but I have a feeling that whenever you go against the stereotype then you are bound to confront. There are not many takers for the idea but taking or not taking, introducing or not introducing but if any one objects to it let them give the reason and of course some NGO's recently contacted me. Some of them are trying to take up that subject and I said strongly believe about it whatever they would like to do I can do help them with it. But today of course we are on the sentencing part.



Excuse me for deviating from the subject. No mam its good. its good . It opens up thought and therefore thats the very purpose of meeting like this but ofcourse **Adv. R. Basant:** As mam as always said we will remain focused. Now because sentencing comes at the end of investigation and trial some reference to investigation and trial would also be relevant. The connection is only that way coming back to the question of sentence. At the end of the trial you have to impose a sentence now. India law is according to me a slightly strange in the range of discretion that it gives to the judge. The latest is sedition. Have you seen the punishment for sedition? Imprisonment for life or imprisonment for a period which may extent to 3 years of course it came as a relic or transportation for life being converted into imprisonment for life be that as it may I only want to impress upon you look at the range of discretion that an Indian trial judge has its sometime shocking for an offence under section 326 depending upon the facts and they say depending upon the judge you may suffer a sentence of imprisonment till rising of court or imprisonment for life. See the (gamat) of the discretion that we have. You know 326 is punishable with imprisonment for life isn't it many of us don't over look back but you have to deal that I can point out a 100 instances in the penal code where you find the discretion of the judge is so enormous which in turn places on the judiciary a heavy burden to make sure that there are principles followed in sentencing. There are criteria followed in sentencing so that the sentence does not depend upon the judge. The predilections of the judge the attitudes of the judge and some critics may say on the prejudices of the judge. This is the burden on us how do you ensure that a sentence is appropriate and that it will be appropriate whether I view it, you view it somebody else views it well that's your problem. That's your real problem. I think the whole discussion comes up today because we are not sure we have exercised the discretion properly. I will not say that myself. I will request you to go through Bariar, Justice Sinha says shall I take you that just one paragraph, just one line actually he was speaking on the question of sentence of death and life that the ultimate discretion where Bachan Singh says, prepare a balance sheet do this do that mitigating on the balance side, work out ultimately strike the balance sheet. Now after such exercise in Bachan Singh please see para 33, just one line it will be done. I will just read it to you as you don't have that. This is what Justice Sinha says, after evaluating all the judgements of the Supreme Court post Bachan singh to ascertain how the Bachan Singh doctrine has been put into practice just one line so that we know where we stand only for that there the lordship says the truth of the matter is that the question of death penalty is not

free from the subjective element and the confirmation death sentence or its computation be this court depends a great deal on the personal predilections on the judges constituting the bench. I ask you is it justice if this is our own assessment or the sentencing discretion that we have tried in the ultimate area of life and death with so much of care as stated by Bachan Singh if it is dependent on the personal predilections of the judge. I say as the constitutionalist, I rebel against this sort of sentencing because article 14 is violated in its entirety. If the sentence would depend upon the judge if my life or death would depend upon the bench before which my case is coming then sir, I am very sorry article 14 is not operating properly. You know in the Supreme Court they have been hanging benches and life benches.

**Participant:** It is everywhere.

**Adv. R. Basant:** Everywhere it is so because I thought the final if I say then If Supreme Court can commit an error sir because everyone can commit an error because not the Supreme Court is infallible but Supreme Court receives it after tyres of consideration and still this error survives. Article 14 remains a letter in the book of the constitution. It is not operated in its reality and the computer would decide now to which bench my case should go and the computer would choose between life and death. Sir, this is not Justice system has to evolve and at least in the final area if you can't make that choice, please give up and say I will not take anybody's life. I would love the death sentence to continue in statute book. But I would like better discipline in the sentencing. Definitely, in the area of this not only this others also. My time is running out therefore I will just give you some very basic question. Have we ever thought where to start in sentencing? It says it may extend up to 7 years, I am coming straight to the point and then we will be done with it. I don't have the time. After going to the Supreme Court, I know 3 minutes I get at best on Monday and Friday. I have to finish my point without that I am gone and therefore we don't have the time. The system does not have more time to spend on it so I come straight to the point and say if there is a sentence take a very simple example of an offence punishable with imprisonment, for a period which may extend to 7 years. Sometimes or with fine or with both I am not going to that let's say where it's a mandatory punishment of imprisonment which may extend to a period of 7 years. If you want discretions to be exercised uniformly we must tell these subordinate courts how they should exercise this discretion. We are celebrating the 150th year of Penal Code Of India. Is there one decision which gives a guideline. Sir, please start from 0 and then go up

depending upon the gravity of crime. Is there one decision that says sir please start from 7 years and come down depending upon the circumstance. Is there one decision which mandates start at the middle 3.5 years go up or go down depending upon the mitigating or the circumstance. If you want law to be uniform, if you want law to respond to article 14. I would believe that one of you must write a judgement in which you say that all subordinate courts must start your choice I would think in the middle go up or down otherwise if you ask me without unhandled discretion everyone and you know this is another great disappointment with the system that trial judge says this and that and ultimately he will say I have heard the accused on the question of sentence and the foolish accused always says I am innocent you know if you have an experience as trial judge the accused would be saying I am innocent. Even if he murders his wife he would say I have only 2 children. Well, pointed attention of relevant circumstances is not given and then the judge will say considering all circumstances this is the punishment. You would agree with me? The appellate judge would think sometimes he would think 7 years is too much then he will also say the same things and say considering all the relevant circumstances in two years it may go to the supreme court if you are lucky and if it goes before the judge with the right persuasion somebody may say oh! I will do a notice enhancement. Somebody else will say after all 15 years have passed by let's pay 50 crores and go away. Pay an amount and get out of it you know I am not trying to be critical of anyone but I am critical of the system because we have not even after 150 years of the penal code told them where to start. I feel guilty why I didn't think about when I was a judge but as my period got over long period of 10 years, I feel guilty that I should have written one judgement where I should have said that great discretion to be exercised properly. To exercise properly you should know where to start, if you don't give a place to start then each one will start the way he wants. Why not you say in one judgement by one at least if you agree with me that either 0 or 7 or 3.5 then adjust up down. Is every court in India has the mental discipline to follow this sort of a system. I am trying for systemic correction. In the American law, they have mitigating sentence, aggravating circumstances and a normal sentence and the judge's discretion is limited to that extent but not so in our system. Somewhere this is to start I am just trying to throw this idea open what is wrong if we would say that it has got to start at 0, 7, up, down or middle, up, down there by you have served a great cause for removing the uncertainty of sentence I am disappointed. See the judgements of the high court, see the judgements of the supreme court where is there a clear guideline as to

how the sentencing discretion is to be exercised. The other day I had a case of 489(c). The accused kept two currency notes in his possession. He had a case which cannot be accepted but the sentence it is 5 years, 7 years or fine or both. And the first 2 courts said that it is 5 years. I said it is only 2 notes, many of us may also commit this mistake. At any rate look at the sentencing discretion that was a very fine gentleman. The judge said no, this is worse than murder because you are murdering the economy and therefore 5 years is okay. So long as justice is administered through human agencies and computer's do not replace human agency in that therefore you can always say that what it is I am not at all I am on the system evaluating a process by which this disparity in sentence which cuts at the root of article 14 would be eliminated or at least reduced. Now on the question of sentencing I need not repeat no because discretions are to be exercised how a sentencing discretion as I try to formulate there are famous quotations on discretions it must be disciplined by law because you cant go this side or that side it must be informed by precedents according to me do not give any safe guidelines as to how this has to be. It has always depended on the judge and I would only read para 33 again and again. It has depended on the judge predilections of the individual judge regulated by analogy. If you have to be consistent you have to follow the principles of analogy not that it is a safe test. Not that if you ever get two sets, two sets of cases of facts you don't get it at all. That's where the individual human agency in administration of justice becomes very important tempered with mercy when the judicial discretions are exercised. Sublimated by knowledge of principles on which punishment is imposed. Why our punishment imposed liberate ourselves from personal predilections to the extent possible that's what you are doing everyday. I don't think on the question of sentence alone that is impossible. Everyday in every adjudication we try to liberate ourselves on personal prejudices. Always be conscious of public good involved. The error percentage will be further reduced. The various theories of punishment I am not going to, I said informed by the principles of punishment now with knowledge sublimated by the knowledge principles of punishment, now of the various principles of punishment you know deterrence is always open debate as to how much deterrence can keep a person away from crime. But the law assumes, accepts that deterrence has a role to play. Retribution they say eye for an eye this they say is gone but we have substituted it by another principle what is that? What we call the doctrine of proportionality you cannot punish an individual unless he deserves it and to decide whether he deserves it you have to look at what he has done so earlier theory of retribution I

don't think it has vanished frankly from the minds of the polity it has not vanished, from the mind of the judges. It has not vanished but we try to make it refined by saying that not retribution but the doctrine of proportionality whatever that be that is there one more I would think is the reformatory ideal and in that I would like judges to have one perception. I embolden myself with this principle as a trial court judge and later as the High Court Judge. I thought it was a process of empowerment for the judge because many of the judges who feel unfortunate that I have to impose a punishment, I am being cruel in imposing the punishment so they become very light now. There is a Gandhian principle which Gandhi borrowed from the Christian philosophy which said a sin can be compensated or undone by penance you know so sin plus penance is innocence. You commit a sin you repent over it, you do penance for it and then you come back to the area of purity Gandhi said in one famous quotation that crime plus punishment you hate the crime and not the criminal. When the crime is appropriately responded and you undergo the punishment you enter the area of the domain of innocence so what are you doing as a judge from the domain of guilt you are holding the hands of the accused allowing him to pass through the conduit of punishment so that he reaches the sublime ones innocence. As sentence will have to serve all these purposes I repeat

- 1) It must be disciplined by law
- 2) It must be formed by precedence
- 3) It must be regulated by analogy
- 4) It must be tempered with mercy
- 5) It must be sublimated by the knowledge about the purpose in which I include the reformatory principle and the judge must liberate himself from personal prejudices

Ultimately, what is needed for public good because it shows of our voyage is crime free state and therefore yet to be conscious of that also I wish the Indian judiciary will be able to respond and acquitted itself of the blame that we have not been following sentencing policies properly.

I wish a principle would emerge whereby you will lay down that I will always start in the middle, come down if necessary go up if necessary only and I am not simply say considering

all the facts this is the punishment. We become arbitrary on that judges become arbitrary when there are no principles to guide I would always say when I came to the Supreme Court, you know lot of my stories get involved in the supreme court also sorry for that if judges were obliged to give reasons for their decisions. Many decisions would have been different many admissions would have been different sometimes, I hear sorry semantics when you argue and the judge says sorry when you succeed you say greatly obliged I can't understand in my court at Kerala if somebody says obliged I would use to tell him don't be obliged I am doing my duty there's no question of obligation but come to the supreme court they would say greatly obliged thankful to my lord and the judge would say sorry. Why sorry sir? The case doesn't deserve admission and be proud to dismiss

**Participant:** obligation..not audible

**Adv. R. Basant:** Right sir, you can justify but obligation to the sense of justice is not to semantics has a role to play your mind set whether you like it or not gets reflected in the semantics that you employed well to summarise many more things I wanted to say but we must stick to time or we will not be doing justice. I think my final request to you would be can you please think of one of you see every great decision is brought out by the beginning by a small magistrate the principle it goes up and down and ultimately gets consolidated you are occupying a much higher position I couldn't do it I feel sorry for it now I think at least you people who have the opportunity. Please think I am not saying do this please think whether this violation of article 14 in the matter of sentencing can be avoided by a systemic correction of calling upon on everyone to start from somewhere and go up and down depending upon still you will have the discretion but it will be channelized. There will be a method even in Magnus and therefore there will be a method that we follow in the question of discretion. These days are wonderfully exercised isn't it sometimes I state my own order of transfer using my discretion so are cases were the concept of judicial discretion is annihilated but we have the burden to find out how the system has improved and I think the key ladies and gentlemen is in your hands. You have the opportunity, judgeship is a great opportunity not only a burden it's not only a privilege it's a great opportunity and that why I say constitutional judges should not only know the law they must also have a perception what the law ought to be. Madam discussed 164, celebrated judgement you must have read about it. You may discuss, you may disagree we are not worried at all you may disagree but here is a

judge taking upon herself the opportunity not only to know the law as it today is but having an ideal what the law ought to be if you think the Indian Judicial system has to acquit itself of the indiscretion of the sentence has been consistently inconsistent if you want to do that here is a great opportunity for you now before you demit office have one judgement which we will debate at the supreme court at least and find out whether those points can be accepted or not. Thank you very much I would have loved to spend more time with you but then unfortunately my time is running out. I am stopping exactly at 11 o'clock. Thank you very much.

**Justice Gyan Sudha Mishra :** Thank you brother justice and I am glad that you have agreed yesterday also I had expressed myself to what you have said when there is discretion on the sentencing that must be packed with reason and much more articulate by laying down concrete principles which should guide when there is discretion on the judge to impose punishment where the maximum and minimum line is drawn here. So I am very glad that yesterday I didn't know how to carve out and translate into reality those philosophy but today you have given out the principles and I am quiet sure that will be helpful to all of us and obviously those of you are still functioning so we will discuss it further in the next session. `

**Adv. R. Basant:** Next session another subject will come can we have ten minutes for you inputs. Put across your suggestions also. I don't know how you do it but you have to eliminate subjectivity in sentence. I don't know what you accept. You may accept what she suggested, what I suggested, what you think but the end is very clear I want article 14 to be fully honoured and my fate should not depend upon the predilections of the individual judge

**Justice Gyan Sudha Mishra :** Only that part you know that sitting in court whenever the lawyers argue why such and such sentence has been awarded to such and such situations Then comes the reply article 14 does not apply to criminal cases but the principle on a particular situation similar treatment should be given to the accused . I think of course by implication.

**Adv. R. Basant:** Article 14 may not apply to in criminal cases but the soul of article 14 is equality. Soul of article 21 is also equality see its no answer to say that criminal law is alien to article 14. It is alien in the sense that you cannot say he has been awarded only one year and therefore I should also be awarded only one year to that extend article 14 is not

applicable. Not to take away from you judges the responsibility to be uniform. When you say article 14 is not applicable to criminal trial it is this that you can't say 'x' has ordered one year and you also award me one year only. That may not be applicable that does not absolve you from the responsibility to be equal in the treatment uniform in the treatment principle in the treatment on the question of sentence also. just one more thought in our law after post-conviction , post pronouncement of guilt adjudication there is a posting for sentence absolutely baseless that does not work at all Iam asking you why don't you ask your subordinate judges that in every case whether the sentencing discretion. You must call for the probation officers report not all reports of probationary officers are acceptable but some material why are we not making use of it. Insist the trial judge to get it seal it in a cover and not open guilt is adjudicated one of you can do that give a direction to every subordinate judge wherever there is a sentencing discretion because you know sentence is a combination of gravity of offence and the individual who in his response committed in the crime is important. I always take this grievance against the Supreme Court, all the high court we haven't understood the Bachan Singh doctrine correctly. Bachan doctrine in para 303. If you read it said the restricted life persuaded ultimately hold that deprivation of life by state should not be resorted to rarest of rare case. looking at it from the crime perspective and criminal perspective the lesser option is unquestionably for closed then you say that this is a case where the sentence of death can be imposed but must be in rarest of rare case. We didn't understand at all we thought the attempt was made to identify the rarest of rare case the attempt isto identify the case where the lesser option is unquestionably foreclosed. Rarest of rare is the label given and the litmus test is where the lesser unquestionably foreclosed. So many test were introduced to find out the rarest of rare case please find out that case which the lesser option is unquestionably foreclose and after swami shradanantha (not clear) this judgement is oen of the greatest judgements were the elbow rule was fully utilised by his lordship and the court said you can impose a sentence of life with a rider that it can be ordinary sentence of life and release can be considered for fourteen years or 20 years or 25 years or 30 years and in Swamy Sadanatha case lordship said not till life absorbed this man he should be let out so today following Bachan Singh modified by swami case every judge is to come to a conclusion that the worst option of life sentence is unquestionably foreclosed you get it the worst option of life sentence which will never let you out of prison and that sentence must found to be unquestionably foreclosed when his lordship, Bachan Singh said



there is only one option now there are shades of options available you must come to the conclusion that the worst option is also unquestionably foreclosed then only you can impose a sentence of death well so that I was only on the point that the individual peculiarity on the accused person is very important in exercising sentencing discretion you cannot have an input on that because the accused will not lead any evidence nor do we expect such evidence should be laid at the stage of trial. In most of the cases, in the morning you ask guilty afternoon you say about sentence after one sentence there is one day and then the ,most reluctantly some judges would have not prepared the fair copy. It is not ready but we have posted it to today. The next part formality of questioning and that questioning with that what does he say I am not guilty. I must have tried at least 1000 session trials and at least 400 appeals the capital offence in all that I have found nowhere in there will be in a serious attempt to adduce evidence on sentence and therefore what is important is you collect the material don't open them because that may prejudice you ask him in to give it to you in a seal cover after he conviction is pronounced what is the probation officers . Probation officer is a social justice functionary and what is his assessment of this peculiar circumstances why are we not doing that you do it ?

**Participant:**No (not audible)

**Adv. R. Basant:** I completely agree with you. Call for the probationary officer report after conviction. That's the only distinction. If you think it affects the sensibilities of an accused don't call for the probation officer's report pre-conviction but at least after conviction you must call for it. At least after conviction you must call for it and if you have a system by which you say this will not be opened before one judgement by the High Court is enough you can call for the report but no judge should ever open it before conviction, so that anxiety can also be and the delay between conviction and sentence can also be avoided if you say every judge must keep it in seal cover should not under any circumstance should open it. If the judge is going to open it and the accused can have no legitimate ground of legitimism you can work out I am only suggesting, I am only on the point there must be a probationary officers report at least before you choose the range of standards. That's my point. When you do it how you do it. It's all your look out , I am not worried but you must have a probationary officer's report because unfortunately the accused are not trained or not used to furnishing evidence under sentence. Right, I am done. Thank you very much.

**Justice Gyan Sudha Mishra :** Now we have to

**Participant:** Not audible.

**Adv. R. Basant:** You must understand my point. There is no law which says you can't call for the report for the probationary officer in a murder case. That's when I said I have elbow room. I told you where I have elbow room. If you should decide the question of sentence properly sound input must be available and therefore I say I may not be bound to call for report under 362 or probation offenders act but to decide my discretion under which is available to me under law I call for a report you have that an option it's not that you are powerless you have that option nobody is going to question you and if you say and make it clear in one judgement that you should never, never open it or you cannot open it after conviction you have your remedy without any hassles you have your remedy.

**Participant:**not audible

**Adv. R. Basant:** I told you sir 362 is not specifically attracted. Probation offenders act is not specifically attracted I agree with you but it is your burden to choose the sentence and then if no inputs if you call for a report if you call for a report not against law.

**Participant:** Not audible

**Adv. R. Basant:** I will tell you to choose the range now what's our problem today, that range is not properly exercised that is our problem therefore to use to find out to, please sometimes we have a blockade because we think can the section 363 cannot be got over probation offender act cannot be independent of probation offender's act independent of 362. When you want to choose sentence is there anything law which prohibits it has all relevant information I don't expect it from him. I want an authentic version and I call for a report from the probation offenders I would have called for the beginning to keep it closed I will not open because the problem which you said if I do not open it, if I declare there is no question of any prejudice because otherwise between conviction and sentence further lapse of time would come in. You choose whatever you want I am not under questioning I am only on the point to choose the range. Choose the point and range. You must have some material this is good material you can rely on that all I can say.

**Justice Gyan Sudha Mishra :** This section can be said further in other section because these are the principles which can be apply we are even for economic offences or other offences

**Participant:** Not audible

**Adv. R. Basant:** Please, there is in a murder case also, there is a range it will be between life and death. Only two punishments are possible you cannot impose anything less than a sentence of imprisonment for life but you can impose a sentence of death which means vital range is there don't say there is one offence in the penal code where the range is not prescribed. You look and tell me, tell me one offence in the penal code where there is no range even in the murder case there is a range because it is either sentence of life or sentence of death that's a wonderful range that you have. That's why Bachan Singh says prepare the balance sheet before you exercise to choose from that range. Thank you very much.

**Justice Gyan Sudha Mishra :** We will have the same curiosity in the next session also because thiwill apply in other sessions. Also we will assemble at quater to 12.

**Adv. R. Basant:** quarter to 12.

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**SESSION-6**

**SUBJECT: SENTENCING FOR ECONOMIC CRIMES**

**RESOURCE PERSONS: Adv. R. Basant, Adv. Sanjog Parab, Hon'ble Justice K. J. Sengupta**

**CHAIR PERSON: Justice Gyan Sudha Mishra**

**Justice Gyan Sudha Mishra :** So very good afternoon once again. I am quiet sure that you all are refreshed so as you already aware this session will be on sentencing for economic crimes extremely relevant for our modern times provided we are able to book them. The first speaker is Justice Adv. R Basant.

**Adv. R Basant:** Not me mam let him continue. Time is running I will add later on.

**Justice Gyan Sudha Mishra :** So advocate Sanjog Parab from Bombay High Court. We have already introduced to each other so please go ahead.

**Advocate Sanjog Parab :** Sure ma'am. Hon'ble Chair Person and learned judges it's a privilege to be here at the morning and to understand the focus of the academy which is doing so good. I have been observing all the speakers in the last few days the thought process are evolving but I do realise that if you look at the trend of supreme court at present it was reformative to an extent became retributive. Now, they are looking at deterrence and compensation on a broad perspective various judgements are already in place which I sight very briefly since I have two other speakers with me. A few thing is that just to clarify is I understand that we all are from appellate benches so we all are circumspect. I have been a defence counsel, I have also been a prosecutor for government matters in the past. I tried to bridge a balance and understand what is the predicament which we face and what we really need. Society now reminds of us admitted facts are that being appellate benches we have to keep track of. So the parameters are brought down drastically at the same time we also have to look at circumstantial evidence cases which again narrows the discretionary aspects. Two views of the same facts are always going to be emerging from any given set of circumstances and the last being that Justice Basant of course quiet vocal in his thought processes but I believe that we have adhere to the system. We all like to have changes coming through in various means try to make it as innovative as possible. But we are still circumspect. We have to live in the system so keeping that in mind I will try to put across our views what we feel is an appropriate situation.

**Justice Gyan Sudha Mishra :** Adding on, out of curiosity I am asking you because what is the experience in Maharashtra about the conviction or rather the consequence of the trial in economic offences because in my experience I may be its a perception it may not be reality but my perception is the do economic offences result into any judgement so that we reach at the stage of punishment because most of the economic offences what we notice is still at the investigation stage. Except for small crimes do you think economic offences result at the stage where you have to decide an deliberate about the (not audible)

**Advocate Sanjog Parab:** Yes, mam there have been situations we have the security transaction act where many would have been rendered by the learned judges and as regard the other issues few are at the basin stage again the part of the whole process investigation which at times may not approve at times. Maharashtra has come up in terms of conviction rates we were fairly(not clear) let us put it very frankly. 5 years back, I think we now have hit a bench mark of 15%-16% on an overall perspective we are coming up and the process has been put together and the system has been made more robust that sense was the word as far as the whole process is concerned. I won't dwell into that but I also believe we all discussed and we concur that the investigative process is so critical that at the end of the day it is coming up in tears at the appellate level. So what really happens then is we have a set of circumstances, already dealt with so in that perspective we have improved. We will have a better tomorrow in that sense I will just give 1 small quotation of Doctor Mckinsey, a well-known criminologist, going back to the 60's what he says on sentencing it is to indicate the authorities of law. This will be done partly insofar as the offenders informed and insofar as the act is prevented. It is only when offender sees his punishment of crime to be the natural or logical outcome of his act. That is likely to be lead to any repentance and it is recognition also that is likely to lead others to any real abhorrence of crime as distinct from mere fear of his consequences. I think this really epitomizes what today's society and the governments are looking for. We all have been needing the delinquency and the proliferation of economic crimes. Traditionally, it is no more a small thief or a burglar. We are having a law graduate, we are having a chartered accountant, we are having MBA, we are having an engineer who are perpetuating frauds not just in a few lakhs but running into crores were economies are devastated- Satyam etc. All the cases in points I believe in fact as well as statistics go there are about 37- 40 companies who have just made the economy of nearly 30,000 -40,000 crores. What does a judge really do. Do we be very nice with him and the answer is no. The answer it is time that deterrence is imposed. Let the message

go out loud and clear because here you have a man who is no more illiterate or doing it just for the sake of doing it . Its agreed, if that be so can we be so nice at the bar or at the bench and say fine. You bring back some money back to the system. We must do that the volumes are so high merely imposing fines will not be an answer I just read two days back Mr.Malliah as he is 4000crores now he has got on board where the money has been taken off. In such a situation, what we really need to do as judges on the appellate side, send the message loud and clear. It is time that a deterrence sentence is imposed and people henceforth will realise or think twice. That no the consequences are serious various provisions have come in which have made again, which have rather enabled our hands. SEBI today provide for punishment of rupees 25crores under section 25 of the act. We have got the MPLA, the money laundering act which again has serious penal consequences but a fine is provided. Also, the information technology act provides for serious fines so it is not deterrence. Let us try and bring back the money to the system. Ultimately, the economy has to run. We are answerable to our own system but yes society always demand. Society does expect some kind of message to be send across. We have got lot of scams running into crores we have housing scam running it to crores. We got all these fly by night wire operators do various financial schemes who feel fine. I will be in jail for about a month or 90 days till the charge sheet is filed but Iam going to get bail eventually and my life will be normal. It is these kind of people who need to be put behind and the message need to be sent. So, what I would strongly advocate in today's days that the demand is certainly deterrent sentence. A message which goes out loud and clear and yes as we all know discretion is again there, sentencing is the issue of discretion but at the end of the day the discretion has to be again balanced in such a way that we are able to retrieve the whole system. Bring back some money into the system in terms of compensation even the victim today compensation is not a new concept as far as India is concerned and it goes back down to the 5th century that the 'Dharma Shastra' everything talks about it. Manu has codified it in its own law compensation has been there, compensation finds in section 357 of Crpc and a right of victim today has been recognised in 372 of Crpc they also can come to court and demand it let that also go back to them in terms of retribution if that be and at the end we look at it also if on the concept that some money comes back to the system by way mitigating things to the state or the economy is concerned. It has to send the message, it has to be very as far as people are concerned that the courts will not allow the system to be taken for granted. It is alright that you know the frauds have been perpetrated whatever is the investigative process ultimately it comes back to the

court in the form of chart sheet and eventually in terms of convictions we have discretions even at the time of grant of 389 when the appeals are being admitted we also can impose better conditions in terms of whatever is provided within the frame work we certainly can't transgress because we are answerable so this is broadly the pattern which I would suggest the other issue which has been bogging troubling the courts also has been corporate area which was briefly (not clear) yesterday. Corporate sentencing has been an area which has not really developed. We had judgements which have been running counter because IPC is still as it stands has a substantive sentence and fine and we has judges would not be able to separate them. In fact, Valliyappa textile which has been referred to in the study material Justice. Srikrishna is then was the judgment was pronounced on 16/9/2003. Where he held under income tax act that the corporate body or juridical entry cannot be sent to jail. Mr.Chidhambaram, as he then was immediately amended the Income tax on 1/10/2004 and brought in section 278(B). The deeming fiction offences by companies, the act was amended instantly what needs to be under as far as IPC is concerned the anomalies also exist the Honourable Supreme Court in a series of case Standard Charter Bank etc. Then read into the provisions and said that under certain circumstances and means that impose a monitory sentence on the completion. So, to that extent as learned judges of the appellate division you will have the discretion to go that far you may deal with offenders as they stand since their individuals but when it comes to the concept of mens rea the enabling provision now which has been read into the 2 judgments can easily be enforced. Even a corporate body can be entitled and punished by way of a penal sentence namely fine as far as the individual is concerned the remedies available it is 3years, 7 years as the statute provides certainly a case where the court should not really look at discretion per say because these are offences perpetrated by people consciously. I don't think that the concept of mens rea can really be now brought down to these kind of highly qualified professionals who are economic offenders its time that we rise to this occasion then the other areas which I would like to invite you attention would be the area where economic sanctions also are permissible. Now in SEBI, there are provisions asides from penal things from 25crores. They have provision where any such company can be easily forbidden or barred from accessing capital market for period of 5 years 6 years or 7years. It is time that some economic sanction is brought on board either by way of public disclosure of corporate body so that people know that this is corporate body indulged in so and so acts. And this what the court has done there could be other formats where they are forbidden like from accessing the capital markets where again they cannot and

cheat members of public. One example is as far as the MP act is concerned. There is a case in Maharashtra in Bombay, a lady was involved in a car accident and the licensing authority has revoked her license. Now these are situations. Section 185 of the MV act -driving under the influence of alcohol. You must be knowing about Jayashree Khatker. Now these are situations where the courts did rise although it was decision taken by the authority which issues license. The matter went before the court but the court said we are not going to entertain it. The revocation of the license for an offence under 185 although the trial has not been commenced but it is done. These are instances where court should really come down heavily, may be harshly and then send a message out thus far no further you have been involved in incident. We will deal with it. The law is there, enabling provisions are available to us this is one of the areas which have lots of suggestions. A judgement where the Honourable Chair Person has been a party namely to UPAHAR case which has been reported in last year again Supreme Court took a call. The accused was convicted for the offences the honourable chairperson, in fact gave an option of enhancement or pay more compensation and in fact 60 crores came out which ultimately were used for a trauma care centre. So it is not the powers which exercised then already realm of the judicial appellate jurisdiction. It is not that something new happened so this can be achieved. The sentence was inflicted and fortunately in that case the victims said we don't want compensation. They were looking for deterrence sentence. The sentence was also inflicted at the same time money was brought back in the form of this which was used for the trauma care so this what can be achieved this is what is possible within the system with in the frame work. Yes, we all would love to be innovative but the question is that we have to deal with our own system. We are answerable to our own system and at the same time with a narrow campus as the learned speaker said yes the elbow room, everybody would love to but the question is discretion. Still has to be balanced such as that which cannot be questioned. At the end of the day, if you are looking at a message, use the discretion, have a detailed order. Let it go down to the subordinate judiciary which may then become a bench mark for onward decision to come forth as long as the thought process are evolved and are translated into actions down to lower judiciary. These are other formats, the concept of also sentencing will leave the citation and point out what has happened. We have got the case of Alister Perrera which travelled from Bombay again convictions and came up to supreme court in 2012. I will just leave the two paragraphs which are important where the honourable apex court has pointed out the concept of sentencing in criminal laws. I just read 2 or 3 lines. Sentencing is an important



task in matters of crime one of the prime objectives of the criminal law is imposition of appropriate adequate, just and proportional sentence, commensurate with the nature and gravity of crime and the manner in which the crime is done. There are no straight jacket formulae for sentencing an accused on proof of crime. The courts have evolved certain principles, win objective of sentencing policy is deterrence and correction now in a case where an accused has mode down 7 labourers who were sleeping in a night certainly there cannot be a correction there are situations where I believe that you don't even have to extend the benefit of probation of offenders act. These are contumacious acts these are (not clear) where there are no questions. The man deserves deterrence what sentence would meet the hands of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentence. I need not read further so these are the perspectives which the courts have allured to in terms of striking balance under given circumstances. It is entirely with the realm of discretion and jurisdictions, what discretion is to be extended to what extend at the same time the theory where the message needs to be sent out. In terms of deterrence lastly what I believe is since, I have two other speakers I will conclude quickly. I believe we have reached a day where we are expected to do something in terms of society calling upon us to restore that element of faith in the system which unfortunately I believe people like all these schemes and all these people have been taken for granted. Yes it is day of recurring in that sense that sentence has to be deterrent and if possible try and may be compensated bring back into the system by way of attachment of properties, by way of heavy imposition of fine. There's no latitude on that, the doors are open wide enough bring back the money the system where it is now required. So, that at times at least we are able to perform and judicially look at what has been achieved today in the larger interest of the courts and societies. That's all. Thank you. Thank you for the patient hearing. If any queries are there ..

**Justice Gyan Sudha Mishra:** Can you just enlighten us from you experience what would be your view as a member of the bar that even at the time of grant of dealing with economic offences do you think that commission can be imposed for attachment of the property because I did encounter a situation of this kind where I think a matter was from Assam or Sikkim, where some contractor or may be engineer I don't remember the facts in detail. We didn't have unanimity even in that because I was in the view that if he gets a bail and he doesn't compensate state government on that then what is the good? Ultimately, the state will suffer so let his

property be attached to the extent of the loss that the state has been suffered. Do you think that kind of plea or a view should be taken?

**Advocate Sanjog Parab:** We have got an act Maharashtra Investors & Depositors Act. It the case of the NaCl of late about 2,3 years back ago and ma'am in exercise of the powers at the investigation stage itself under 102 the investigators officer has gone and seized assets worth 5600 crores which is the value of the total fraud the matter is now .

**Justice Gyan Sudha Mishra:** Had you appeared before me in that matter. I would have got the support because I couldn't do it because again I couldn't convince my brother judge on that and he didn't agree so I couldn't do it because the other side the counsel also didn't assist us that way.

**Advocate Sanjog Parab:** The matter is now in the High Court were they are about to have pro-letter distribution taking place. We have got the enabling provision and in fact just to conclude there is latest judgement of Justice Mishra of apex court are R.Vasanthi Stanley where even he has come down on quashing as we were discussing on with justice Sinha yesterday that every third person goes to court have settled and quash it. The apex court has now as September 15th clearly taken a call don't entertain such kind of quashing consent petitions let the trial go on. Let them face the ignominy of trial but do not allow them to come back and say yes we have settled. Iam willing to pay 'x' amount of money no that's not it. It's time that the message goes out loud and clear.

**Justice Gyan Sudha Mishra:** The message goes on loud and clear.

**Advocate Sanjog Parab:** It's been a pleasure.

**Justice Gyan Sudha Mishra:**It's not proper for me now and again to add abstract to because it's better that you listen to other speaker Justice Sen Gupta on this and later on we can discuss if you have queries.

**Advocate Sanjog Parab:** I think we will deal with this at the end of all the speakers may be.

**Justice Gyan Sudha Mishra:**So, please justice Sen Gupta.

**Justice Sen Gupta:** Very good morning to everyone my dear brothers and the honourable chairperson here and didi and brother who is on the side.

**Justice Gyan Sudha Mishra:** and your dear sisters in the front.

**Justice Sen Gupta:** Oh! my sisters sorry gender bias don't accuse me for gender bias hopefully iam excused for this so sisters of here particularly suddenly newly I found another sister here. Its very good to see you. That's why I said dear brothers when I started iam a very dear sister I might not be accused of being subjective and this is a mutual and reciprocal obligation mind that because in Bengal we follow the brothers day anyway iam really privileged that iam sharing my thoughts with the honourable judges and also everyone economic offences what I feel before independence, the government attitude was something else at the time income tax act and all were there. After independence, because inter revenue used to come to the nation this has to be kept in mind . In the Britisher's period the revenue used to go to the abroad ruler. So this is the difference. But there has certain provision in our Indian Penal Code still holds good to take care of the present day economic offences. There are people who call it as white collar crimes. Its a known list and a diabolically nature because it has the impact of the economy on the nation and so its a life of the nation without revenue a nation cannot run. So therefore it is settled law that in privy council immediately after the judgement in Dr. Mukherjee this is old decision in 1954. You know everything . That's because you have done judgements and everything no need for explaining the judgements to you all. Our predecessor speaker has very appropriately put and this also in the mind of everyone. Its a balancing pattern impact in the economy meaning the aggravating and meeting that impact. Two elements has to be borne in mind. When I was a judge while dealing with income tax matters I have also done customs matters, central excise so I have few experience value in the subject also on prevention of corruption act also. At present to my mind in urban area the corporate offenders are many more and with greatest of humility with risk of some criticisms. If I may be permitted to say so all politicians not all, politician is one of the worst offenders particularly prevention of corruption act therefore the prevention of corruption act at present iam dealing with of course the punishment provided the statute are not very adequate even if in a(not clear) situation. It is for the legislature to think into the matter or could presently lokpal and lokayukta act 2013 had taken care of it has increased slightly their quantum of punishment. If the investigating agency in prevention of corruption act when they point out under section 409 also then it takes care of many things. But if you deal with the prevention of corruption at itself then punishment in case of politician, in case of educated people I fully agree with my learned predecessor speaker did should be deterrent and it must have an impact in the society because these people are

presenting people at large and common mass if the punishment impose this sort of person and call them as criminals then it may go down to the people but if you find an illiterate person involved somewhere and upon analysing the quality of evidence at the time of trial, if we find his involvement is minimum obviously punishment cannot be as extreme as it is a principle of (not clear) that has to be balancing so questions of proportionalism and since of rationality as one of the elements indeed as it varies from man to man. Naturally, we sense some proportionalism in the matter of quantum of punishment. It's not in English jurisprudence and not American jurisprudence, it is a recent development of a judicial pronouncement. If you kindly permit me just to share it is engrained in our mythology (not clear)dis- proportional punishment everyone knows that the punishment that the death of Vidura the uncle of pandavas, was the result of disproportional punishment and also the punishment to a juvenile because of the bars. So this came in jurisprudence found in our Indian mythology, Indian ethos and culture who didn't go to abroad a proportionalism is one of the thing and also the discretion to be exercised is this the conduct of the accused during investigation during trial and even at the appellate stage. I give an example one thing when I was exercising a rape jurisdiction, my learned speaker has told very rightly to come back heavily on quashing matters. Any right you have said this was the rest of the case before me and under article 226 so this fellow was a Sabhapati of Jilla Parishad and his wife was also working in a school, he came for quashing of the case filed against him. Prevention of corruption act before the High Court just investigation stage so it came before me and then the investigation is opposed seriously. What I did I took a pragmatic view idea object is to see the money should be brought back. Money or wealth must be brought back at the very inception not at any later stage. He came, I was asking look you are an active politician with all right. I can do a help to you if you (not clear) then I asked him how many properties you have . He said these are the properties. He has a purpose in jurisdiction and may not be akin to article 142. So investigation, he says that I want a bail and quashing. I said I will quash everything don't worry. Just tell me the truth if you don't tell me the truth I will take other course of action and then you will be at the hands of police so the 3rd degree whatever will be available. I said you are educated, a politician. Then he said I have this assets. I said okay, very good. I asked what is your income tell me. He told the income per month before the sworn in as the president of Jilla Parishad. Then he was a head teacher he said these were his income and all. I asked him what his children are doing? he said one is medical student, one is so and so. I said all right. Then I asked do you maintain any car

he said yes. then I asked how many? Two. Okay very good. Your quiet capable gentleman. I said alright. Then I said I can help you. First, if you agree to sale of this property immediately, so he gave the list. admitted it, he agreed to the sale of the property. I put an option, after making the deduction and everything expenditure I put an option. This property cars and properties.

**Justice Gyan Sudha Mishra:** I think Supreme Court should cooperative in Sarah matter.

**Justice sen gupta:** I will come later onto Sarah matter. So then I put that for auction and in auction it cost around 10 crores. So what I did, I just calculated by taking assistance of one of the advocate, his balance was par surplus fund having legitimate income before he assumes office as the surplus and value. 10 years income I just gave it back. This is your money, take back and balance what I did balance I told him listen you have put also labour for getting this property making all these deeds and obtaining the intellectual property you are having. So must be your intellectual to get so much of wealth during a short term of your political office. So, I gave him 1lakh and told him to fight your litigation before an appropriate court. So I gave him 1 lakh and balance was immediately deposited in the state exchequer. Then while writing the judgement I just simply observed. Since, his conduct is very cooperating and as far as bail is concerned his conduct will be considered by the appropriate , where he will apply and no question of quashing in this matter because prima face this case is a very strong case. However I make it clear that his conduct should not be treated to be a confessional admission. Therefore, the learned trial judge or if the charge is made at all the learned trial judge, the investigating officer will not be influenced by this and should not keep it in mind. Lastly, I added if the charge is same and the trial conducted and he is convicted then the quantum of punishment shall be considered. Considering the quantum arrangement his act and conduct should be considered. Upholding the Supreme Court pronouncement the balancing was made. This I dealt as a High Court Judge. So this had a serious impact and then almost many a people opted for resignation and the investigating agency also but my dear sir, I am asking you one thing I have a little experience when that experience is this you tell about the CBI, CBI, CBI. I know personally a High Court Judge, after his retirement his house was raided . CBI found large number of currency notes etc everything. They recovered nearly 30 crores in all. The CBI people who did search asked judge what will you do with all these money? This politician would just eat up. So, let us do one thing. It will benefit to you and will benefit to us. What

they did in the list they said that 10 crores is recovered and balance 20 crores was shared between them. So this is what I tell you this is the serious implication in the society, prevention of corruption act. Then presently the rural area the particular list and regional everywhere eastern region Bihar, Orissa etc. Chit fund, chit act the money circulation chit fund act. Presently, it was in a scam you know that very famous Sharadha scam. So many political persons were involved. Very frankly speaking I have seen one of the charge sheet in Sharadha case the way the charge sheet has been made I am sure there will be no confusion but no attempt was made to recover the money, just passed on to the hands . I have dealt with a case it was Rohanlal chit fund like this chit fund company, so repetition was filed by the State Of Bengal against the chit fund, what they said that police is inactive because of the politics. Then the matter came before me. So, I was sitting in division bench with the then Chief Justice Of Calcutta High Court Justice Sirpurkar. Sirpurkar told me what is your thought about this. I said, I think I have done a case like this, just like this, just have told now we should make an endeavour, first, to recover the money that a good idea. Then what happened, we appointed a special officer immediately in article 226, writ jurisdiction it was a public interest litigation it was so a retired judge of the High Court was appointed as special officer with a power to collect all the properties in the name of companies, or in the name of directors or in the name of the employee or in the name of agent or in the name of whatever may be . He was immediately appointed and he took possession and the matter went onto sometime and then justice Sirpurkar retired and then I became the presiding judge of the high court. Then I gave several directions. It was so happens because possession was taken immediately in a very early stage. This all properties were could be recovered a large plot of available land and it was acquired by the national thermal power corporation and at least 300 crores rupees were compensation was awarded for the acquisition of this land. Had there be not the intervention of court the money would have gone somewhere else so 300 crores came in and with the collection of money I must say that our special officer did an exemplary job and in that he could collect all the money and could return all it to depositors. Only the principle amount not the interest what I meant to say is that at the very early stage when-ever you got the first of opportunity you see that money is brought back and money must come back and to see the mitigating situation takes place during the time of investigations far as possible it is not the idea to punish. If you punish and then you not get back any property then its nothing rather we will be losing if we send to jail we have to spend money for him because nowadays its simple imprisonment. According to

status, you have to pay allowances and everything. After recovery of the money, and if you find in the quality of the evidence that his mind was to be misappropriate and everything and naturally punishment should be given. This has to be done. Now, there are so many cases particularly we must see whether if we can negotiate and tackle the corruption among the politician we can take care of the society automatically but they are representing the society. Next thing is this we are thinking of prevention of corruption act it is very sad taking gratification, taking bribe is an offence but giving bribe is not an offence. Transferring of Indian money to abroad now special investigation team is formed for the same . Let us see and watch what would be the result but I feel please don't mind. I am out of the system now. Measure which has been taken is not very adequate and effective according to me. There could have been some measure. The money could have been brought back immediately here. If I can just say thus identify who were the offenders who have done it. First attempt should be taken to forfeit their passport and to pass mandatory injunction directing them to bring back the money from that bank to here. We cannot compel any foreign bankers please remit the money, never. Unless there is a treaty to that effect with that country because there treaties and agreements with the security of the foreign investment treaty there with some countries and banking treaties are also there but an Indian account holder if we asks by mandatory injunction to bring back the money and abolishen of that order we can take care of or we can take what are the assets and properties in India. He is having and if we can attach, confiscate and sell, they will bring back and I believe honourable Supreme Court have been in article 142 can do it. If this could be done I think that a lot of money and the black money circulate in India

**Justice Gyan Sudha Mishra:** Why is Supreme Court thinking out of the box.

**Justice Sen Gupta:** It is just Supreme Court's mind set. It is just a wilful thinking and I am sharing my ideas only

**Justice Gyan Sudha Mishra:** you are most welcome you know, that is what i have been saying that the consensus should buildup where we can compel the system to introduce the change.

**Justice Sen Gupta:** Another thing by mentioning sharadha case, what I think that detaining a person during the trial .

**Justice Gyan Sudha Mishra:** This is a judgement of Justice Munshi I guess

**Justice Sen Gupta:** Abettment means suppose I am giving bribe not a public servant. If I give a bribe an ordinary man attempt to give a bribe I shouldn't be charged for aiding and abetting. Suppose a peon he is collecting money from a stranger he is collecting the bribe and give it to his master he should be aiding and abetting but if he give the bribe he is exempted from a particular section. I will give you the answer I will check it because I am dealing with that I will tell you so naturally therefore in Sahara case I think there was the detention of a person in jail. It is very difficult to bring back the money at the same time we are spending money for him in the jail. We are out of pocket already, now we are again out of pocket. So measures should be taken it is up to your wisdom in situation. So in rural area the economy crimes is one thing and in urban area the economy crimes are one thing and also in border area. Do you know what is the duty drawback fraud in export and import. I can share because all of you know the punishment system what punishment will you give it is up to you I give the thought. A particular trader he exported certain exportable goods, In exportable good he imported input raw materials so he got, he paid the duty now he claim duty drawback I exported this so naturally he produced before the customs authorities appropriate authorities, revenue officers and allowed sanction duty draw back. Rupees 23 crores and he took the cheque and encashed it and appropriate it. Thereafter, actually the case was that he got the sanction order for 23 crore department was not paying in spite of order so he filed the writ petition. He had been living in the jurisdiction then the trial court judge passed an order directing the government to pay the amount of duty draw back and with the judicial order the duty draw back was paid the director of revenue intelligence has some inefficiency of mind they thought that there is some doubt so they started investigation and found that its a fake export, paper export nothing so the case was handed over to CBI. Then they said this fellow is so influential in the court also after obtaining the order he managed to withhold the original records. The department could not get a copy of the order to appeal against taking advantage he filed a contempt application and on the decision the government was supposed to pay. Then when the matter came to appeal court the moneys has already gone, no interim order and you will be surprised to know with this money of 23 crores he managed also to buy good company. Supreme Court allowed it. It was a fictitious account was projected and negative growth pricing was on the 23 crores and he paid 23 crores he took the money fraudulently from 23 crores and he bought a company, with huge assets then he started selling and it was ultimately then the CBI took over the investigation of this fraud and CBI people failed to collect the original cheque and the original cheque which was



encashed was also destroyed. This is I am giving the example that may happen so this sort of offence may not be 409 but 406,405 all these are minimum punishment but as because there is a minimum punishment our endeavour would be to collect the money if necessary by bringing several actions such as attachment of the property also for immediate sale that is required because whenever he used to visit the district the DM should say how he can tackle the problem, this he has done that, you lost one FIR the police is doing their job, political problem, you take (not clear). File the civil suit recover the money file an application for attachment before judgement and then you get the property back atleast this property can be in the hands of the government and sell it. So these are the measure in the government level. Naturally this prevention of corruption act apart from this prevention prize chits and circulation act another thing the learned speaker has just mentioned that how many people you have dealt with a punishment under the income tax act. non filing of returns, evading income tax act how many, that any assessee who has not paid the tax has been prosecuted why? The system is there under the income tax act until the commissioner or chief commissioner of income tax takes to prosecute. whenever you get this you take deterrence particularly corporate assessee so individual assessee case comes in take a lenient view or you must see what is his motive? What is his quality of evidence. Whether his act is deliberate act or not that is the most important and what is the impact in our economy. Indian penal code you know this include an area for counterfeiting of currency note. Counterfeiting of currency note is a very, very serious offence and also counterfeiting of coins, Indian coins and foreign coins. You will be surprised to know in Bangladesh area a dollar is also being printed by using counterfeiting machine. So it is been injected. So dollar is today 69 rupees dollar not Indian currency and when I used to take in Calcutta High Court, it was a 2011 matter in season I used to say that this fellow printing of the Indian currency 500 rupees they feel that it will not be cost oriented so denomination 1000 so my brother was sitting with me we normally used to check the money in cash. I used to cash. I asked do you have a machine to do this. He said yes I have a machine because the offender paid the fees he paid currency so 1000 rupees so this we don't take it serious they are very frankly speaking counterfeiting of coins, counterfeiting of Indian currency the punishment I think if you find a punishment if it is used. Sorry, should I stop here.

**Justice Gyan Sudha Mishra:** As we are running short of time, justice Adv. R Basant also will have to speak

**Justice Sen Gupta:** Okay

**Justice Gyan Sudha Mishra:** So, we will wind up at quarter to one. I would love to listen to you but

**Justice Sen Gupta:** Yes, I will finish it in 2 minutes. So, I shall tell you hurriedly what we are just sometimes I just overlook all these provisions like corporate area security regulation, contract regulations act. Customs act I have applied I have already told you and indirect economic impact offence is that ways and measure the immediate impact supposing excise duty to be paid this measure instruments are faulty then it is shown less so less duty so these are the offences which are to be taken very seriously and lastly I shall say that while giving the punishment first if in case of use of the currency note if it is found guilty the amount of the currency he has used that should be fine. First, apart from conviction show that the money should be brought back to our main stream of economy. What is the rehabilitating measure? Rehabilitating measure to the victim, here the nation is the victim these are the and also the customs act and income tax act, central excise act, money laundering act, so whenever I besiege all of you that whenever you get a chance and you take this measure that the money is brought back fast the punishment and involvement of quantum of punishment. Thankyou for giving me a chance

**Justice Gyan Sudha Mishra:** I think we should be more thankful to you for giving the inputs and its very notable that the focus is on recovery because, yesterday Prof. Chokalingam was focusing on the compensation part. I think in economic offences that philosophy can be applied where there should be more on recovery rather than sentencing. Thank you Justice Sen Gupta.

**Justice Sen Gupta:** Thankyou, I really I am elated for your compliment. No question of interruption because I have taken more time than I was allotted.

**Justice Gyan Sudha Mishra:** So now Justice Adv. R Basant will address

**Adv. R Basant:** Earlier speakers have practically covered all the major aspects I thought the signature tune in sentencing for economic offences I think the primary motto the mantra should be the message must be sent around loud and clear as he told that crime shall not pay. Well anyone attempting and economic offence must clearly be told that he is not going to gain by it and that's where I think both the speakers have spoken about the initial attachment insistence

of condition of bail, deposit of the amounts these will have very laudable effect in preventing crime. We need not go to examples which may not be there in summary courts at all I think 138 is the main bread and butter of a criminal court today 138 of NI Act, at the end of the day what do you do? Twice the amount of fine can be imposed. How many times do we do that if we should sent around a message that crime is not going to pay asking him to return the amount asking him to pay the amount of cheque after 5 years is not sending down the message at all well that principle which should be there must apply to all economic offences where of course the deterrence sentences is important in an economic offence because you were murdering the economy of the country. You are trying to send around a very bad message that this sort of crime pays so that to me I thought one line if you can summarise the philosophy of sentencing in an economic offence crime is loud and clear the message that the crime is not going to pay ultimately when you are caught not only the sentence of imprisonment which should be unhesitatingly invoked and also that the law will catch up with you and recover ill gotten wealth. Well this applies to all economic offences speakers have taken you through various examples. Iam particularly impressed by the statement which he made that the message must go loud and clear that you will not benefit by it and that I believe is the most effective manner in addition to imposing a deterrence sentence of imprisonment it must be followed up with the corollary the corresponding the consequent direction of appropriating taking away all that wealth which right from day one the plan could start. Thats all I want to say. Thankyou . So we will have a small tea break. We are reducing break time under compulsion we will re-assemble at one because yesterday we skipped over but then it felt that a little break perhaps is necessary.

**Adv. R Basant:** If the chair would permit, any questions on the last two sessions we could finish of in ten minutes Iam sorry I will have to leave Ii will not be there with you for the next session.

**Participant:** For 141 there is a judgement of apex court where its is said that when someone wants to settle the first month this much and proportions have been given that could be perhaps increased by saying during the time of commission some money should go to the state because there is no stand here by passing the civil remedy by commiserating the criminal courts so the courts can certainly impose even some nominal amount be made to the state. Its a good remedy of you know .

**Adv. R Basant:** Actually since twice the amount of fine can be recovered the amount of fine can be twice the cheque amount now see some substantial part of it can be given to him and the state should also be paid I totally agree with him because the of course the state criminal adjudicatory process is not to recover money for state no court fee but still state's time is spent the state's resources are spent and therefore it is important that we get that also.

**Participant:** not audible

**Justice Gyan Sudha Mishra:** So we will reassemble at one

**Participants:** Yes

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**SESSION:7**

**SUBJECT: SENTENCING FOR SEXUAL OFFENCES:**

**RESOURCE PERSONS;PROF. MRINAL SATISH HON'BLE JUSTICE K. J. SENGUPTA**

**CHAIR: JUSTICE GYAN SUDHA MISRA**

**Justice Gyan Sudha Misra:** Welcome, once again the rejuvenated audience after the break, Justice Sengupta will address us first, because he has to catch his flight and Justice Basant also will be leaving in the mid so we will be deprived of their company in the next session, so.....because these sessions will continue up to two p.m. and we are having only two speakers, so I think.....

**Justice K. J. Sengupta:** It's now coming back to this sentencing in economic offences some approach, and in case of sexual offences. Here the standard the rationality and also the sense of proportion, this will apply every case, but in sexual offences of course their but all feel as taking a pragmatic view, we should be slightly leaning towards the victim and particularly the victim, belongs to the lower section of the society particularly that doesn't mean that, we shall

forget about the other aspect also, I mean balancing aggravating and mitigating circumstances together, before amendment of 2013 of Indian penal code, there were some, there were some difficulty in excising the discretion in judicial pronouncement. Actually in these kind sentencing we require the legislative action to lay down the norms of sentencing, I think at one point of time in 2008, Dr Madhav Menon has submitted a report feeling the need of the reformation are laying down the legislative guidance for sentencing and in 2010 or 11 central government took the note of it and decided to do something there, but nothing has been done, sentencing although in other countries there are sentencing guidance is there. But at present because of the amendment of 2013 after Nirbhaya's case, 376 and 376 A, 376 B, 376 C, 376 D all are incorporated, here to find the various measure of punishment provided, here in case of, in some cases, you know the death sentence is also an option, and in some cases life sentence mean normal life, in some case ten which was not there before amendment. So some guidance we are getting, what I feel, if we read the language of the particular section we can understand the guidance in here in the section itself in sort of punishment should be imposed, but the difficulty is this, the judicial pronouncement is not consistent as per awarding of death sentence, before the Supreme Court pronouncement in 1993 in rarest of rare cases, it was then, has that imposed that Supreme Court pronouncement was there, and approach of the Supreme Court was there, why death sentence should not be maintain, particularly prior to 1973 Cr. p. C, 1973, because confirmation aspect has been given, but before that, why death sentence should not be maintained, but after that inclination is no to award extreme punishment that's why the rarest of the rare case. According to me it is very subjective satisfaction, subjective matter, depends from, varies from man to man, for instance I can tell you, in West Bengal, come across the newspaper, if person was murdered, as many as eleven persons were convicted and awarded death sentence. So I don't know, what was the quality of evidence, what is the motive which really prompted the learned trial judge to award such extreme punishment. So nature of the diverse and the nature of the heinousness has to be understood properly while awarding the death sentence or affirming the death sentence because it will come before the High Court for confirmation. so now this section if you read all these sections will keep the guidance here so to some extent measure, why we should do that, in particularly the Supreme Court is also not consistent in case of Dhanajay Chatterji's case you remember, Dhanjoay Chatterji's case what happen, a girl below sixteen years or fifteen years was raped then murdered, and that was in a circumstantial evidence no direct evidence, in circumstantial

evidence is so strong, which will lead to that, that fellow has done it, but here Supreme Court has awarded death sentence, recently found Justice P Sathashivam's judgement, lordship reversed the judgement of acquittal of the High Court and awarded life sentence, on a fact minor girl 12 years raped, eye witness and murdered, therefore the mind-set of the judges really varies from person to person. this is Indian Penal Code, and the Indian Penal Code, not only the sexual offence, 302 is, section 376E, capital E, note 376 E, without murder mind that, is without murder 376 E, a repeated offences now legislature are providing minimum life sentence being normal life or with death, so here no option, no flexibility at least minimum normal life, now we get the guidelines, now we come to this the whole, the whole decisions, we are know that, it says that India, ethos and standard of punitive deterrence make heinous offence but when the offender is a juvenile, they may be released on probation of good behaviour this is a Supreme Court, also said that, depends upon the facts and circumstances and quality of the evidence nature of involvement, why we shall exercise discretion? and next, the fact that character or reputation of the victim or to know that wholly alien, that she is a prostitute or she should not be so why extreme punishment should be given so arguments has advanced, should be included negative impact, this apart, there are other offences, sexual offences means I should say, active sexual offences or performing sexual offences, there are non-performing sexual offences now recently introduced, which are clearly dare to engage in so many matter. 354 A, sexual harassment and punishment, for three year sentencing, where it should be done, 354 B assault or use of the criminal force maximum, minimum, maximum seven years, section 354 very grey are what should be .....so this is discretion has to be exercised in a very judicious manner, under there is a clear proof, direct evidence, this sort of this, punishment should be very, very cautiously it should be done, and that apart adultery is also there, adultery we have hardly come across in a adultery punishment to take it very leniently. Next, the, you see prevention of atrocities against the children POCSO Act, which is commonly called, POCSO Act. You see POCSO Act has to be taking very serious, therefore it should be done. I think offences against the children our approach should be slightly different in otherwise in the, at that stage, they are asset to the if the children are made victim to this, and with the mind of rehabilitation of that children, suppose, for example I gave you, the sexual aggravated, sexual assault has been done, but while the trial on, the offence is committed and when the trial ends see has achieved the majority. And the accused has gone for what to marry her, the question is this, whether this husband should be convicted or not? If the husband is

accused is convicted, then what should happen to the family the victim doesn't want it is a situation, what should be your approach, I give the food for thoughts. I feel, it's not that, you have counter an offence, offence means an offence in rape is against the society, not only a person, one cannot, this is not a compoundable, one cannot compound. Therefore the accused married, but you are serve him the minimum, or if the fine is an alternative, may be the fine. If the educated guard is there, she doesn't want the husband to grievance, but what happens I used to give it, deal with the bail matters, you see, with the promise of marriage they are in cohabitation and there was a rape, so rape charges are there, so in order to procure bail, he say I am going to marry her, so marriage is done, everything is performed, the judge send him to the jail, and witness to the marriage ceremony and it is very food for the media. So I, I feel that, it came before once, when I married her there is no problem, but if you want to marriage, I want to know how is your means, whether you can maintain her after marriage, procuring bail or not, as I judge know, he should also son sometime, where he means rich family so allowed. So the marriage, what I ask a trial judge, to take a note of this action while trying that, so my message is that,

**Justice Gyan Sudha Misra:** More than that, if the trial court doesn't have that discretionary jurisdiction I do not from where do they get this concept, because the statue doesn't give the you know the power or authority for the judge to permit this kind of a marriage as a substitute of the sentence, so from where, so that is you know, violating the provision of.....

you are absolutely correct, I am not meaning, violating in.....i just want to ensure that where form the trial court get that discretion, that you permit him to marriage and therefore your sentence substituted by your marriage,

so in that situation if you find that this is the honest and sincere approach then o. k. we can award that is minimum, but if you find that is to procure bail, then certainly not, and this is the PCOSO Act, in POCSO Act there are so many provisions are there, so because of time constrain, these are more or less sexual offences are there, I didn't mind my next speaker is there.....thank you very much for listening.

I think I didn't hurry you too much.....no.....no.....no.....because I have to catch the flight also...I am thankful for the inputs from your session, and for this seminar today.....so we are looking forward again for further interaction, so would you like to wait or.....I will

just.....o.k. you may have to leave 1:30 at least. so we will have a different flavour now, of course in today's session, we are mostly hearing the legal fraternity, the lawyers and the judges, now we have a different flavour, Dr. Mrinal Satish, as you he is the Associate Professor of law at National Law School, in Delhi, we have the benefit of his views on the subject, Professor Satish Mrinal.....he was formerly a faculty here.....yes.....i presume that all of us are aware of this. Thank You mam, he was.....he was a faculty.....

**Prof. Mrinal Satish:** Nine years back I was here at National Judicial Academy and some of the work that I want to discuss today actually started when I used to work here, to give a slight background on my work on sentencing in sexual offences, I did my Doctorate in Law from Yale University in US, and my topic was sentencing in rape, focusing on India and that Justice Sengupta was saying I worked on the issue of sentencing guidelines. And whether sentencing guidelines are good way to actually structure sentencing discretion and what I asked to comments, speak here extra today and tomorrow. I also had the opportunity of working with justice Verma committee with respect to rape law reforms and I was in disagreement with them, with respect to the sentencing discretion, justice Dave was discussing, with Justice Basant over deep and what the new amendment, which was completely removed sentencing discretion, and in my assessment, that was absolutely counterproductive and I will speak about that, I will speak about that, Just to begin with the quote, this by Professor Walker, he says criminal law as a whole is a Cinderella of jurisprudence, then law of sentencing is Cinderella's illegitimate baby, so he enforces the neglect of sentencing jurisprudence, the lawyers, judges or academics were, sentencing were hardly studied, or looked at.

Justice Chinnappa Reddy in his book also notes this, he says most of the criminal appeals the Supreme Court confines itself to the statutory interpretation or to the issues of fact determination, it seldom discusses important jurisprudential issues relating to sentencing hence criminal law and criminal law has become static. and we know that the Supreme Court in various cases has said that sentence should be determined according to the fact and circumstances of each case, it is not possible to prescribe a strait jacket formula for sentencing, and the Supreme Court in Santoshkumar Bariyar in the context of death penalty, says that, sentencing has become judge-centric and there is a need for principled sentencing, so the issue that I want to discuss is this, does there exists unwarranted disparity in sentencing, I intentionally use the word unwarranted and this is what is also the view in sentencing



jurisprudence, because disparity is actually essential in sentencing as process as all know, because we can't give everybody the same sentence, giving everybody the same sentence as unfair as giving different people different sentences, so unwarranted is defined in sentencing jurisprudence and I will go to that as well, when it says that if you go against, what the statute permits you to do, you go against the judicial precedent or you go against the constitutional values then the sentencing is needs. then sentence imposed is disparate and it is unwarranted disparity so then the next question is the disparity exists in sentencing guidelines and appropriate solution to reduce such disparity, and like I said, *vis-a-vis* a sentence is disparate, if the same sentence is not imposed on two convicts who are similarly situated and of course we know when we say similarly situated and of course we know when we say similar like each case is unique so how do you deal with that sort of situation. This I already mentioned what unwarranted disparity is defined as and also when factors are considered, so what I did in terms of looking at sentencing in rape, to study whether there were unwarranted disparities in sentencing is that, is I looked at all cases decided by all high courts and the Supreme Court from first of January 1984 that is when the criminal law amendment Act 1983 came into force, up till December 31st of 2009, period of twenty five years, so i looked at, picked up the criminal law journal and took all the cases where the, accused was sentenced either by the trial court or the High Court or the Supreme Court or that came around one thousand cases, so what i wanted to talk about now is my analysis looking at all of these one thousand cases, and then I used statistical analysis to trying to see what are the factors that are impacting sentencing by courts. But before that I need to take a step back to be able to to understand and hypothesis, what are the factors that might be impacting in sentencing and what is, what was the law reform that happened around this time and what is the Supreme Court is saying? And one thing that comes up is the question of rape myths, and stereotypes. So rape myths are defined as prejudicial stereotype, or false belief about rape, rape victims and rapist. So it covers everybody, it's not only about the, about the victim alone. And stereotypes can be of two verities one is descriptive stereotype and second is prescriptive stereo types. the difference between the descriptive and prescriptive stereotype is as the words themselves indicates, a descriptive stereotype is, when you say that for instance, the example you know that you say that acquaintance rapist are more traumatic than the.....sorry, it is the opposite, the myth is the opposite, strangers rape is more traumatic than rape by an acquaintance. So if I say, someone may say it's your opinion, nobody really needs to take, give any value to what I am saying, but if the law says it, or if a judgment

says it. at look there is a need for injuries, when the rape occurs then that becomes prescriptive, because that's the prescribed, that's been said that this what should happen so that's the distinction between the descriptive and prescriptive stereotype, like I said as examples here, calling rape offenders monsters, beast, animals excetra. Justice Sengupta mentioned the POCSO Act and then the POCSO Act, the statistics are very clear, that lot of the offences are committed by people you know. the same thing when you look at NCRB statistics, with respect to rape and again my study also shown, that eighty percent of rapes are committed by people that the victim knows, and if you start calling that person as a monster or beast or you say that, that's not mean, someone like me, will not commit the offence and the someone else, then that makes, even in law enforcement becomes an issue, because if it say the, father committing rape on young daughter, understanding is that no father will do this, because these offences are committed by people from the different class of society or different set of people, so therefore that is one common rape myth or stereotype. Similar is the stranger rape is more traumatic than the acquaintance rape, the prompt reporting requirement and this was myth that always a woman is raped, she will immediately report it. That was recognised by Supreme Court itself as, not true when it said, you can take time that in offences of rape we will give a lee way as long as explanation as to why that delay occurred? Similarly the victim is physically resists for something that was, discussed court said that amendment in 2013, now as explanation now saying that it physical resistance is not required in the context of consent. A victim are visibly emotional while testifying is the another myth, and the biggest of them are that the women's makes the false allegation of rape and this is..... This therefore you have to be careful in adjudicating of rape cases. So as all of us knows, in terms of proving rape in court, four very primary pieces of evidence, the victim's testimony, medical evidence, witness testimony if any and other corroborative pieces of evidence, just to take, look at the back ground of some of these myths,. so Mathew Hane, former chief justice of the King's Bench in UK who wrote this text book of criminal law said, rape accusations are easy to make, hard to be proved and harder to be defended against. He had really no research for saying for what he did at that point of time, in fact the house of lords notices this in the case of R v R in which they struck down the marital rape exemption and said Mathew Hane has no authority for saying this, so we have relied on this for 300 years, without using any authority. Now John Henry Weighmore, the famous authority on evidence law who all of us used, cited from Hein and use the same thing that women are prone to false allege rape and says requirement of no corroboration. We

accepted Hein and Weighmore, and then in our text books then the same thing is reiterated so we see how all of these ends up coming into Indian Law as well. The supreme court, some of supreme courts judgements also contribute it to actually reinforcing some of these stereotypes. The most used case in rape law analysis is the Supreme Court judgement in 1983 BHARWADA BHOGIN BHAI HIRJIBHAI v. state of Gujarat 83 3 SCC217. This was a very simple case before the supreme court where the victim was under 16 so therefore it was a case of statutory rape. The question before the court at that point of time was can you rely on sole testimony of the victim for convicting in fact the didn't really need to go into the analysis that it did but what the court say is yes we can convicts solely on the testimony of a victim of rape but in doing so we will lay down reasons as to why they believe a victim of Indian women will not lie about rape when it laid down 12 conditions saying that these are 12 reasons why an Indian women will and those concentrated on issues such as virginity saying that Indian women consider virginity to be very important so they will not lie about it. Indian women consider marriage to be very important factor as wife's incase they consider marriage as an ability to get marriad will infact they will not lie about it. So these were the facotrs that the court said at the same time they said western women will lie about rape and listed 6 factors as to why western women will lie about rape so very clearly these were stereotypes and they ended up becoming prescriptive stereotypes because it was a supreme court saying that these are the reasons some of these actually then get picked up by lawyers becaue when you are arguing in a defence case and you wanted to say that this victim is lying you say look she is urban woman who meets the western women categorisation so therefore she is the one who is more likely to lie similarly in the case of Rafeeq v. State of Uttar Pradesh, the supreme court said that what a victim of rape experiences is some deep sense of deathless shame. Now, Iam not saying that people does not experience this they might but if you say that this is what they should experience that becomes you are expecting the same sort of behaviour from different sort of people irrespective of their own personal situations so as all of us know we react to trauma very differently. If someone tries to beat me I might run away if someone tries to beat you might beat that person back. So expecting need to hit back is then imposing the standard that you will do to me as well which the law finds problematic interestingly when you look at section280 of Crpc which says that the demeanour of a witness is important and should be recorded by the trial judge while taking the testimony might influence the manner in which the appellate's courts decide and that was very clearly exhibited in this case of Kamala Nanda v. State of Tamil

Nadu, if I am not wrong. Where this was a self-appointed God man which had raped multiple young girls in his ashram and has also had committed murder now 5 or 6 of these girls came up to testify and the trial judge recorded the demeanour saying one victim was crying profusely the other fainted while testifying the third had to be offered water. He wrote all of that down when the case comes up before the supreme court. The supreme court says yes we believe all these girls we will convict because we believe all of them I believe while reading that judgement that were various other circumstances as the court could have used to believe the victim but the courts says why we are believing these victims because they cried because they felt faint and this is the reason why we believe them over the other legal reasons that the court had to do that and that sort of reinforces the stereotype. Similarly in the context of medical evidence the book that all of us regularly use is Modi's medical jurisprudence and toxicology. When we look at Modi's medical jurisprudence and toxicology and we will look at the manner in which Modi's book brought in this stereotypes It relies heavily on Mather Hein and writing in 1914 dr. Jaisingh modi reinforces stereotypes he talks brings in the caste and class angle in to medical examination saying that a woman belonging to a labouring class of society is more likely to resist and fight back rape than a woman belonging to an upper class of society. Virginity testing became important because he was the one who advocated for virginity testing brought in the state of hymen is an important factor brought in the two finger test infact if you see the latest edition of Modi's medical jurisprudence edited by justice kannan A lot of these things have been removed because it was recognised and justice kannan prefaced that we did work with him on this provided material to show that all of this was stereotyping and there was no basis for dr. Jaising Modi and a subsequent editors to say that so lot of that has been removed so lot of backgrounds coming to the issue that I want to speak on so the question I was trying to see was whether this rape of stereotypes impact the sentencing process. One thing was that we realise that the supreme court in various judgements said that you have to rely on the sole testimony of the victim did that impact the sentencing process. I found that in most cases trial courts in 70% of the cases trial courts gave the minimum 7 years this is a settled 2009. However there was no real reasoning as to why 7 years had been given the high court gave the minimum sentence in 55% of the cases and the Supreme Court in 65% of cases there were high reversal rates nearly 33% of cases were getting reversed once by the high court then by the supreme court. There were sentences being modified at both levels. so we see how all of these ends up coming into Indian Law as well. The supreme court, some of supreme courts judgements also

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demeanour saying one victim was crying profusely the other fainted while testifying the third had to be offered water. He wrote all of that down when the case comes up before the supreme court. The supreme court says yes we believe all these girls we will convict because we believe all of them I believe while reading that judgement that were various other circumstances as the court could have used to believe the victim but the courts says why we are believing these victims because they cried because they felt faint and this is the reason why we believe them over the other legal reasons that the court had to do that and that sort of reinforces the stereotype. Similarly in the context of medical evidence the book that all of us regularly use is Modi's medical jurisprudence and toxicology. When we look at Modi's medical jurisprudence and toxicology and we will look at the manner in which Modi's book brought in this stereotypes It relies heavily on mather hein and writing in 1914 dr. Jaisingh modi reinforces stereotypes he talks brings in the caste and class angle in to medical examination saying that a woman belonging to a labouring class of society is more likely to resist and fight back rape than a woman belonging to an upper class of society. Virginity testing became important because he was the one who advocated for virginity testing brought in the state of hymen is an important factor brought in the two finger test infact if you see the latest edition of Modi's medical jurisprudence edited by justice kannan A lot of these things have been removed because it was recognised and justice kannan prefaced that we did work with him on this provided material to show that all of this was stereotyping and there was no basis for dr. Jaising modi and a subsequent editors to say that so lot of that has been removed so lot of backgrounds coming to the issue that I want to speak on so the question I was trying to see was whether this rape of stereotypes impact the sentencing process. One thing was that we realise that the supreme court in various judgements said that you have to rely on the sole testimony of the victim did that impact the the sentencing process. I found that in most cases trial courts in 70% of the cases trial courts gave the minimum 7 years this is a settled 2009. However there was no real reasoning as to why 7 years had been given the high court gave the minimum sentence in 55% of the cases and the supreme court in 65% of cases there were high reversal rates nearly 33% of cases were getting reversed once by the high court then by the Supreme Court. There were sentences being modified at both levels. I looked at each of these cases and this is where I brought in statistical analysis to see what are the factors that impacting sentences. I found that past sexual history was cited in a case. The sentence reduced compared to those cases where past sexual history was not cited. When the two finger test was conducted if the doctor was

not able to insert his two fingers then the chances of acquittal were high, or there were higher sentences if the victims were younger. The one thing that came across the marital status of the victim became very important in the sentencing process and here we have cases like Gurmeet Singh which all of know is one of the most important cases relating to rape law because it gives you data issue of anonymity putting those screens while taking victim testimony but somewhere in between the Gurmeet Singh judgement when you look at the sentencing order the supreme court says that this case has taken 15 years to reach this court. In the interim the victim must have got married. Hence, there is no reason to impose harsh sentence. The victim was not before the court and this was what the court said they reduced sentence saying she must have got married then you have the case of Madan Gopal Kakkad, this is what the supreme court said in Madan Gopal Kakkad, now this was a case where this man, accused Naval Dubey was a doctor by profession. He had used his 10 year old niece literally as a bait to get all her friends who were in the age group of 8-12 in the neighbourhood into their house and he had sexually abused all of them 5 or 6 girls between the age group of 8-12. Now only one of them came before the court the court convicts all the three courts convict so on the question of sentence and here the victim is represented because Madan Gopal Kakkad is a father of the victim. The supreme court says we are told at the bar that the victim who is now 19 years of age after having lost her virginity still remains unmarried undergoing the untold agony of the traumatic experience and the deathless shame suffered by her. Evidently the victim is under the impression that there is no monsoon season in her life and that her future chances of getting married and settling down in a respectable family are completely marred. So the court gave importance to the fact that she was not married although she was 19 and although the aggravating circumstances that were very clear in the facts of the case that here the accused had raped a girl when she was 10 years old. Which would been enough to give him the life sentence was not the factor that the court cited but this was the factor that the court cited to give him the life imprisonment. Similarly, again in the case of baldev Singh in 2011 the supreme court said not directly but said that in a case of gang rape while sentencing the person to period undergone the fact that the victim had got married in the interim was considered an important factor. So when I looked at this entire group of cases all of them in which these factors came in I found that for injury of a person the accused were given higher sentences we can say that is the right approach because the injury is present actually indicates violence that would justify higher sentence but if injury is absent the sentences came below 7. So that

indicated that an injury were an important factor in sentencing in the case of acquaintance rape sentences will lower than rape by strangers. Another very interesting thing that I found and this sort of impact to law reform that happened subsequently was that in cases where the accused in case of statutory rape the victim was under 16 years of age but the accused was in the 16-18 or just above 18 age group of course the accused were in 16-18 the juvenile justice act came in. If they were above 18 years of age both High courts and Supreme court in most of these cases sentence the accused to a lower sentence than 7 years. Sentence to period undergone and articulated in these reasons they were doing so because this was a case of consensual sexual intercourse and elopement in some cases. Both high courts and supreme court in most of these cases sentence the accused to a lower sentence less than 7 years sentence to period undergone and articulated reasons that they were doing so because this was a case of consensual sexual intercourse and elopement in some cases and so therefore clear message from the court that higher sentence for statutory rape especially where they were in the same age group and it was consensual sexual intercourse. Even 7 years sentence was too much but however we saw that the legislature going the opposite direction increasing the age to 18 and increasing the sentence as well. I also found that courts while sentencing were not using theories of punishment and then why I say theories of punishment is because the theories of punishment are used there is some sort of justification that can be given to a sentence and when courts use theories of punishment society cries for justice was something that was articulated some other cases the court used reformation, proportionality and ends of justice. Now using different theories sometimes even within the same year in the high court by different benches means like what the Justice Sen Gupta was saying earlier that if I am a person who believes in rehabilitation and I am giving lower sentences and if the another judge believes in deterrence you are getting higher sentences within the same high court jurisdiction for instance. In the case of mitigating factors courts use young age, illness, delay in the judicial process, socio-economic status, marriageability of daughters having dependence, loss of employment as factors that are important in reducing sentence now I will discuss some of these in more detail in the next session because is that where I want to speak on sentencing leniently v. sentencing harshly. I will talk about mitigating circumstances in more detail in that. I also found that in aggravated rape cases where the minimum punishment was for 10 years most courts gave the minimum punishment as 10 years. So the aggravation did not really make difference to the sentence so in terms of how to exercise sentencing and how other countries done that in the context of rape



like I mentioned the criminal amendment act 2013 brought in a new sentencing regime it removed sentencing discretion as you know in cases of rape but a better model existed for instances in U.K. If you look at the U.K sentencing guidelines for rape it provides factors which should be considered while sentencing. It does not say this is what the sentence you should be giving it does not give you a certain number. It does not say that if X, Y factors present it should be 10 years, 15 years, 20 years. It gives guidance on what factors you should be considering while sentencing persons. It does say injury is important but It then says when should injuries be considered and when should injuries not be considered what impact should that have on sentencing if you are interested you can go to the sentencing commission website of U.K. and you will find all of these in their website. So solutions that other jurisdictions of identified in sexual offence sentencing is one identifying the theory of punishment for instance Israel has identified theory of proportionality as the theory of punishment as they will follow. So tell the judges that this is the theory and then they explained how that theory applies to that particular crime and so if you use any other theory then that becomes a question, or becomes an issue on which you can appeal saying the statute says proportionality is what should be done and by using deterrence you are going against the statutory laid down theory of sentencing the other is listing the aggravating and mitigating factors now its impossible to list all aggravating and mitigating factors so what is advocated is that you list mitigating factors that are not relevant for instance in the context of rape you would say past sexual history is not a relevant factor so past sexual history of the woman should not be considered as a mitigating factor while sentencing so there is a negative list of mitigating factors that are put in and this has been done again in various jurisdictions where as putdown factors has to be considered and factors that should not relevant in any relevant factors. But what most of these practices also emphasise on its reasoning Ii would say they say if you actually provide the reasoning as to why you are giving 5 years, 7 years, 9 years 10 years then you become accountable and that itself acts for the sentence as a guidance to ensure that the sentence is within a particular frame work. So, its a very interesting theory of discretion called hydraulic theory of discretion. Now the hydraulic theory of discretion says discretion is like water in a pipe so if you press it somewhere in between as all of us know the water will just go some where else it will not stop and so it is said that discretion is also like that if you stop discretion in one place it just goes somewhere else in the context of sentencing it was noticed in the U.S that when sentencing discretion is taken away prosecutors became all important so the prosecutor determine what sentence a

person would get and not the judge because the prosecutor decided what offence he would be charged for plea bargaining a very important factor so I would decide whether its murder in case of 1st degree 2nd degree or otherwise and then determines sentence accordingly. In the Indian context now removing sentencing discretion I anticipate will lead to something like this where we are giving discretion not of prosecutors but to the police. You are letting the police decide whether they should charge the person for an offence which has a minimum sentence or something that doesnot. So the way of solution in the context of sentencing for rape could have been identifying a primary justification specific theory like deterrence. Designating a starting point this is soemthing thats done in various jurisdictions we already had that. 7 years was the minimum sentence that acts as a starting point departing upwards or downwards depending on the aggravating or mitigating circumstances this we cannot do in rape anymore but in other offences you have a starting point you go above the starting point if the sentence is if the aggravating factors you go below if they are mitigating factors Identify factors that the courts should necessarily consider while sentencing example nature of offence harm caused to the victim, prior criminal record etc. Provide a list of relevant and irrelevant factors example pleading guilty so that you can sentence guidelines as a detailed analysis of what you should do when a victim accused pleads guilty and how much weight that should be given in the sentencing process. Like already mentioned providing list of aggravating and mitigating circumstances. Theres a very interesting thing that the Israel sentencing guideline does in terms of burden of proof and sentencing the israel sentencing commission said that when we bring in aggravating factors. Aggravating factros would lead to increase in sentence which means curtailment of liberty for a longer period of time and when you are curtailing liberty for longer period of time are principles of evidence is that you have to prove that beyond reasonable doubt so they say that if the prosecution brings in aggravating factors then they have to prove the existence of the aggravating factors beyond reasonable doubt similarly in the context of mitigating factors the israel sentencing guidelines say that its just not the same that the mitigating factor that exist. You should actually prove that the mitigating factor exist. Now when I ask judges trial judges how do you figure out that those mitigating factors exist ad I asked that in the academy here the anwer I have got is to trust the lawyer because we have no way of finding out whether the mitigating circumstance exist or not and I think thats happening in various other jurisdictions as well so therefore these very sentencing guidelines say that the you should ensure that evidence is lead to show that there is this mitigating and aggravating

factors exist and in the Crpc as all of us know section 235(2) Crpc with the pre sentence hearing does provide for that discretion to judges to get evidence we have had cases of course there are diversion in the supreme courts view on that matter whether you can lead evidence in 235. This still debatable but as something that the law commission did recommend in its report prior to 1973 amendments that at the stage of pre-sentence hearing there should be provisions of leading of evidence. So to conclude like I said pre-sentence hearing becomes a very important factor so does identification of a theory and necessity of reasoning in a sentencing decision is very clearly articulated in section 354(3) of Crpc. Where the Crpc very clearly says that even in the context of sentence reasoning is important so I will stop there.

**Participant:** You pointed out in your earlier analysis that minimum sentencing is imposed by the trial court that is 70% by the court 55% and supreme court 65%. Before amendment of 2013, there was a discretion to impose less than minimum sentence only by giving adequate and special reasons. So it can be one year it can be two year it can be three years so did you make an analysis of the cases where less than minimum sentence was imposed. So this was like 7 years imprisonment or less than that .

**Prof.Mrinal satish:** That is what I was just mentioning the cases were I said the sentence reduced so how a statistical analysis were it takes cases where this factor was important or not and you can make an analysis of what factor lead to reduction of sentence so all that I have mentioned when I said the sentence reduced if the past sexual history for instance was cited are those cases where the sentence was below 7. So when I say 70% was the minimum the other 30% of the cases were trial court gave below 7 years because I am not looking at cases where there were acquittals all of these were convictions so 30% of the cases were below 7 years. The percentage increased in the High Court, Supreme court was in between that's what I was saying.

**Participant:** not audible

**Prof.Mrinal satish:** What I was saying right now was that because just with the load of cases that judges have if the lawyer comes and says that this person is the sole breadwinner you as a judge have no way of finding out whether he is actually the sole bread-winner.

**Participant:** So you should explore it.

**Prof.Mrinal satish:** Yes the judge should explore it but the question is I was appointed by the Delhi High Court last year as an amicus in a death sentence matter to look at this particular issue. So the bench asked me to look at presentencing reports and 3 cases in the High Court of last two years the judges sort presentencing report and what they found was that there was one probation officer in Tihar and she was not trained so whenever they asked for presentence report she got back in one case saying that the accused washes his hands frequently and now what is relevant from point of view of sentencing but for her also practically as the officer both the accused where from Bihar. Though in one case the High court had said that she should be given the some funds to got Bihar and interview the family it was really impossible for her to actually do that so ultimately actually I found in one of these cases where the trial lawyer had said he was the sole breadwinner of the family he had 3 brothers and the family had property so the trial court had relied on that evidence so therefore we need to setup this infrastructure before we actually get into

**Justice Gyan Sudha Misra:** I think the question would be that would that consideration be at all be in the minds of the judges because he is the sole breadwinner therefore he can get away with the punishment which should be imposed as the primary consideration.

**Prof.Mrinal satish:** In terms of that consideration I would say again there has to be some sort of policy that we need to have for instance in rape cases like I said if you take young age as a mitigating factor in all the cases I have studied most accused were in the age group of 20-35 or they were much older in the 45-60 age group. If you say young age is a mitigating factor then all of this people benefit from that because they are young so therefore you have to make policy that for rape young age will not be a mitigating factor and applied uniformly in all the cases.

**Participants:** .....

**Prof.Mrinal satish:** Exactly, that's exactly what I am saying then you have to say then if the legislature says that look we should still consider young age as a mitigating factor then that's fine because right now what's happening is some courts consider mitigating some courts consider it aggravating some judgements which I read

**Justice Gyan Sudha Misra:** Right from yesterday we are deliberating on that that there is no uniform consideration criteria laid down for sentencing because its ultimately varies from a

judge to judge. So, if some amendment or some addition is made into the statute by the legislature I think that would be a concrete guideline.

**Prof.Mrinal satish:** But one think ma'am as the legislature has taken time to do it one. Second I think.

**Justice Gyan Sudha Misra:** That is you know right from the beginning yesterday itself we said we deliberate, Prof. Chokalingam also said about the philosophy of sentencing but the problem is that if the judges, of course supreme court have little you know scope to expand and do it by way of interpretation but specially at the trial level and even at the appellate level we cant go beyond the parameters and the statutes that prescribe the sentence so when we are deliberating at least you know there should be some way of conveying it to the legislature or somewhere because right now how is it conveyed only when there is something, some extraordinary situation like Nirbhaya situation comes up that something is done. Why it does not be a consensus that we deliberate in the academy, atleast it should have a persuasive value.

**Prof.Mrinal satish:** Couple of things how other countries have done this because legislatures again as all of us know are very reactive. Unless something happens they wont

**Justice Gyan Sudha Misra:** Had they had any impact of their voice on the legislature.

**Prof.Mrinal satish:** YES they have. How they have done it is they have setup sentencing commissions like law commission does extensive research as it is a body which does research on sentencing and gives feed backs into the court so it is appointed that way so what the legislature have done is that they have setup these bodies to do that. Again that requires legislative action but what courts have done

**Justice Gyan Sudha Misra:** why the academy should not be treated as a sentencing commission.

**Prof.Mrinal satish:** It can be . What courts have done before this has happened is that they have at least decided in their jurisdiction like state Australia is very famous for doing it various states of Australia because the legislature was not acting they said that we will formulate our own guidelines to deal with the statute gives you the power to sentence in this frame work so

at least in the state of Victoria for instance they say that in the offence of rape or any other offence this is the policy to follow so that in that state it is consistent at least so that is something that until the legislature comes in judges could do say at least in this jurisdiction this is why in this High Court jurisdiction for instance. This is how we will.

**Participant:** not audible

**Prof.Mrinal satish:** I completely agree with you

**Participant:** .....

**Prof.Mrinal satish:** I don't advocate transplanting .. I don't advocate it at all and as Justice Sen Gupta mentioned if you look at the Malimath committee report and the Menon committee report both suggested that you use the U.K model in India and I am in complete disagreement with that position because like you said the conditions are very different. So what I advocate is that we need to have our own system but what I advocate is that I say U.K model to show that it has happened and its possible for us to actually come up with our own system keeping our ground realities in mind its just that It existence has been done.

**Justice Gyan Sudha Misra :** But there are some common features which can be taken care of. Discretion to courts should be left .

**Prof.Mrinal satish:** also continuing with that we can also learn from the mistakes of what they did, what they did wrongly but what we end up doing in a lot of cases is we wait for the U.S to legislate. 25 years later we will take that filled with all its mistakes rather than learning from what happened that's it.

**Participant:** .....

**Justice Gyan Sudha Misra:** We will continue the discussion after the lunch break and we will reassemble at 3 as already scheduled.

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**SESSION: 8**

**SUBJECT:SENTENCING LENIENTLY V/S SENTENCING HARSHLY**

**RESOURCE PERSONS:PROF. MRINAL SATISH**

**CHAIR: JUSTICE GYAN SUDHA MISRA**

**Prof. Mrinal Satish:** So in this session I want to talk on, approaches to sentencing from the frame of sentencing leniently versus sentencing harshly, to look at, factors that influence harsh and lenient sentencing and how to go about that, so look at the guidance to see, how to determine the appropriate sentence specially the law commission in its 47th Report of 1972, said, instead of proper sentences is a composite of many factors, including the nature of the offence, if prior criminal record, sorry.....nature of the offence, circumstances extenuating or aggravating of the offence the prior criminal record of any of the offender, the age of the offender, the professional and social record of the offender, the back ground of the offender, with reference to the education, home line and social adjustments, the emotional and mental condition of the offender the prospect for the rehabilitation of the offender, the possibility of the return of the offender to normal life in the community the possibility of treatment or training of the offender, the possibility that the sentence may serve as a threat to crime by the offender or by the others and the present community need, if any of the need deterrent in respect to the particular type of offences involved, so it's very broad, categorisation of what sentence should contain and if you look at what we discussed in the previous session, it also ends up in mixing of the various theories of punishment and says there is a composite of all of them. This was then, articulated again by the Supreme Court in Modiram versus Madhya Pradesh, that the Supreme Court said that the factors, pertaining to both the offence and the offender need to be taken in to account in sentencing. The magnitude of the offence and the circumstances in which it was committed should be considered so also the motive of the offender, his age character antecedents and the social status and the sentence neither to be too lenient not to be sever, then

we have a series of death penalty cases, where again the court, went in to the question of how do you determine, proper sentence, Jagmohan 1973 1 SCC page 20, says that aggravating and mitigating factors should be considered and aggravating factors and relation to the offence and these are the possible mitigating factors, minority of the offender, old age of the offender, condition of the offender, for example why it happens this, the order, the superior military officer, provocation, when the offence was committed under combination of circumstances and influence of motives which are not likely to recur, either with respect to the offender to any other and the state and health of the delinquent, and then the court went to what Bentham had said, see Bentham mentions the following circumstances in mitigation of punishment, absence of bad intention, provocation as preservation, as preservation of near friends, submission to the menaces, submission to the authority, drunkenness and childhood, the one thing that both this list and the second list that the court gave in Jagmohan, as all of us seems to be a reflection already fixed in I. P. C with respect to defences as well as exception to section 300, so there is nothing new, in terms of these mitigating factors in fact they were defences so, why the court is saying this as mitigating factors actually not completely accurate. In terms of the theories of punishment that the Supreme Court used in 1970's we saw, justice krishana Iyer handling most of these cases, and he emphasized on reformation, being a theory of punishment, so you have Rajendra Prasad, Sunil Batra, Lingala Vijaykumar, Charls Shobhraj, Ramasheys Chkraborty all of them were advocating the reformatory theory of punishment, that at the same time in the Supreme Court, benches where, Chief Justice Chandrachud was, heading those benches, he was not advocating this theory, he was talking about retribution or deterrence, so therefore within the Supreme Court you had two line of thought about the theory of punishment, should be given, in 1990's we move from reformation to retribution and classic case is Guvala chenna venkateshu, 1990 when the Supreme Court, citing James Stephan said that the criminal law proceeds upon the principle that its morally right to hate criminals, it confirms and justifies that sentiment by shifting upon the criminals, the punishment which expresses so bringing in retribution, and this continued in Dhananjoy Chatterji which came earlier, look at this sentiment in Dhananjaoy Chatterji, where it said the Supreme Court said that, the society cry for the justice, is something that need to be kept in mind, earlier a retributive theory of punishment. In the 2000 we see the Supreme Court moving down towards proportionality as a theory of punishment as well as merging proportionality with the so called society's cry and we have a judgment of Ruliram Versus State of Haryana, 2002, where the Supreme Court says the



criminal law adheres to general deterrence to the principle of proportionality, prescribe the liability, according to the culpability of each kind of criminal conduct, proportion between crime and punishment is a goal, respected principle and it remains a strong influence in determination of sentences. So proportionality starts coming in to the picture and through all of this we see that the court is not really providing any guidance about sentencing in fact, in Ruliram Court went on to say that the criminal law ordinarily allow some significant discretion to the judge in arriving at the sentence in each case, presumably to permit sentences, that reflect most settled subtle consideration of culpability that are raised by the special fact of each case. Judges in essence affirm that punishment ought to fit the crime, yet in practice sentences are determined largely by other consideration, sometimes it is the need correctional needs of the perpetrator that offered to justify a sentence, sometimes desirability of keeping him on moderate consideration and sometimes even the tragic results of the crime. Inevitably this consideration cause a departure from justice as the basis of punishment, so the court itself saying that because of these various factors it leads to some sort of disparity in sentencing. Like I already mentioned, in the case of Santoshkumar Bariyar in 2009, the Supreme Court said that sentencing has become judge centric and it is not principled, and it emphasised in series of judgements, State of Mdhya Pradesh versus Balnath, in State of Punjab versus Premsagar, so then the question becomes, taking from what we were discussing in previous section, ask can sentencing guidelines help, now the importance is let us look at the definition of sentencing guidelines, a sentencing guidelines as professor Dough says, in its broadest sense it is a piece of authoritative advice issue to sentence, about how they should go about deciding the sentences that they are imposing and Professor Wasik says that the guidelines are flexible device to ensure that all sentencers take into account similar factors when determining the punishment, and an important part is this, they are not meant to provide a right answer, but only to inform and advice in right decision making, so it's about the approach and not the conclusion. And in this context, when we talk about sentencing harshly or leniently I would use those terms because we, we goes back to these principles, one is the principle of equality in sentencing, the principle of equality in sentencing says that the offenders should not be sentenced differently solely on the basis of factors such as religion, social status, employment, race, caste excetra and there has to be consistent application of sentencing principles it advocates equality of approach not of outcomes, and says consistent application of mitigating factors across the crime and it is again sentencing, which based on judges, personal opinions

then there is a principle of equal impact says that the sentences should not have a disproportionate impact on a particular person or a class of persons. fine is a very good example of differential impact if you, impose hundred rupee fine on someone who is earning thousand rupees compare to someone who is earning one lakh rupees per month and that, has a different impact and the policy actually says that, equal impact is a meta level policy decision and a it sometimes the legislature that should be taking these decisions. So what you do with respect to aggravating and mitigating factors, like I mentioned earlier, it impracticable to all aggravating and mitigating factors, Professor Julien Roberts who hates the sentencing commission in UK is a professor of Criminal law in Cambridge currently heading the sentencing commission in UK. He suggested and this what the UK guidelines tells, that at least, that we should least factors that should not be considered in particular crime, something like I already mentioned in the last session, and we should also deal with.....look at how we deal with collateral consequences and I think this is very important in terms of what are the consequences for the offender in relation to the sentence. There is lot of cases we see offenders arguing that look I lost my job, because of this, therefore I should be given a lesser sentence... One argument against that is that when you are signing your employment contract, you already know that, if you commit a crime you are going to lose your job, so therefore taking an argument that I lost my job, therefore my sentence should be reduced is something like you already know. but at the same time how you deal with the consequences of the offenders family and consequences to third persons and that is very difficult area which world over the people are trying to grappled with. In terms of consequence to the offenders, family a question of reduction of sentence on the argument that look, the family will get affected, one thing that has been advocated in some countries, is to say that, it is not the fault of obviously of the family that say the spouse or the children that this person committed the offence, so therefore the state should do something with respect to the family, so there is some sort of social security mechanism that should be provided to the family and reduction of sentence of the offender to provide is actually injustice to the victim, because the victim is the, would become unequal in the process, because why are you reducing the sentence that the someone because he has the family. The other argument about regular reduction of sentences keeping offender family in mind is what of those situation, if someone does not have a family, so would you consider an unmarried person given higher sentence and a married person lower sentence because of the entire question of having a dependents in the family. The other question is the consequences for third person, and I think

just go very clearly articulate in different sense before the Supreme Court in Sanjay Dutt's case. there the argument made was that look, if you sentence him to prison for a long period of time, then there are so many people who loose employment, the Court did not accept that argument in the context of the sentence, but took it in to consideration, by giving him two months to surrender, saying you can complete all your pending assignments and then you can, that you can surrender, again it's come back into prominence because he was released every magazine picked up the magazine in the airport and it was talking about how, he was given two months and that again, like create Sinicism saying I commit and offence, so many people any way who might be dependent on me or employment you don't care and put me into the prison but if it is someone who has an industry of his own or someone who is a Bollywood actor like Sanjay Dutt why you would treat him differently, so consequences for others again is another important factor which the policy decision has to be taken probably case by case or at, at, at the broader level. so in terms of judicial discretion, it seems interesting to go back to some of the Supreme Court decisions on judicial discretion to see, can some of these cases which are not really in the context of sentencing the used in exercising the sentencing discretion. one is 2004 Supreme Court judgement in Union of India versus Kuldeep Singh, where the Supreme Court said that the judicial discretion signifies discretion regulated by the rules and law, and discretion brings with the heavy responsibility to consider relevant reasons, and to arrive at a decision based on the judicial thinking. them in Bhel versus Chandrashekhar Reddy the next year the Supreme Court said, that discretion can never be unfettered, since that would result in discrimination, and a judicial bodies bound to justify its discretionary judgements through proper reasons. It come back to the question of reasoning, and we go back to the original judgement on discretion which is E. P. Royappa, where the Supreme Court said that this justice Bhagwati's judgement in Royappa where he says, from a positivistic point of view equality is antithesis of arbitrariness, in fact equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic, while the other to the whim and caprice of an absolute monarch. when an act is arbitrary it is implicit in it, that its unequal both according to the political logic and constitutional law, and it is therefore violative of Article fourteen, and fourteen strikes at arbitrariness in State action, and ensures fairness and equality of treatment, it requires that State action must be based equal and relevant principles applicable alike to all similarly situated, it must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality. Then you had again back to Jagmohan Singh, where the Supreme Court says, that

the judicial discretion is not arbitrary in the context of upholding, the death sentence but the constitutionality of death sentence say, because it is based on, well recognized principles, and in Rajendra Prasad justice Krishana Iyer disagreeing with Jagmohan Singh, says guided missiles with little potential in unguided hand, even judicial is a grave risk, and he said it is not clear what is wellness principles, that Jagmohan Singh talks about and he say this principle need to be articulated and in Bacchan Singh ultimately in the context of death sentence we see the Supreme Court saying that the rarest of rare case formulation is this well recognised principles and also section 354 sub section three, of the Cr. P. C provides the principles that the jagmohan Singh is talking about. So thus Royappa applied judicial discretion, this is Bhagwati in his dissent in Bacchan Singh, in 1982 three SCC 24 talks about this, where he says, unfettered and uncharted discretion conferred on any authority, even if it with the judiciary throws a door open for arbitrariness for after all a judge does not cease to be a human being, subject to human limitations when he puts on the judicial role. And the nature of the judicial process, being what it is, it cannot be entirely free from judicial subjectivism. and if you look at H. M. Seervai's book on constitutional law, and you see he criticises Royappa, he criticises Justice Bhagwati's decision in Royappa and saying, gives the example of sentencing, and he says that if you were to apply to Royappa to sentencing, then entire sentencing system would be unconstitutional, which he why he says, it is his opinion Royappa justice Bhagati's judgement in Royappa was not correct, but if you actually take that, point forward, let's see what Seervai is actually saying, and we go back to Royappa, it appears so that, unless judicial discretion is guided by some sort of principles it would actually make sentencing unconstitutional. and this was noticed by the Supreme Court, very recently five years back, six years back in Mohamamd Farooq Abdul Gafoor where the Court held that Article 14 applies to judicial discretion in the same way as it applies to exercise the executive discretion and in absence of principle judicial discretion can become erratic and personality based and this, would be an arbitrary exercise of discretion which is violative of Article 14 of the constitution. So in terms of, I have mentioned herein previous session itself, of how it is important to bring reasoning in sentencing and that's one way of ensuring that, it's not lenient or harsh sentencing, but it's a framework of sentencing that is based on principles, so in terms of it, exercising judicial discretion, one thing is identified primary justification and then designate in starting point again I mentioned all of these previous session, so I will get on to the next point one interesting discussion in the, in sentencing theory has been, whether sentencing is an art or

science? And the implication this has is that some argues that sentencing is an art, so if it is art, you cannot really train someone to be an artist, where you have the talent or don't have the talent. So the others arguments that the sentencing is like a science, so in science you can actually learn how to do something, or the others, the sentencing should be considered as a scientific approach, and if it is a scientific approach, then you bring it various factors that can go into sentencing of offenders, and the importance that is bring in the rule of law in the sentencing process, which means having the rules, which are fixed knowable and certain, thus enhancing liberty and reducing arbitrariness in the exercise of the state power. So ultimately I would end by saying what Lord Bingham had said, that the dragon of arbitrary discretion has not been slain but it has been domesticated and put on the shortlist so sentencing discretion in comparative days is, complete discretion to an untrained dragon that destroys the rule of law, and it said that, we need to figure out the processes by which we can control the sentencing process, thereby ensuring that principle say of equality is actually brought forth in the sentencing process, and then people are treated equally during sentencing, so I will stop, there and take the questions. Justice Gyan Sudha Misra: So any reaction or any question that,

**Participant:** Have you come across any of the judgements wherein while imposing sentences, a compensatory factor is considered as mitigating the bodily punishment, corporeal punishment, particularly in crimes relating to sexual offences. Providing high compensation and thereby lessening the corporal punishment, have you come across any judgements? I have only two judgements to.....2005, they are old judgements, only ordering compensation, but of the recent nature have you got any research.

**Prof. Mrinal Satish:** I don't, more recently after the 2013 amendments have not come across any, but there are older judgments 2011 and five and some other situations where compensation has been considered as mitigating factor in sentencing. Do you have that citation.....I have that, one was Baldevsingh, which I mentioned, 2011 and I will give the citation, I don't have it right now, but I can give it to you, I was asked a question, I was at the Jharkhand Judicial Academy, last month and I was.....which one.....Upahar case.....that is only compensation, but mitigating of punishment using....as a comparison there are just the few cases, but I think the one factor that, does come in an ethic is that something that Justice Katuj has noted in Baldevsingh, was of those situations, where the victims for instance says I want compensation and I am not really bothered about, the punishment that you give.

The victims associations, don't want just, the other way, so how do you deal with the.....how do you deal with that situation, because I was saying, I was in the Jharkhand Legal Service authority has organized a programme last week on the victim compensation, and one of the judge there made a point, when he said that look, where we give compensation under section 357 A, or we will recommend compensation in 357 A, does it mean that we should treat the.....while trying a case, we should treat differently, justice Dave was there, he said, no, not to be treated differently, to be treated as you treat any other trial, but I think that, that, that.....what do you do if you give compensation, you reduce sentence, something that been, coming up and how, other jurisdictions have dealt with it, against the both of them, completely, separately think, there should not have any, should not have any.....compensation should not have any impact on sentence but also moving a way towards 357 A approach, where you say the let the State, compensate, and so therefore, let sentence and fine be treated separately and compensation be treated separate entity altogether.

**Justice Gyan Sudha Misra:** My reaction would be, we were discussing about the economic offences, so economic offences one can think of substituting the sentence with compensation but, if it is an offence, you know, affecting body, mind or you the victim in person, then how monetary compensation can be adequate. so to my mind you know you can't consider compensation so far as that part is concern, unless of course in situations where the court has time to feel, because yesterday I was mention about the matter, where a man was accused of a rape, he was also convicted and then the matter came up before the Supreme Court, myself and justice Katuj we, the man was married, the victim was married and out of what, they had a settled, they had, that boy had ready to pay compensation to the girl and the prosecution through the complainant was not really perusing the matter, but the question brought up that, can the court also, especially when the charge was of rape, it was slightly different you know, it was delayed set up where not traditionally gang rape in the sense, that the woman was forced and subjected to this criminal assault, it was a kind of that the boy took away the girl and exploited her and thereafter the other boys also assisted and all that, and just one person had committed the physical assault, so in that event there was also, a question, whether it was a consensual sex or all that. So it became very difficult whether to accept compensation so justice Katuj was of the view that, now the 17 years has passed, and both the boy and the girl they are married, now what purpose would be served by sentencing, by sending him again to the behind the bar just to like you know having a pound of flesh, and I was, I was bit confused what should be the

appropriate and a bit reluctantly I agreed so that the question arises that, as I said of course you should not be bog down by the media reports, but media also reflects the mind-set of the society to that extent to get affected, that if they says that, how and how can a woman's honour can be compensated by money and that too when a woman judge is on the bench. So it, you know compels in to think, that what should be the appropriate punishment in a situation of this nature, where long time has lapsed, and even though the long time the blame would be on the system, for that, it was not tried out speedily. but what should be the approach, because you have done a lot of research on this and law outside of this country what do you think, should be, the vision of the judges in such difficult situation, like suppose you were to function as a judge in a matter or as a research scholar or what you have experience from so many national and international situations and the judgements, what do you think, should be the approach of the court in such a matter?

I think that's the judgement of Baldevsingh, that you were talking about and I what read, that justice Katuj subsequently note it, and because in the judgement itself, the court in the judgement, I would like to just add, the argument of the prosecution was that, how can you know like a gang rape, its case of gang rape and therefore, this cannot be and the punishment cannot be reduced, but the proviso says that it can be done, there are very pressing reasons, so just keen to have your opinion. media saying that the judgement did not.....it did not reflect any of these reasons, here is the case of gang rape, victim seeks compensation, so compensation awarded and sentence undergone, that is just what it says, what it made people think, that here is the case, where compensation has been given and.....just.....so at times also the judgements also.....judgements hurried is judgement buried, then I think that.....Justice Katuj was always a man in hurry, so that.....law not detail about that and exactly that case is about and then you realise that what happen, what you have exactly said what you have done in that situation, by you say that it is 17 years, the victim was represented, we don't have a jury system, but if are jury, then what would have been your view in that?

So I not even as a jury, here itself I would have deduced the sentence, but also given the woman emphasising on the question of reasoning, if you say look this is 17 years back and the victim does not want this man to go into prison once again, she on the other hand want the compensation, taking that in to consideration that is the reason, because of which we reduce the sentence, that is 17 years back, it makes it the principle of.....so the bottom line is that he

hasn't gone scot free, he has served three and half year and that was and on other hand not spent a single day in the prison, then I would have said that no there must be sentence, there is lot of cases judges discuss, you realise that the fact story,

Oh.....I will tell you the back story of euthanasia, judgment, because you know one of my colleague has reacted in that judgement, because justice Katuj was a man always in hurry, so he was too much in hurry to deliver a judgement, not even allowing your brother or a sister judge to have its own point of view so then one of my colleague tells me that, yes....yes justice Katuj complemented me that you contributed a lot in that euthanasia judgement although I had not written, did not pen down the judgement so one of my colleagues he says, yes, yes she has contributed she must have read the judgement, but then, when I told him the inside story as to how it has gone, it was you know shortly put justice Katuj on one extreme that we are going to allow it straight away and I was on the other end, north and south pole that I am not going to allow it because, after the JIV Hatya be on my side so I will not permit this, then shortly put he, it has a long story, behind the long story, behind the screen it will be very interesting story, if I was to write my experience, what went behind the screen, so he moved, to step backward or ten step backward I moved ten steps forward and that is how that judgment finally given, that all right we will not permit active euthanasia, and passive euthanasia, we permit it under the Court supervision so you are right that what goes behind the screen if you know, that how, though.....you know this, there was a time as a counsel, there was a time when we used to say, oh....what is this other judge doing, because I was counsel many a time, that I feel that one judge is saying yes, and the other judge is just not interfering and just not saying anything at all and I would, react very heavily, of course outside the court, what is this other judge is doing, is he a separately ke bolo yes to yes and so what is the use of having the division bench, what is the use of having two judge bench, or the larger bench, but it's not so, because the other judge also applies his mind and he might be keeping quite because he endorses the view and, then he might be endorsing the reason, but yes many a time there is a tug of war or the.....or which is healthy also. What I was saying.....therefore I was told this is how the laws develops so it is always helping, it's not something to feel conscious about it, why should we dissent or why should you say no to something, so but yes, dissenting for the, with reasoning, dissenting not for the sake of you know, getting your point be upheld. Then I was reminded one of the saying that the two, judges agree all the time, there were two must be a fool, so that causes.....so that complex may not be there. What is Baldevsingh, after trial court started



saying that, to release people without, thinking that the Supreme Court had done this and the fact that, and there is no.....the back story is this, where.....no I think it required a little bit of reasoning that why we have done it, and how the provision, you know supports, enables, which was.....the other case was, it was the case of breach of promise to marry, which became the big issue.....

second case is justice P. V. Reddy in Kuldeepsingh, there what he said, again one of the judgment, where had the opportunity of sharing sitting with justice Reddy that is the back story of Kuldeepsingh, then you realize the issue there in Kuldeepsingh again, the woman had a child from this, breach of promise to marry there was sexual relationship, the woman had a child and the man refused to marry her, it was not rape that commented the Supreme Court, and in the Supreme Court he said, that he is going to acquit and the lawyer for the accused said that if you acquit, he is willing to pay fifty thousand rupees. He was anyhow going to acquit, but he offered fifty thousand so I said acquittal and fifty thousand rupees compensation. now it is very clear that it is the legal basis for giving them fifty thousand rupees as compensation was not there and after giving an acquittal, he was using his, and he mentioned in the judgment, using Article 142 of the constitution to do complete justice, I am ordering fifty thousand rupees to be paid, doesn't even call it as compensation, but again one more paragraph made a difference, because what happened after Kuldeepsingh across the country, was that court started saying that breach of promise to marry here, it was not fifty thousand rupees given it was a compensation under 357, therefore the Supreme Court has said that, breach of promise to marry is a rape and you can prosecute and thereafter lawyers misinterpreted that judgment, and for years, and I remember Justice Reddy sitting in NJA, saying I did not mean that, because judges ask him also, saying sir you said in the judgment, he said I never said in that judgment, so I think in terms of reasoning he was saying may be should have put two more paragraphs saying why that fifty thousand rupees had been given , saying that it is not a crime that the Supreme Court, not recognizing breach promise to marry as a rape same thing in terms of sentencing, when it comes to mitigating factors, like I said, this very interesting side of cases were not, did not want to give the seven years, because it was a consensual sexual relationship, the family had filed the F. I. R and the girl herself, did not appear to want this man in prison for seven years, but in some cases, what the judges said, that, they said this man was very young and he was not able to control his urges therefore that is the reason I am reducing sentence, that became, precedent, when court start saying that young age cannot able to control his urges, that is the mitigating

factor that become one of the factor that it should not be considered in a.....keeps getting....that is I think, that have been emphasising, that when they are using their reasoning at the careful in terms of what is views, because that becomes precedent for, especially trial courts as well as lawyers, defence lawyers were looking for something like this in reduction of sentences. Sir any research has been made on the question that the deterrent sentence has resisted a prospective offenders from committing crimes? Sir. lot of research has been done on that, in fact in 262 report of the law commission on death penalty, this has been dealt with quite bit of detail, I worked with law commission on that report and this was, the task I had been given, which is why I.....we put a lot of research in to that term, justice Basant was saying in the morning, what the research actually shows is that certainty of punishment is something that is more important than the severity of punishment, because if every person is.....the.....the entire question of deterrence comes from Bentham, and Bentham understanding was that every criminal while committing the crime he will not think that he will not be caught, so the question of getting the death sentence or getting the severe sentence is not even in the mind of the person at that point of time. However if it is clear that you will be caught and you will be punished then that acts as a more deterrent factor as than that of the severity of the punishment, this was studied extensively one thing that these studies have shown both, some studies have shown that harsher sentences actually lead to crime coming down, some have shown that, harsher sentences let do every crime increasing in some cases, so it's not conclusive as to what happens one way or the other therefore using harsher sentences as a justification or other way it is not, it is not particular,

**Participant:** Generally man will not think of the consequences, when he is committing the crime.

That exactly what Bentham also said, that you don't think of the consequences, therefore it is essential that you actually have a system, where the person is caught, and tried for the offences. In many murder cases, hanging is going on still murders are not being stopped, people know that, but people are committing the crimes. Also lot of these cases of murder, when we read the cases that some underlying dispute, and that underlying dispute the person is going to commit that murder, irrespective whether he is going to behind or not lot of these say, when the dispute is something in the village, you are fighting over property for fifteen years and that one day, go kill that other person without having any consideration what the consequences will be and

I think that really shows that in terms of using deterrence as theory I think, time has come that we stop, using deterrence but also, looking in terms of other theories, one would be proportional punishment to the crime, second is in case of dangerous offence, offenders incapacitation, you say I am going to put this person behind bars to make him incapable of committing that offence, because he is not in society anymore, I think those are the theories which are gaining more prominence rather than deterrence or retribution.

**Participant:** Have you studied any impact that the sentencing the other way would have a very good effect? I will give some example from the A. P. High Court, an Honourable Judge while granting a bail to the molester, who filed a bail application in the High Court, and his case was pending for trial, were pending for investigation, for granting bail, the honourable judge apart from asking for the production of the two, sureties and all these, directed him to make a community service in a government general hospital at the Capital for one week, and he served it, of course legality of that were is a different one, but the judge has impose it and he served it also. Have you come across such situation which are not on statutes book but it should be covering innovative or nor that is a different aspect, that boy was asked to serve for one week. for this very matter the Madras High Court while granting bail, directed the accused force a fact, another judge in a bail matter asked after giving bail asked him to go to Gandhi Museum and read daily the speeches, the books.....Supreme Court in another case said while granting bail you should not impose odd conditions, it is impermissible, that is the problem, that is the problem. Motiram versus State also speaks about this, you can't.....

**Prof. Mrinal Satish:** Justice Krishana Iyer, who kept saying that in the Harsco, Harsco judgements Justice Krishana Iyer suggests that, let him do community service. Other jurisdictions have using.....US regularly using this community service, juvenile justice Act, but that is permitted, and so what, one criticism of community service without custodial sentences has been like similarly like.....treatment of our Bollywood stars, that of the Hollywood stars Paris Hilton, who was picked up for shop lifting of a neck-less, from herald. this is check in some provision, under the community services I think even under the probation of offenders Act you can, in juvenile justice Act also, you have to maintain good behaviour for a limited period of one year so that he will have to do the service, ya..... one criticism of community service in US context as I said, was Paris Hilton then was given community service without custodial sentence, they said you go to heralds, wherever, clean every day or and the criticism

of that was that, two thing that cleaning as punishment, so meaning to say the people who clean your.....say this room, are that is the punishment, therefore you clean the room does that mean punishment, that is one criticism the second was are you letting people get off very easily, you go and steal something worth 100 thousand dollars and you said return and you go clean that place every day for one month is not something, not proportional to the crime that has been committed therefore.....they see in American law, suppose the thief goes stolen 100 computers, and returned 75, what is the sentence? that is in the context of plea bargaining you strike a deal on, you bargain on the sentence, but not in the sentencing process, because in the sentencing process now the recognition is if the crime requires a custodial sentence you should give a custodial sentence whatever it is, then community service campaign addition to make that person realise, what crime they did, so therefore you have to tailor the community service also depending on like say you don't send that person back to the victim's family for instance but if you say, if you committed such and such fine, if there is a victims association or there is a thing and you go and do community service there, so you realise the impact of what your crime has, for instance Motor Vehicle accident, if you have killed somebody in vehicular homicide, or you have caused disability to someone, then you go and work in a hospital so you realise, what impact you are having on people not go and clean the street at the same time, because you really have.....you are taking that as I have to clean the street and not really experiencing what, or seeing what other people are experiencing in that context and that's how some, some US states have tried to integrate both of this. The accuse is not accustomed for doing a particular job, no there was one form of punishment which the US began they know criticise for the dignity question was they use shaming punishment, shaming punishment basically meant to take a board outside then pick a stole neck-less for the store, and two things happens, one is dignity, why should you hold the board like that, if we look at the Indian context, straight way violation of the fundamental rights, second is dangerous, you don't know you are standing there without security someone might come and it did happen, people committed crime against these people, saying you are a criminal I will come and punish however I think, it's very complicated issue.

**Participant:** Sometime back we had seen a film on this also, Dushaman Rajesh Khanna sent to serve the victim's family, but no judge will give in a Motor Accident case, don't killed, that film came in Tamil also, in almost all the languages, it was dubbed.....what was.....the idea was novel.... the languages, it was dubbed.....what was.....the idea was novel.....what are

the reasons for failure of plea-bargaining in our country? I India. I would like to tell you from the experience from here at NJA at some eight years back there was a plea bargaining camp that happened here that here in Bhopal jail, and that was the first thing so we were called and asked can you study, what happened in that, what we realised that I look at the jails in ten years, while there is others states is plea-bargaining has failed in US also. It is not something that had really a big trouble, we, law commission said use plea bargaining and picked up, right now the offences, which you can plea-bargaining are limited and here it is in Bhopal some 67 cases that came up in that camp of which sixty of them were under section 25 of the Arms Act. Section 25 of the Arms Act, if you look at the NCRB statistics Bhopal is number one in country for prosecution under section 25 of Arms Act, we went to the local police station here, Bhadbhada Road police station just ask the police man, why you have so many Arms Act cases? Very frankly told us 99 % of those are planted. These are people, whom we cannot find any other offence, we put him and that's how this happens Bhopal city that is the policing mechanism that we are using. So what we then realize that, lot of these cases, these people are actually, those who cannot.....do not have the capacity to get bail. so they are being encouraged to get in to plea bargaining, so the people who accede, take the plea bargaining, are people who cannot get bail, the people who can get bail say, why should I plead guilty, I will get bail and go outside. So that's the reason why it failed, because we are using plea bargain gig against people who don't have the capacity to hire the lawyer or even if there is a legal aid lawyers could be able to understand, or the capacity to get bail are to all sometimes don't have sureties, sometimes don't have the sureties, and the other people who have the capacity think that I will get a bail and I will get acquitted and why should I get into plea-bargaining is the.....sir asking in the morning plea-bargaining is one of those situations where the transplanted something from a different jurisdiction without realizing that it had failed and failed miserably in the US and we just took that put it into the Indian system. we have a sentence bargain.....but judges in the US also don't really like the plea-bargaining because they see that they don't have a role, it is the prosecutor who decide comes to a judge saying that we have decided, and the judge says on these facts I think there is a conviction of murder of first degree possible why have you given.....agreed to a lower charge, where the judge has no role in that context.

Let us also discuss a bit you know, there are been lot of conversation and since yesterday about the sentencing part, that whether compensation should be treated as a punishment, good enough to compensate for the offence which has been committed or the actual sentence, in Motor

Vehicle Act, I would like to have a feedback, that in Motor Vehicle Act, when a person is booked for a reckless driving, and goes to the extent of killing people on the pavement. What would be the appropriate punishment? Do you think the compensation should be enough for such offences or the sentence should actual imprisonment should be there? Or in view of the imprisonment compensation can be enhanced, because that is the area, where because after all intention to kill is not there. What would be the.....A drunk and drive is very serious, that's the area.....exposing their prosperity for a small and minor they give handover the Volvo car, the four person last week, drunk and driving.....no.....no.....this situation compels to really think about it, that all right that intention kill is not there, there is a provision for fine also, it always there they are the killers on the road, murders on the road, but knowledge can be there, knowledge, he has to pay the compensation in addition to prison....I came across the case of similar situation in that, what is that case.....that is the case of Parera.....Alister Parera, 304 part one, Alister Parera, it was justice Katuj and myself, were disagreeing with then the matter went to the larger bench.....so that is again a compelling situation, for the poor that should the compensation be treated as an adequate punishment, on the ground of the plea that he has not.....he has not killed the people on pavement intentionally. Had it been intentionally, it should have been murder, that was my view also, that decision is followed by all the courts now, if there is a simple rash and negligent driving then it will be negligent driving punishable under, so far as my views are concern, there is no harm in discussing it, because a man of ordinary prudence ought to be knowing, what is the consequence of his acts, if does it intentionally, and therefore to say that, where compensation is enough, but I wanted to have broader view point of.....punishable but how much.....punishable pulse compensation must be there, sometimes they simply when they are driving on the road, they will ran away, drink and drive is very serious, if the driver has the knowledge about the consequences, and that consequences ensued ultimately.....now a days, that should be not simple rash and negligent driving, that should be.....lenient punishment, rather than the harsh punishment, if the chairperson permits I want to ask the question, outside the subject, just to seek the clarification from chairperson and my brother and sisters here, that the powers of the appellate courts, 386 Cr. P. C, in a case A-1 was charged with 302 I. P. C and also 304B dowry death, the sessions judge has given a clean acquittal for 304B, but committed for 302, now the appellant is before us, we find that 302 is not proper, 304 B is proper, can the appellate court convict him for 304 B although he was acquitted by the Trial Court, and there is no appeal?

There is one Supreme Court judgment, which says when the charge is under section 302 and the conviction is under section 304 B, because under 304 B is having some, burden shift upon him, now we find that it is not 302 but 304 B, but the trial court has given clean acquittal for 304 B, for valid reasons, now can we again go back to 304 B and convict him, in absence of there being appeal by the State? No....no in the absence of preferring any appeal by the State, same was the situation in the case of Salman Khan, no...no.....Salman Khan is different, tis was not part two straight away, that was different, here Appellate Court.....ion the absence of the.....in the absence of the in the absence of there being appeal by the State expressing grievance against the 304 B acquittal, can we take up that? one argument is that entire argument before us appellate powers of the court,, we all know, it is the entire thing.....State does file an appeal in some of cases also, challenging the acquittal, but that acquittal is on the basis of factual....not on the question on the sentence, but on the actual appeal....but one argument is that the entire matter is before it, it can any decision, 386 Cr. P. C very clearly says, including it can art of the finding also, 304B was argued in the trial court, both charges are there, the charges are both, charge is already there, charge both, 304 B and 302 of course various things are there. What can be done by making the observation that can be remitted back to the trial court for retrial? Now already they have opened the acquittal, one thing 304 B, for that you can remit, giving direction..... There is another mandate also, it did not say that the accused prejudiced, because there is no challenge where the state or the appellate court is remanding for 304 B. A matter against the acquittal came up before us, then it was already 125, we were able to rise it at 113 by it matters senior judge said all these correctives must have done the murder, alright we will convict him for life, brother will write the judgment, then I was new I came from civil side, and these criminal matters are torts, lawyers are not opened, not allowed to open his mouth, then I went to found that it was a civil matter, to take a revenge a criminal case was booked, then session judge written in his judgment that absolutely no reason.....then I confirmed the judgment and get judgment for the just to senior judge to see it. That told me I dictated and allowed and modify the acquittal and punishment, and convicted again, sir you need not apply your mind, now you can just put.....there is no material then the he confirmed it. My view is like this, our learned brother put it, the facts would show that, he was charged for three offences, 304 B for dowry death, and straight murder 302 the trial court held that, he was not the, it is not, he was acquitted of 304 B but he was convicted for straight murder 302, then he came to the appeal, because he

was convicted for 302, suppose if therein it was found that it was not a case of 302 but it occurs only for you call 304 B that is dowry death, whether the trial.....the appellate court can him under 304 B, because he has not come in the appeal under 304 B, he has come for 302, in this there is one legal angle, to my perception, because we have dealt with the similar type of the case, 302 to have an enabling section under Cr. P. C 221, wherein it says that, if the facts and charge are framed for the major offence, but the fact establish only for a minor offence, then thought there is no charge before that court for punishing him under minor offence, still he can be punished under minor offence, there is another enabling section under 465 of Cr. P. C, 465 says that no conviction will be set to be void just because there is no charge for that offence, these two are enabling sections, now in this context the point is, whether for 302 offence, 304B is minor offence or not, because the facts are similar, because the facts are similar, whether I was murdered or whether wife was held to be, in a suspicious circumstances.....that would have been possible, had there been no charge for 304 B, what I am saying is that there is a specific charge and there is an acquittal, that is why.....had there been no charge then, we can go whether is a conjunctive sentence 302, my answer to that question is, here before the appellate Court, there is a presumption that there is no charge of 304 B, you were dealing with only with 302. Therefore there is a presumption that there is no charge for minor offence, by facts if the major offence consists in itself the minor offence also, you can punish. you can punish, without necessity of the charge.....charge is there, but....before you there is no charge, but the ingredients for the charge under 302 is different from 304 B, the trial court they the accused would have defend for charge under 302, they would not have the opportunity to concentrate on 304 B, for 304 B soon before the death, altogether 302 and 304 B are totally different, before the trial court he was tried for the both offences.....that's not.....that is why if the major offence consisting the facts.....that is depending upon the facts of the case.....had there been no charge we would have done something, acquittal is there, which has some rights to the appellant, now, he is saying that why you are convicting me, when the State is not aggrieved, correct, No....the reason for our shift from 302 to 304 B some presumptions are permissible, I will just give example of Supreme Court judgment, husband and his paramour, were accused of committing murder of the wife of the A-1, they were charged for, what you call 302, but then what happened is that the trial court convicted them for 302, then it came to the High Court, High Court held that, no...no they have not committed murder they have abetted the suicide of that lady, so high court converted that judgment in to conviction from



302 to 309....that is the abetment of suicide, 306 or 309....306..... O.K. then they went to the Supreme Court, the Supreme Court has observed that for 302, 306 is not a minor offence so that you cannot punish, by facts they held that, and there they have given the clarification, if the major offence consisting within it, the facts relating to the minor offence also, you can punish there is no doubt about, 221, that is....O.K. that depends upon the facts, why, why, why, why would, why because, why because he was tried before the Trial Court for both the offences so, you should not forget that fact, he was given an opportunity to defend himself for that two offences, he put in his defence, alternative charge, only fact is that he was acquitted of 304 B but he was convicted for 302, so major offence within it consisting of the minor offence, but also then, he cannot be taken to be suppressed, there is no prejudice caused to him, that is my opinion of course. Such situation also.....if there was alternative charge.....no question.....I dealt with a similar situation.....there is one judgment of Supreme Court which, which came only yesterday 1962, Justice Ganjendragadkar, Wanchu, three judge bench, clearly states that you can't do that. there was an elaborate discussion as to what is the meaning of altering the findings, 386 there was...the word is the appellate court can order the finding and maintain the sentence, can maintain the sentence all this is are there, the....Gajendragadkar judgement that you cannot alter the findings of which you can't convict him of an acquittal offence 1962, any judgment thereafter comes, we don't know. As 304 B he has been.....you can only remand the case to the trial court, that can be done.....in one appeal.....we are going beyond the boundary subject wise and clockwise....

**Justice Gyan Sudha Misra:** So has the remedy, and special thanks to Dr. Satish, for his inputs and looking for you all to see you tomorrow again for the grand finale of the subject....

**Participant:** thank you madam..... thank you madam.....

**Mr. Milind:** There is a tea arrangement for all of you.

**SESSION: 9**

**SUBJECT: SENTENCING FOR CYBER CRIMES**

**RESOURCE PERSONS: JUSTICE A. K. GOEL, JUSTICE GYAN SUDHA MISRA**

**Dr. Geeta Oberoi:** Very good morning to all of you, its ten exactly, so today is the last and the concluding day and we will have a benefit if having experience of all of our four speakers, today we have justice A. K. Goel, judge Supreme Court of India with us, Justice Gyan Sudha Misra, whose been there you all.....all of these three days, to share her experience, Professor Chokalingam whose headed many universities and the departments he is there and professor Mrinal Satish, form national law School, Delhi is there. So what we have planned actually is that, we will merge these sessions, we will have continue sessions, because it's your day of departure so we, have thought that we have continue sessions from ten to twelve, where you can have two hours continuously, you can have benefit of experience of speakers and also share your, own experience and own issues and sentencing with them, so with this I, first of all ask honourable justice A. K. Goel to start the session.

**Justice A. K. Goel:** The respected sister, Gyan Sudha Misraji, Professor Choklingam, Professor Mrinal Satish, Dr. Geeta Oberoi, my sisters and brothers from different High Courts. I will find this seminar on sentencing in criminal cases is going on for the last three days, they have already covered most of these subjects, and today's subject are also overlapping with the subjects which I think already, which has been discussed and debated, starting from sentencing philosophy, traditional and emerging approach to sentencing, sentencing for caste based atrocities, sentencing for gender related atrocities, library and, sentencing objectivity, sentencing for economic crimes and sentencing for sexual offences, sentencing leniently versus sentencing harshly, now we will have sentencing for cybercrimes, and sentencing practices from other countries. So this subject has remained debatable for the last.....ever since we have a criminal justice system, so I will start by referring to, what the mandate of law is as mentioned in Bhagwat Geeta. See in chapter two, Lord says, what is the mandate, what is the divine mandate that is Prityranay Sadhunam, vinashay duskritam, dharm sansthaprthanya sambhavami yuge yuge. That's what Lord tell Arjun I will come, from time to time in order to ensure that the rule of law is established and how rule of law is established is by paritrany sadhunam, by protecting the innocent, and vinshaych duskritam, and punishing the guilty, so punishing the guilty becomes necessary in the society, and how do we punish the guilty. We have now governed by statutory laws, under Article 21 of the constitution nobody can be

punished, nobody can be deprived of his liberty, without the established law, that is the enacted law. There have been also the debate, whether enacted law can itself be challenged and there is a recent decision, I will refer to it, referring to section 364 capital A, where if you kidnap a child then minimum sentence is life, life or death. Life is minimum, even if the child is unharmed and released the same day. So there is a debatable note, there was a recent decision of the Supreme Court upholding that, that's the legislative prescription in a given situation, to prevent child kidnapping which has very serious offence. Now there have been law commission reports, which may be referred already, and also Dr. Madhav Menon, drafted a sentencing policy, those law commission reports treat as most of the time to do, thinking that American system are most well researched, and let us follow the American systems. Let us follow the British system, that's some time our approach, and Malimath committee also went in to it. Malimath committee report found, that's the view of many that there should be certain, we have wide range in sentencing, in I. P. C we have different provisions sentence, which may extend to life, sentence which may extent to ten year, so that it can be one day sentence, it can be ten year sentence, a total discretion what is the guideline, so Malimath committee recommended, that there should be a sentencing manual. So that you can check subjectively there can be a range, or a lesser range, and that debate is also going on in tax laws, in tax laws at many places we find, the penalty which is will be equal to the amount of tax evading and sometime the penalty me be only for a technical default. then we have many statutes, where we have provided minimum no discretion, they say if you give discretion, it will be misused, there is also a debate on this subject on sentencing in case of death sentence. All of the principles we have laid down in finding out, which is rarest of rare case. Normal sentence, life rarest or rare can justify that, what is rarest of rare, how to define it? Very serious attempts have been made by the scholars, by scholar judges also, to cull out justice Thakkar, in his celebrated judgement has culled out principles, what are the grave circumstances, what are the mitigating circumstances, and do you say the offence is conceived diabolically, and executed cruelly. Where do you say, the accused can't be reformed, therefore the death sentence is a must to save the society. So this whole range of debate is evergreen debate, therefore I must appreciate, this programme that's why perhaps, three days discussion has been organised, so that we understand what are the different dynamics, why it is so? What is the range of the debate, and who a judicial approach can be formulated, what is the right judicial approach to follow? I may mention one important thing, which don't know whether it is known to you or not. I was dealing

a case of judicial side of death sentence. And the issue was, that the death sentence has not been executed for eight years after the death sentence was finalised by the Supreme Court order. Whether it should be now, converted in to life by a judicial order, to give effect to Article 21, that was the writ petition. So we called for the record and saw, i came across an order of A. P. J Abdul Kalam as President of India. His was a general order which he passed to all.....the general order was I believe, that there is no human being who can't be reformed, provided the State set its entire machinery in to motion, any person can be reformed, that's my philosophy, therefore I told approve the death sentence, death sentence should not be approved, the Governments recommendation of successive home ministers, made he did not accept, and returned and when it was reiterated, then he was bound, well he did not signed the file and he kept the file pending throughout his tenure, that was the justification, main justification for the delay the government gave. This the extent of difference in philosophy personal philosophies, ultimately after Abdul Kalam retire, the day he retired, the file were sent back, the next President immediately approve the hanging, most of those cases where the home minister, the then home minster advised, the President to do it. Then, contrary to what, Malimath has said, absolutely contrary to that is now a thinking in US, I was noting, proceedings of annual conference of national association to advising to collect, which was held in Philadelphia on 14th of July 2015 and that was a debate or a meeting, which took up the subject of the sentencing policy, since the law commission reports, starting from 34th report end up to the Malimath committee report, the reference is made to developments in sentencing in years, becomes important to see what American are now thinking and, surprisingly this conference was inaugurated by Barak Obama, President of US, who said that American sentencing policy is totally defective and needs an overt, why he said this objectivity in sentencing he is also law, he is also a law professor, so he said objectivity in sentencing should never be there, this defective policy is because of objectivity, and what is the consequence, he refer to certain figures he said, in US, prison population is 2.2 million, which is made for the world prison population, 25 percent of the prison population of the world is in US although the population of one fourth of India, that means about five percent of the world's population, is US population and the prison population is twenty five percent. Now we see in India prison population is 4.20 lakhs, which is world's.....world prison population is five percent, in India we have 20 percent of US prison population, though other population as such four times the US population. So this is the comparison which Obama made he says, there is a defective policy which is resulting in

such high disproportionate prison population in US. and this point he also made in the context of the conference was association for Advancement of coloured people, you know there in US there are coloured people and majority of the prison population is of the colour people, colour people are in position of disadvantage also, financially also they are poorer section and it's a fact that prison population it may be US, it may be India, it may be other countries, will be comprising of mostly poorer sections of the society, so second figure, he mentioned was, the expenditure on prisons is 80 billion US dollars per year, and he said that, if you believe US dollars per year is spent only the colour people. it can itself result in substantial reduction of crimes, because in US large number of crimes are drug addicts, or drug related crimes, that is because of situation in which children are placed, or the disadvantaged children are placed, so this is just an issue for discussion that it is not that, mechanical sentencing or objective sentencing, objective sentencing becomes the mechanical, there is no application of mind, see the grid book there the sentence prescribed and give it. As we also do under the corruption Act, or NDPS Act alright minimum ten, ten years is minimum, alright ten years, so minimum legislative, legislatively mandated minimum sentence sometimes may also results in injustice, but at the same time this being a very sensitive subject, first requirement in adopting a right judicial approach will be to get involved in to the issue.

As they say, there are two components in sentencing. one is the circumstances of the crime, the other are the circumstances of the criminal and also, if I can add the third, in these circumstances of the victim that sometimes we ignore and we have Professor of victimology also here, so victim is also an important stake holder, how victim is compensative as a part of sentencing process, this is the third element. So we have also seen, you must have come across now, in the High Courts, crimes against women, 304 B are the dowry death cases. They are mostly based on presumption under 113 B of the Evidence Act, because it is difficult to prove as to what happened in the four walls of the home while the woman died. Therefore the presumption is raised that if soon before the death, there was a demand of dowry. Then you can draw an inference, that it is because of the dowry related, dowry demand and dowry death, so that is required to prove is that there was a demand of dowry, which is also harassment which continued which results in death, which is a corroborative fact, and with that fact this offence is committed, but most of.....many times it is also possible that death takes place for an unrelated subject. Some time they take the plea of an accident, it's a suicide, and even suicide is covered in 304 B, that is unnatural death means not a natural death, it has....with some reason

other than the natural death that is taking place, and there was a harassment for dowry. Now it is also a fact in most of the cases there is a harassment, without harassment, within seven years of marriage, a woman will not end her life, either by suicide or nobody will kill her, if there is a harmony in the family, then there is no question, harmony in a family is the biggest treatment for even a sick person, so lack of harmony or harassment is certainly there, that's why this presumption has been incorporated, but if we find it is to be proved before the death, harassment demand of dowry soon before the death, how soon before has been a question, live and proximate link between the death and the demand and what is the evidence of live and proximate link, when it is to be inferred or not, at times it is debated by eminent lawyers that there is no live and proximate link, there is no corroboration of the evidence for demand of dowry or the evidences not reliable because of he is demanding scooter, whether he actually demands, it's also a fact that, what was the real harassment is not known to anyone and times the woman was suffering in silence, she will not share with any one, or the person with whom she shared, may not be a witness in court, so the lawyers or the prosecution also plead his case sometimes may bring some friend=, who may not actually not knowing what really happened, and when trial took a false story, or exaggerates the story of the harassment for dowry, so on these niceties we have to be appreciated while the court concerned to do justice. I have seen in many cases team of individual judges, mostly it is the subjective approach which I ultimately control the judge, what he is thinking, and there we said also defence lawyers make out stories no she was not happy with the marriage because she wanted to marry somebody else, we are also in defence, yes she had affair with the....she wanted to marry me, but the family, her family didn't agree, and that has resulted in to death. So the theory is probablised or prosecution has not proved , ultimately I have seen many cases 304 B, particular judges they will not, give any sentence, they will say, soon before death dowry demand is not proved beyond a reasonable doubt, that's what they normally go for acquittal, no what is important is I am not expressing any view, which is the correct view, it all depends on the facts and it's an average judge has to take a call when the case comes, but the point to be kept in mind is the impact of the judicial orders on society cannot be totally ignored, it is the balance between the criminal or the society which has always to be kept in mind, while adopting a particular judicial approach. You cannot blindly acquit everyone, by giving the definition of what is proved beyond the reasonable doubt, is a concept, which is very flexible concept, and a times it depends on the individual judge appreciating the evidence, if he says yes, there is a doubt, for yes there is a doubt, so in

such cases I found, that other approach that could be the yes, harassment is there, 498 A is a lesser charge, which provides, ingredients of 498 A doesn't necessarily include demand of dowry, it includes both harassment, mental cruelty it may be, related to the dowry, it may not be related to dowry. therefore even there being a charge of 498 A, just thinking this has been a question, in genuine cases, why not at least convert the charge to 498 A, and say yes there is some, harassment, evidence is there, by way it is for dowry or without dowry, whether it is soon before or without soon before, but certainly justifies 498 A offence, so that the criminal, if you are satisfied only, yes the crime is committed, there is a huge gray area, of cases where court is convinced, crime is committed but, it is not proved beyond reasonable doubt that the accused before the court has committed it. and therefore perhaps it becomes necessary to acquittal is the only remedy, so you have to think of some policy how to deal with a situation where, the crime goes unpunished, we have not.....we are not responsible, responsibility basically is of the investigator or the prosecutor, to bring before the court credible tangible evidence, but then the court is balancing the rights of the society or the intact the order of the society and impact on the order on the criminal or the victim, these are the two parties, society is also a party apart from individual criminal or the victim. So one remedy is perhaps to go for an offence, which may be a lesser offence or an offence for which ingredient may be slightly different, or proof of ingredient may be easier or can be easier inferred from the evidence on that, the other facet is, if you can't sentence, you may have come across the amendment made to the criminal procedure code in 2009, in section 357 A, which provides for monetary compensation out of the state fund to the victim, irrespective of the conviction or the acquittal of the accuse tried before, it doesn't have any connection with the conviction. A person is acquitted all right, can't be helped, for want of evidence the person is acquitted, then victim says, what is my fault, I have been, I have been injured, my head had been broken, I have given evidence, you don't believe it or I have not been able to identify, whatever dacoity has happened, or murder has happened, there is no eye witness so the murder is not proved, but the fact remains same that the person has been killed, a person has been murdered by whom is not proved by the State machinery, then the state must.....let me talk in advance law, that the State must financially compensate, the victim, so that's not a sentence as such, you are acquitting an accused you are not sentencing anyone, but the victim is being compensated. You must have come crossed now the law made, that in 357 A, we compensate as high court judges we also deal with, writ petitions coming to the court, no fault in the cases of the accident cases, say gas

leak case, or some other situation, where a girl is raped, or there is an acid attack the victim come to the court and file a writ petition, my right to life and liberty is violated under Article 21. So court gives compensation, this principle started long back Rudul Shah 1983 and the above judgments, subsequently that at least what the state can least do is to provide monetary relief to the victim, that's of course not strictly penology it may be victimology, but or sometimes it may be some logy, it may not be strictly sentencing, but certainly the court has to be conscious to plight of the victim in sentencing, what we believe in any matter, where person is, has suffered, as a result of some kind, no this 357 A is a very potent weapon to provide the justice, and it may be justice, it may be a victim of any type there is also a power, there are now Supreme Court judgment in the matter, that the compensation can be given not after the trial is over but at the earliest opportunity by view of an interim order. Straight away the victim is not before the court, court can su-moto even without any formal application say, where is the victim, victim of crime, prima facie he is victim of crime and, this is the extent of compensation we needs, therefore lack the State give this much compensation, there are now schemes by various State framed under section 357 A, under which funds are available with the districts, with the district judges, itself because they are the chairman of the legal service authority, 357 A provides the funds being disbursed by the legal service authority. Now for the last seven years there is hardly or rarely those funds have been used, because of lack of awareness of the trial judges, that this is a fund available and there is a victim who has suffered, and have only to direct, that this much fund be made available, by an interim order, perhaps that's one area that needs some consideration. We have now one of the subjects, I find is cybercrimes, we know in 2009/11 now 2008 Act which is enforced in 2009, this information technology there have been some, wide ranging amendments, particularly section 65 to 74 which provide for various sentences in different kinds of cybercrimes, cyber are the crimes committed with the help of computer may be hacking, cheating, fraud, or any other crime against the person of the property, so various sentences are provided, what is the appropriate sentence we apply the principle of proportionality, which again involves subjectivity, perhaps subjectivity in judicial making.....judicial decision making cannot be wished away, and that's why I referred to these two conflicting recommendations of the highest bodies, one saying that there should be, subjectivity the other saying, there is should not be any subjectivity, there should be more and more objectivity, perhaps both are right in their own way, I will say, that there has to be subjectivity, as well as objectivity. Discretion has to be there, but not a total discretion, not a



blind discretion, not a discretion where you cannot make out any.....if there is such situation, then how to tackle, you have to see, then what are the circumstances, what is the sentence prescribed, what is the sentence being by different courts, there are normally, decisions available precedents available like 326, three years sentence or two years sentence, all it can be more, but sometimes you say 326 is try-able by magistrate, magistrates can normally can give three years unless it recommends to the, refers the case to the higher authority for giving appropriate sentence, then 307 attempts to murder sometimes, it is very technical offence, which requires an intention an act committed to cause death, there is an attempt, so this wide range of sentence is certainly creates a problem of challenge before the court, sometimes we have seen exactly similar cases one court is giving three, the other court is giving eight years and we had a, judicial officer who is still there, I am not naming him in Punjab and Haryana, he will give maximum provided, that was his rule, whatever is maximum, he says this is my power, I will give that much in every case, and that was his problem, wherever he goes the problem will go on strike or they will agitate, don't posting him here, so he will use his discretion to the maximum, and we also see the judges, they will use their discretion to give the minimum possible. Most of the case there was a judge, he was called as undergone judge, in every case, he will sentence undergone, and if you go to the jail, they will always say, the prisoners will always say Saab, release me on undergone, I have already undergone some sentence and that I should be released, from that sentence, then there are certain circumstances, ten years has passed, twenty years has passed, but the case is not taken up, both side has strong points, that twenty years back this offence took placed now, I have suffered enough because of pendency of case for twenty years is itself, a sword hanging, so that's the factor, and the victim says that, he has never suffered anything, first he got anticipatory bail, then after conviction, pending appeal he was granted bail, then after the appeal he was granted bail, then in revision, he was granted bail, so throughout he has been on bail, he has never gone in custody even for a day, so this dilemma will continue because we have various, various serious infirmities in our system. The one infirmity is the delay which is involved in the process. That's a subject we can't discuss today, but that's the factor which makes things difficult, to give complete justice. After twenty years, supposing somebody had been heard some injury was caused, then today after twenty years, to punish to death sentence, if the process has taken the time or the process of consideration of mercy petition has taken time, then the person, not been given death sentence, because of that, or being given death sentence in spite of that both are issues which,

create complexity. So these I think some of the points, which I thought, I should mention, then we can have discussion of any questions. We can go this, thank you very much.

**One of the participant:** Your Lordship was referring to, section 357 A, Cr. P. C,

**Justice A. K. Goel:** I am sorry.....I think we have doctor Mrinal Satish and Doctor and Chokalingam Professor Chokalingam, should we first hear them, or we go to the question answer, first and then.....

**One of the participant:** Your Lordship was referring to, section 357 A, Cr. P. C, in spear of awarding compensation, I may express one doubt, with regard to it, in hit and run motor accident cases, where the vehicle is not known, at present we are having a limited scope under section 161 of Motor Vehicle Act, where under a scheme has been evolved, compensation scheme, the hit and run cases victim have to apply to the RTO on that scheme, Revenue Division Officer, and he has to after inquiry award compensation, which is a limited one in cases of death fifty thousand and in cases of injuries permanent disability 25 thousand, my point is whether in such cases in addition to or in exclusion to that one can a compensation a due compensation under 357 A can be provided, ordered to be provided by the District Legal Service Authority, because section 357.....

**Justice A. K. Goel:** This is very important and interesting question, and in my opinion the answer is yes, it can be provided, because he is a victim of crime. Crime has been registered or not registered, F. I. R must have been registered, F. I. R is registered, there.....he is a victim of rash and negligent driving, which is a crime under I. P. C, and whether the accused is arrested or not or the fault is, or guilt is found or not found, but if he has been suffered that much has to be proved, then yes 357, you can apply. This is another very important question, who is victim. We refer to the tort law, history of tort law, earlier in England, the.....if a person was killed he was not entitled to any compensation, why, because they says, tort is a personal remedy, the person against whom the tort has been committed is no more, then there was an amendment in law, a phrase was used in one judgment by house of Lord that it is not profitable to kill a person than to injure, because the tort feaser, the tort doer, instead of injuring, will kill the person, then he is not liable at all, he is liable only of the victim is alive, therefore the law was reformed that, yes even if he is not there, his estate in civil law in tort law, his estate is liable to be compensated, the state represented by his legal heirs, so in accident claim, motor accident

claim, motor accident Act 1988 now, there is a provision that, in case of death the legal representatives may not be dependent on him, even then, even they are financially well off, even if they are not financially dependent on him, there can claim compensation. So same principle will apply. Family members of the accused, accused they are not, no they are not victim of the crime, because, victim of the crime as the crime as the final wrong, the law doesn't make them victim of crime. They have not been, subjected to any crime, as known to law. He is being taken into custody for offence he committed he is not a crime against the family, his family, may be the victims of circumstances, but they are not the victim of the crime, that's what I feel, but I don't know, it's a matter of interpretation.

**Participant:** This Section clearly says, victim or his dependents, including the guardian or legal heir, they are not dependent, they are not there.

as pointed out, you see the definition, how will you say, who has committed the offence, against them, so I think we have to have a purposive interpretation, though they may also be envy can say, but that doesn't appeared to be the intent here, doesn't appear to be here, it's a matter of interpretation, therefore I am not expressing any final view, but prima facie my personal opinion, is that it may not cover that, it's intended to provide a relief to those, who have been, against whom the crime has been committed. under 357 A (2) whenever a recommendation is made by the court, but the word court has not been defined under the Cr. P. C. it's only High Court the offence is with reference to the High Court, then.....High Court is defined, then under Motor Accidents claims Tribunal, injured, legal representatives of the deceased, the officer of the Motor Vehicles Tribunal under the provision, can tribunal recommend, can refer the matter to the legal service authority, district legal service authority because.....court where the criminal cases has been brought, then whether it is, it is Magistrate then, it must be a magistrate, yes, thank you My Lord. Where the trial is taken place, yes, yes, where in criminal cases brought, that court will pass that order. There are cases where no case is registered, because, vehicle is, by interpretation of 357 A some judgements have been given, by the High Courts or by the Supreme Court, they lay down some guideline and they, expanded it a little bit, by interpretation, that by interim order, you can direct straight away the money to be given without following the details procedure, because that procedure is required for final order, but interim orders straight away now the amount is increased to minimum five lakhs, by judicial interpretation, in case of death, but in case of some certain categories of offences minimum

five lakhs and in other up to two lakhs or three lakhs, but now there is an upward trend more and more, there is a demand for a revision, in some states, the courts have been very pro-active, recently and they give the amount of compensation has been given, for example in Jharkhand, I think this scheme has been implemented very seriously, I happen to be there.....this is the victim compensation, victim compensation and the victims have been compensated in a big way by interim orders or the final orders.

This provision of minimum sentence, prescribing the minimum sentence at times resulting in the acquittals as your lordship has rightly quoted, by providing minimum sentence and when the evidence is just short of what is required we are unable to convict him and give the minimum sentence, for example.....I will come to that.....one small case my lord.....a 19 year old boy at the bus stop has winked his eye at a girl that is the only thing, that the boy has winked eye at a girl means 354, minimum two years, I had a dilemma for a small crime of a young boy just winking eye at a girl, two means how, he was to be punished but two years, at that age, then we are helpless because the minimum sentence is prescribed and therefore this minimum is.....your question is very important, your question is extremely important, for this reason here come the role of court to advance the justice, the law may operate in certain situations, so here the proactive role of the judge, judge is not active mechanically, we judges act mechanically, as Obama says, it will be very, very grave injustice, and you say that, these are such insignificant offence for which two years, you're not inclined to give. Sometimes there is a reaction in a given situation and the lawyers also responses to a reaction, sometime inappropriate response. So if it is, so the court has already powers to advance justice in such circumstances by in such manner as is possible supposing the court, court may require with the sentence prescribed is harsh one, disproportionately harsh, the court may this proving beyond doubt is a very flexible concept can be appropriately applied and have a stricter test, and form that stricter test the offence is not committed. You can say, yes offence is not committed because merely saying this, that yes it needs more corroboration, the extent of evidence require to prove beyond the reasonable doubt, is not a fixed concept. In a given circumstances, even without any corroboration, evidence of the relative witness, let me tell you very interesting thing, I met on gentleman we had a conference, and I met one gentle man, who was director general of Police of Bihar, his name was Mr. Abhyanand, so he was a very renowned police officer, he....because of his success in his performance, about ten years back, after the regime, the regime of the previous Government Mr. Lalu Prasad Yadav, handed and Mr. NitishKumar

took over he was successful in big way to check, holding of weapons excetra, so he.....I heard his views and he said I was able to control the crime, why I was able to control the crime, was that I did not made any false case, I registered as cases only under the Arms Act. Which requires I will have to, police constable who will be the witnesses, who can't be own over, and the biggest terrorist I did not made any other case against him except the Arms Act, I will arrest him under the Arms Act and within one month have him punished. I coordinated with the High Court that within one month trial will be over, within one month appeal will be over, and the revision will be taken care of in the High Court or it will be taken of in such a way that within two or three months the whole trial and the man will be a convict, and will undergo two year or three years, so I could book all the dread criminals behind the bars and convict them and my conviction rate is very substantial, and the reasons is the Arms Act with having eye witness account of the police officers, that's all because possession of arms, what I am saying, possession of the arms itself is a crime, for which conviction be there, that's what he told me, I don't know, whether on the ground what is the situation, but this is, but he told me. When I was in Assam as chief Justice, we had a conference on working of the police all the Superintendent of the Police, how to fast track the criminal cases, and how to,. the Chief Minister was also present and I told, the chief minister in Assam that probably is there, you don't get witness and how to book the terrorists and the terror affected areas, where society is threatened, what to do? People are having arms, arms are being supplied by LCF and you can't punish them, so he said I caught hold of found the genuine cases, I registered genuine cases, so that it has respect of the people, people know that, the case established is not false, society generally believes it, trust the police administration, then arrest them, then register Arm cases, and prove them, because no person no common man will become witness against the terrorists. So have a scheme for a revival for those who have becoming witnesses in such cases. This witness, producing the witness is again a serious issue. Nobody is prepared to become the witness against persons who commits serious offences. I had gone for inspection in a district, and given instructions to expedite the criminal cases where people are in custody, so the district judge told me, you exempt me from this direction for one case, I said why? He says, there was a case, where a girl was going on the street, it was a luch time and just before the court on the road, we.....it was a winter time,.... we were standing in the sun, because it was a lunch time, after taking the lunch and we were all witnessing it, that a girl was going on the road, and from the other side boy came and shot her dead her husband, and she was accompanied by her parents,

so murder case was registered, but her parents out of fear, they were....the threat was extended that if you appear as witness, then you will be dealt with the same way. With this threat they left for undisclosed destination, they are not traceable, because they were made witnesses, and becoming witnesses is also a dangerous thing for safety. There is no safety to the witnesses at times and law can't provide safety in a full proof manner. so there is no other evidence and he said that I, myself seen the murder, if I have to go by that way, no evidence, therefore I acquit, that's against my conscious, so at least let my tenure be over if I am transferred, let some other judge try it, I will try to ask the police to find out, who were on duty, whether they can be witness or they can trace out the parents. Which may take some more time. So this is also a hard reality, we have to face.

Another challenging area for sentencing, process of course very few cases are there, the prosecution could prove its case beyond reasonable doubt, but falls short of conclusive proof, sometimes we came across such cases.....that's why proof beyond doubt, is a flexible concept, and it should be applied to advance the justice, not mechanically. Difficulty arises when, at some places court act mechanically, bare reasonable doubt is not something, unrealistic, some doubts will always be there, unless you, yourself seen something. When you say, when you worship the God, where is the God as have you seen it? What is the evidence? Now there is a God, certainly common person like me can't give evidence, but I still believe, that there is a God, or I may not believe. So, therefore, whether it is proved beyond doubt, to the satisfaction of the court that's the definition of proved. Subject to appeal, further appeal, there can be conviction, based on the admissible evidence, admissible and relevant, reliability is an area, where the courts comes, admissibility and relevance are objective testes. of course, there also the parameters, where you can stretch to admissibility, like you say, hearsay is no evidence, then you say, you have principle of res gaste, which is again is very flexible principle, in Evidence Act there are many principles, which are flexible principles, so they have a role to, they have a role in holding what I am saying admissible, what evidence is relevant, reliability is entirely for the judicial mind, reliability is whether you believe or you don't believe, only believe it, I believe it, yes it is possible to believe, there is no reason to what to believe so both reasoning are available with the court, ultimately the law is weapon with the court to do justice, and for a judge who is sensitive who is involved, we can advance justice in variety of situations, but of course not always. I don't suggest always justice can be done, but we can try that.

**Dr. Geeta Oberoi:** Now we have, Professor Chokalingam,

**Professor Chokalingam:** Honourable chairperson of the session, honourable justice, justice A. K. Goel, distinguished judges, and my colleagues here, the presentation of justice A. K. Goel gave a very wide perspective of the various aspects of sentencing, he has touched upon many things which are useful to, the practicing judges, professional judges, particularly what I was impressed was that, in the whole process of sentencing, for, so far, many years it was thought that, task of the judge is over.....

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**SESSION: 10**

**SUBJECT: SENTENCING PRACTICES FROM OTHER COUNTRIES**

**RESOURCE PERSON(S): 1. PROF. K. CHOKALINGAM AND 2. PROF. MRINAL SATISH**

**Dr.Geeta Oberoi:** So welcome back, now we hear professor Chokalingam, followed by Dr. Mrinal Satish and then we go to question answer session with them. Is that format all right for everyone? o.k....Professor Chokalingam.....

**Prof. Chokalingam:** Distinguished judges, in the last two and half days, you are listening to several speakers on the major theme of sentencing several of the new points which made us believe us in externally difficult task for the judges to arrive to the proper sentencing, proper punishment. In the first presentation of day before yesterday I was talking about the sentencing philosophies the purposes are various punishments. I was focusing in the course of mu talk about the failures and success about different sentencing methods of different countries and at the world level there are been radical changes in, revolutionary changes in the sentencing policies. I took up only one country finally as the....the European country Finland, which has achieved remarkable reduction in prison.....and also not against the crime so that was a good experiment which has been followed by many of the European countries, but it is not the same even now, the United States of America and English and some English speaking countries have still following the retributory punishment more punishment for sever crimes. Now in today's presentation I would like to deal with some of the...the methods of sentencing the procedure of....the practices in some of the countries, other countries. Now in the sentencing practices in other countries might help us to follow the best practices, and avoid the mistakes of others to

achieve the goals of sentencing. that why very similarities in the western nations, respond the crime and the values they underline those, sentencing and punishment policies vary greatly amongst the western countries the institution of criminal justice are similar almost in every country. These institutions of criminal justice include professional police, prosecutor's office....public prosecutor's office an independent judiciary and relying on imprisonment as the major sanction for various serious crimes and various community penalties for others. There is much more similarities than the difference in the context of criminal law doctrine the rule of evidence and procedural safeguards. nonetheless most countries over the past four decade sentencing and punishment policies and practices, deal enormous....now current trends and the criminal policies, crimes is increasing rapidly from the mid nineteen sixty's until the early nineteen ninety's in United States, England and the Netherlands and many other western countries and started decline since after nineteen ninety's. however crime trends are not parallel by similarities in policies or institutional responses at least four areas for comparison stand up, firstly prevailing beliefs vary greatly about the cause of the crime and the capacity of the criminal justice policy changes among policy makers in the united States and more recently in England and some Australian states many policy makers believe that crime is the result of bad or irresponsible people, not criminal conditions and inadequate socialization, because it is unscientific assumption, they believe that the harsher punishment for reduce the crime rate to through deterrent and incapacity processes. In Unites States of America, penalties steadily became harsher, to the possibilities that the crime rates may not be much affected by punishment policies, such premises Patrick observes though not changes in the policies are just increasing the severity of Punishment would be widely seen as an appropriate or the cost effective means of controlling the rate of crime. Secondly the relation between the crime and the imprisonment patterns vary greatly. Imprisonment rates and the prisoner's numbers increased continuously in United States after 1973, and nevertheless after 1975 but decreased continuously in Finland after 1976, fluctuated widely in France and Italy and fluctuated slightly in Sweden and Denmark. In the 1990 imprisonment rates have increased in many but not all countries. They refuse to the existence, even general relationship between the crime rates and imprisonment directly or through intermediary effects on public fears opinions policies indirectly. Imprisonment against the impact of the crime in U. S and Europe. Thirdly the policies governed and the quantum of punishment vary greatly. The U. S continues to use death penalty and life sentence without possibility of parole. Prison sentences exceeding ten years



are common there. Rest of the western world has renounced the death penalty and life sentences, without possibility of parole and life sentences without possibility of parole and prison sentences longer than few years are uncommon. So there is a drastic effect between the united States of America and Western countries, with regard to the death penalty and the higher numbers of the imprisonment, but in some countries for example Germany and Austria prison sentences shorter than six months are regarded as distract and serving no purpose and are strongly discouraged. in others including Sweden and Finland certainty of punishment is seen as important but not the severity, and many sentence to days of imprisonment of a person, community service is a commonly used prison alternative in England, Scotland and Netherlands, but it is used as primary punishment in many other countries days fines are often imposed punishment in Germany and of Scandinavian but not at all used in English speaking countries and many other, for example Netherlands and only sparingly for example France electronic monitoring has been common in United States for decade, but only recently to catch on in most other countries. Fourthly near all western countries attempt to ensure use of fair procedures for determining the guilt or innocence at or before adjudication of guilt. countries vary greatly in what they do minimize the unwarranted disparities in sentencing and ensure horizontal and vertical equity among the sentences imposed the approaches range from the approaches of sentencing range from use of numerical guidelines for sentencing in many U. S jurisdictions as Justice Goel has mentioned about the mechanical way of using the gravity of the crime and the number of the years of imprisonment, then prosecutors sentences recommendation as in Netherlands, then guideline judgment, the judgment in England used by the Court of Appeal issued sentencing information system in Scotland and the U. S and earlier several Canadian provinces and categorical sentence imprisonment enunciates in the Finland and the Swedish Criminal Courts. to the approach of the most European countries Canada, Australia, New Zealand and the large part of the united States that leave the matter in the hand of sentencing judges. Ideals and the dilemmas of sentences the most appropriate sentence will depend on the sentencing philosophies and the policies that inspired a judge in his or her decision, that's what Justice Goel also mentioned about the particular judge in a court who always give the maximum judgment and there are other judges who give the minimum sentence so it has a very great relationship between the particular, the thinking the particular insight, perspective of the judge who is guided by several experiences in his life, sentencing philosophies can be divided by in to two basic categories, one is retributive philosophy and the

other is utilitarian philosophy or the consequential philosophy. Sentencing in retributive terms requires that the sentence is of a nature amount the proportionate to the outcome of the crime, there is the crux of the retributive. on the other hand sentencing in utilitarian terms involves achieve a specific future goal, utility a specific future goal it is more concrete aimed at crime prevention by means of rehabilitation and the reintegration of the offender in the society as we have been mentioning in all these session that an offender cannot be kept in the prison forever, he has to come back to the society and he has to integrate in the main stream of the society or the other, Actual sentencing practices however will not allow, for such a nit separation of the philosophies, we cannot say that out of the many sentencing philosophies a particular sentencing philosophy or self-sentencing principle is followed by any judge. Most of the judgments of, most of the punishment that are involved not one but, more than one philosophy ingrained in that particular punishment. Now, though some of the countries, some of the practices followed in European countries have been mentioned in the first day also and today, now for the purpose of ours like a case study, they thought that they pick up the position relation to in relation to sentencing practices in all the Asian countries which are the developed countries mainly Japan.

In Japan both retributive and utilitarian motives play a role in sentencing, nevertheless in the past decade in the U. S and many European countries recently the policy development in achieving the proportionality at parity in sentencing was attempted which means how, disparities in sentencing can be avoided in a number of countries, for example in U. S, England and wales, Australia, sentencing guidelines have been implemented, in other countries, such Scotland, Netherland, Finland, they have started using aiding tools such as data bases of previous dispositions, to achieve greater uniformity and proportionality in sentencing practices. In Japan as there are no formal sentencing guidelines and officials enjoy the great discretionary authority and gives highly individualized sentencing. In the research on the Japanese imprisonment of justice, mush attention has been given to the main officials use their discretionary powers to deal with the offenders through semi-informal procedures and give them, aiming at their reintegration and rehabilitation. Because of this two questions arises, how this commitment to uniformity in sentencing be reconciled with the Japanese criminal justice has been given to highly individualized sentencing and rehabilitation, is it not contradictory to itself. How one can understand this apparent paradox, in terms of what these sentencing policies signified, and what does it tell us about the functioning of the criminal law, and legal

rights in Japan. In order to address these questions, first we have to examine, the legal roles and doctrine within which sentencing decisions are made in Japan, secondly the actual procedural context within which these decisions are made, and thirdly place these sentencing practices against the broader pattern of Japanese legal history and the functioning of law in Japanese society, let us take the legal provision first, In Japan, for every crime there are statutory prescribed penalties, giving the Judge a range of punishment, within which to decide. For example murder carries a minimum sentence of five years and the maximum is twenty years, which may be again shorter or like that. The prison sentence can also be, the prison sentence can also be undermined....deterrent, murder.....is an additional punishment by death, but that may also be decided to be given suspended sentence. There are no provisions, directly relating to the standards for sentencing in the Japanese criminal code. The revised code of criminal procedure takes the amount of punishment should be in accordance with the criminal's culpability and the end of punishment should be to contribute to the reduction of crime and the rehabilitation of the offender, and judges should also take into account, the offender's age character and personal circumstances and motive of the offence, thus we can see here is an example of a hybrid sentencing philosophy which contains both retribution and the utilitarian elements. Now let us see the legal doctrines, the main stream legal doctrine on punishment is of relative retributive, in other words it includes both the retribution and prevention, the punishment which corresponds with the level of responsibility of act, there is a portion to the crime, that's mean retributive for the sake of achieving the utilitarian purposes, giving a person a sentence that is lower, than what he or she is responsibility deserves should be allowed or giving somebody a higher sentence than he or she deserves should not be allowed. In determining the appropriate punishment the role of prosecutor is important in Japan and that is the sentence demanded by the public prosecutor. In Japan the amount of punishment that the judge decides on is typically twenty to thirty percent lower than the demand of the prosecution, public prosecutors are aware of this fact, and so when calculating the appropriate sentence they want their offenders to get they took the twenty to thirty percent that the Judges will subtract, into account. The circumstances allow us, these circumstances allow to make two observations, one is the standards applied by the Judges and those applied by the Public Prosecutors are essentially the same. Two, the sentencing decision are not just made by the judges. These two matters are related to each other. Public Prosecutors will have to take into account, the standards the Judges apply or they cannot reasonably expect the judges to along

with the sentence they demand. The acts of confessing guilt and apologies or too important element often being discussed as symptoms of the importance attached to the act of admitting the wrong and apologizing in the Japanese culture, and the lenient integrating treatment, that offenders may receive if they confess and showed mercy. Looking at the role of these two acts in criminal procedure will give insight into the apparent paradoxical combination of vast discretionary authority and the rule guided decision making. The role of confession and the apologies in the pretrial the trial stage of criminal procedure, in the pre-trial stage Article 248 of the Japan's code of Criminal Procedures, says that, considering the character and the age, and the circumstances of the offender and the circumstances of the seriousness of the crime and the circumstances after the crime, a public prosecutor may decide to suspend the prosecution. Prosecution's decision in this regard depends on a range of elements but one necessary condition for suspending the prosecution is the confession of guilt, accompanied by an expression of the remorse of the offender. During the years 1999 to 2007, prosecution has suspended in around the forty percent of the economical code of offenders, hence if offenders confess and show remorse, there is a good chance that they will avoid both trial and punishment. The practicing.....the practice making people confess is related to the fact that the confession of the guilt of an important source of information both for the evaluation of the actor and the source of evidence, as acknowledge, they are bound to be, they all are considered to be a first step on road of rehabilitation. This emphasis on confession is not only the consequence of their vital importance for suspension of prosecution and in terms of evidence and also because, the confession are the virtual necessity if the prosecutors wish to vindicate the offender. Prosecutors will only vindicate the person, if they approach to a hundred per cent sure, that this indictment will result in a conviction. A confession of guilt is close to, being indispensable to make that happen, not only because, judges expects the confessions and the reluctant to convict without the confessions, given this importance to the confession, prosecutors engage in the plea bargaining like practices leading to a confession concept, which substantive importance of confessions and expressions of remorse. However, it raises a doubt, whether a confession may, as a part of bargain, would constitute a first step on the road to a rehabilitation and whether the offender is truly sorry and really repented, after all there is a quid pro quo relationship, between the offenders act and the prosecutors acts, offenders act of confessing and the prosecutors act of offering a relatively lenient disposal. The expression of the remorse and the confessing the guilt are two important factors that prosecutors refer to

when they determine how to deal with a specific offence and the offender. Johnson a researcher in his study of the public prosecutor, found that seriousness of offence, likelihood of reoffending, remorse, prior record and motive to be very important factors influencing the suspension of prosecution's decision. Confession of guilt and the expression of remorse, can as such be regarded as institutionalized factors of reference, vital for the institutional base of the exercising the discretionary judgment. Now trial stage around the indicated, judges expects the confessions and similar to what happens during the pretrial stage of criminal procedure, confessing guilt and the remorse can result in a more lenient treatment or a suspended sentence. In 2007, it was found that 56.6 percent of the cases were given suspended sentence. However like public prosecutors, the judges apply the denial tariff, a confession may be it of the defendant is not simply a mitigating circumstance that may be absent or the absence of the confession, or the making of irrational excuses can be taken as an aggravating circumstance. The absence of a confession of the guilt and or a remorse can be indicated as a lack of moral consciousness, and it is also listed as unfavorable in the legal judgments. Absence of remorse is often linked to a risk that the offender may commit another crime. As Japan has a 99.9 % conviction rate, trials mainly have the functions of confirming the guilt. this shift from the fact finding to fact confirming is to an important degree may possible because of the availability of the proved confessions, as a consequence there will not be much left for the defense to do, other than to establish that the defendant, other than the defendant is after all not such a bad person and to establish extenuating circumstances. So this is the procedure and the practices that are followed in Japan and which I want to compare what is happening and what was happening and what has been happening, absolutely 100 % .....so I would like to stop here, because of the time constrains. Thank you very much.

**One of the Participant:** Can we have the print out of this.....can we have a print out of this material.....

**Prof. Chokalingam:**Ya..... I have already given it to....the other days also...can you gives the print of it. Print out....I think the Academy will give.....before you.....

It appears to me that it is akin to section 121 of Cr. P. C in India, wherein the Public Prosecutors for the reasons, can file a petition before a trial court that the prosecution may be stopped, now I want to know the difference that in India mainly the Court satisfaction is required and the

Public Prosecutor must act independently, he must take an independent decision, Just not like the mouthpiece of the state and a state's opinion only should reflect, he must independently come to a conclusion that, there is no point in continuing prosecution again there is another check, that the court must also satisfy then only it can give a permission for stopping the prosecution, that is as per section 321. Have you studied with regard to the procedure in Japan, where, the prosecutors hold the sway of or the court has the ultimate authority? I am not sure of it. O. K

**Justice A. K. Goel:** Let me make one or two things clear. As a supplement to but, Professor Chokalingum has presented a let us not go by theoretically, what is the model in the different places. Different countries have different models but different societies and different systems altogether. So it's not possible to copy as it is any model, we have to evolve our own model, and we are a different society. Perhaps, in Japan, there is no culture, wherein every case there will be denial, the total denial, except in some tribal areas which I came across in Assam, regarding the person, who says, yes i have committed the murder, they will go the police station and lodge report, himself that, I have committed murder and, when he is arrested produced before the court, there will be no other evidence, except confession in police custody, but he will also say before the court that, yes I have committed the murder, his layer is telling, don't say that, he will says no.....no.....no.....I have to tell the truth, and then, prosecution there is no evidence, that's all, but this is not the model anywhere else, to the hilt they will deny, the offence, even if there is a clear evidence and 321 has been void, has there been, ever a case where you experience where a public prosecutor has independently made application under 321, to withdraw the prosecution? Even where he is fully convinced that it's a case which should be withdrawn, and if you withdraws, really, he himself will say? We have added a chapter in Cr. P. C, which is a dead letter, is 365 A to L, which is a chapter on plea bargaining, we have copied it from elsewhere and incorporated it, and I think that more than 10 years has passed, has it ever been operated, perhaps may be exceptionally, it may have been, but most it has not been.....and once a lawyer met me, I was chief Justice, Sir have a seminar on this chapter, I said, why? People don't what this chapter is, I said, do you know it. Yes I know it, can it be implemented, yes, it can be, how it can be implemented? I asked some questions, he had to answer, what he had no knowledge also. But he was organizing seminar, he is an imminent lawyer, organizing the seminar, throughout India, also a.....with the help of all authorities, I will place before you those questions, How it is not workable at all. See there has

to be a written agreement, between the accused and the public prosecutor. Which public prosecutor herein in India is authorized to enter in to a written agreement, first of all, let us look at, one? Second, this chapter comes into operation only after the charged is framed, this is not applicable to sentence beyond seven years, mind it, in offence where the sentence is less than seven years, most of the sentence has undergone, where the charged is framed, but those who are in custody, and this is applicable to those who are in custody. For reduction of sentence they already undergo the sentence, which will be finally awarded in most of the cases, those who can't afford the lawyers, those who are lying in Jails, most of you must have experience of visiting the jails. if you not have the first thing I think than more than the Academic discussion to visit the jail and see who are the people, in custody and what is the progress of the trial and why they are in custody. I am from the Bar, I didn't have much experience in criminal law, but when I become a judge, I was very keen to know, who are the people in custody and why? So I visited many jails, and carried out a study, of all the prisoners in that jail. Why they are in jail? so I found that most of the people who are in custody, where we call for reform, of the law after, Hussainara Khatoon, that speedy trial should take place and, people should not remain in custody, till they undergo the maximum sentence, or half of the sentence, following those guidelines of course, to some extent and now, to most extent, there is an implementation of those directions that you don't undergo the entire sentence at pretrial stage but short of that there are large number of under trials in jail who have undergone the sentence, which will be the sentence finally awarded by the court, the sentences I don't have the experience of all the states, but the States where I have seen, I have visited the jails, this is what I have found, see take a case, there is a small theft, the offence maximum punished, punishable perhaps is the three years, under 380. But sentence already would be one month or two months in those cases, but they are in custody for six months. First of all, most of the investigators say, that we will not file the charge sheet before 90 days, 90 days is our fundamental right that's what they think. that is the thinking of the investigating agency, that they have liberty to, file charge sheet up to 90 days under 167, this is how, under 167, they have a right to file a charge sheet, within 60 days or 90 days so they will not file it. At that stage plea bargaining is not applicable, till the charge sheet is filed again they are in custody for a period longer than, now we try to give training to the magistrate in the judicial academies, I have gone to many judicial academies and asked, practical questions and that did not have any training. this is the fact, the person is arrested in a theft case where the punishment is three years, theft is of a petty amount,

where sentence will be given finally will not, be more than three months, but the charge sheet is not filed within three months, after charge sheet is filed he is not able to give bail, but he is not able to give bail of the, surety who is local, third there is an amendment made now, after this, which says, in bail able case, if you fail to give surety, within thirty days, within specified period, one week, then you can be released on the personal bond, now bail able cases, yes, but there are technically non-bail able cases, not very serious offences, but people are in custody for long period, they fail to give the bail, that provision is not applicable, for 36 proviso is not applicable, but they are in custody. Plea bargaining, doesn't help them, it is only a trained Magistracy which may help, the situation and I will wish, the Magistrates are given training under your respective jurisdictions, but basically it is the job of the Chief Justice. Without chief justice individual judges, don't have much role except in their respective, where they are portfolio judges or inspecting judges, they have the heavy load, that system at some stage, system are different, so if they have the training, they say, sir, 436 is not applicable, how do they release, they are not able to give bail, it's not boilable case, order of bail is passed how do I release, which provision in Cr. P. C. Then now we tell them this is Hussainara Khatoon or this is the judgment Ramchandra Rao 2002, speedy trial is the right and, if speedy trial doesn't take place, it violates 21 and then you can release a person. So, where it is mentioned in Cr. P.C it is a fact, it is not mentioned in Cr. P. C, and they are also told by some High Court Judges, you can't apply constitution, you to go by Cr. P. C, Constitution deal for Cr. P. C.....you can't apply, only High Court and Supreme Court can apply Article 21. I said all right, you don't apply constitution, and you apply Cr, P. C but are bound by the Supreme Court judgments? Under Article 141, yes we are bound, so the laws is, this is a judgment laid down by the Supreme Court is it a law? Constitution 141 says, it is law of the land, therefore, the source of law is not merely statute, and source of law is also a binding judgment. This is one thing, which Magistrates have to learn. Second thing they have to learn is that beyond Cr. P. C, they say don't know what is meant by speedy trial, it's a constitutionally guaranteed right, seven judges Bench in Ramchndra Rao in 2002 Supreme Court has said, that of course before that in Antulay's case or, five judge bench or other judgment in one case Common Cause, which was overruled later, Supreme Court has fixed the time line, that if these category of cases not decided in in this much time then cases will closed, that was overruled, because that will be a judicial legislation. But then they have defined, with judges, which judicial magistrates have yet not picked up, what is the definition of speedy trial or speedy investigation? that definition



perhaps need to be, they are need to trained in that definition, that definition is to be inferred or understood from those decisions and when you feel that the person is prejudiced, beyond the time, then there is a violation of rights, investigation of speedy trial, because in some cases even after 30 years, Supreme Court has said that there is no violation of speedy trial, the circumstantial delay has taken placed. Thirty years delay has taken place, still we can't say that it is a violation of right to speedy trial because there is no fixed time for the trial that may be the circumstances when trial is going on and it is not conclude but the investigation is going on, there is no fixed time for investigation, but what is mentioned in 173 (1) is at the earliest. 167 sorry, 167 that is at the earliest. Now this.....if a person is facing a theft charge, where the sentence to be awarded if the charge is proved if the facts and circumstances of that case hypothetically is three months, then if he has under for three months, and the investigation is not completed. Then it is violation of right to speedy trial, investigation. This is the definition of the speedy trial, or violation of right under 21 which is needs to be understood by the magistrates, for making this sentencing on these aspects successful. Which perhaps in my experience has not yet, I can't say that we are successful to that extent. Our Magistrates have not yet understood, where is the violation of right of speedy trial, and then they are saying supposing that we are convinced that there is, because my system of inspection was to go in jail, and sit with the trial Magistrate along with the person whom he is trying, along with the file of that person and to discuss each case with or few cases with him by way of illustration to make home the point as to what should be the judicial approach of the Magistrate, and that to some extent I was successful in imparting training. So they says that, we are convinced that there is a violation of speedy trail, but order to be passed. They say safest order you can pass is to release him on bail, this is.....he can't furnish the bail, this order has passed, then release him on personal bond, he say I release him on personal bond, but he doesn't come, I am trying the case in Nagaland, the man belongs to Kerala once he goes he will never come. So I say what is the risk involved in? He has, you are recording your satisfaction, that if proved guilty he will not undergo to require to undergo this sentence more than what he has already undergone. Therefore even if he doesn't come back, there is no prejudice to the prosecution. Then if you are satisfied, having regard to veracity of the case, that you let him off and close the proceedings, this will be discharge or acquittal. Because discharge will be at the stage of Charge, acquittal is after the evidence. There is the technical difficulty. I said, he will be discharged, because, no trial has taken place, but this is something perhaps, needs the judicial

decision also. People are not clear, the magistrates are not clear, what do they do, they don't have that training. and that covers I will say that may be covering about fifty percent of the prison population, this aspect alone, we have four lakh prisoners in India, two lakhs prisoners are of this type. Where if our Magistrates are trained, are given proper training those cases, cases itself can be closed, this is.....these are the cases of people in custody, there is a large number of categories of cases, or persons who are, not in custody, but cases are pending for 20 years or fifteen years but the Magistrates do not have training what order to pass, take cases, where a person is never arrested, F. I. R is lodged, they treat it as a pending case, charge sheet is never filed but they, they don't know how to close it. So when we introduced this scheme, we.....introduced the action plan, and told the courts that five year case should not remain pending. The five year cases will be monitored, court wise, so when the matter was pushed to this level, then they started studying, what should be the order passed, they said that, only F. I. R is registered only charge sheet is till...charge sheet don't treat it as a pending, we don't take it, on our pendency list at all, that's one way, they found, because, what order to be passed F. I. R is lodged accused is gone before you, why to keep the case pending, I will tell you one very interesting point of law, which may or may not have come to your knowledge, because the areas where I examined these issues, I found there will be ten percent name for an offence, this is the situation where, more than one persons are tried for the offence and as a strategy one will disappear. Trial remain pending then after the trial is at conclusion at that stage, again will disappear, the evidence is over, everything is over, but the accused is not there, and in absence of the accused how does the court can proceed, they are not clear about it. all right, then question .....that I will come...what you have said, that I will come to.....very interesting aspect you have pointed out, I will not deal that right now, before that....this is .....you are right.....you are right.....now, what can be done exempt the appearance, now they say, he is not seeking exemption, how do I exempt the appearance and proceed? Then separation of trial. Leave him aside, for leaving him aside, we have to proclaimed offender that procedure is a headache, which doesn't want to follow. So I found, a Judge from Bangladesh met me, and just we were having discussion, he said we had, large number of cases of this nature, we amended and added section 332 B in the criminal procedure code. Criminal Procedure code is same applicable in Bangladesh and Pakistan. O. K. 1898, they have not revised it only, they have, added A, B Sections wherever they wanted the changes and there is provision 332 B of the Bangladesh Criminal Procedure Code, that once an accused is produced before the court and thereafter he

disappears will not be an obstruction in the trial. The trial can proceed in his absence, even in absence of his counsel, once he has been served, once he has appeared, then the trial will not be stopped. That's one way they have found to proceed with the, trials. But here it is happening, where one of the accused is not appearing the trial is obstructed. And then there are ten twenty, thirty, in some states there is a fashion, particularly I found in Bihar there are thirty, forty accused in a case, of course, eight, ten, twelve, fifteen I have seen in Punjab also, I don't know about the other states, but the...this is the situation, now would sister said, what sister said, what to sentence we were dealing with a case from Bihar, in Supreme Court, last year, what we found is, two persons have filed, out of five were given life sentence, two persons filed appeal in Supreme Court and they had the least role. Those who were given direct role, they did not file, and so asked them what happen to them? No, they have not filed, they have not coming....they are not coming we understand, but where are they, what does happen? They are at large.....years....five years back where the High Court has given the Judgment, only we have been arrested, then we issued the notice to the chief secretary of Bihar, and the Home Secretary to give us the Data of cases where the conviction has been confirmed up to High Court and the persons have not been arrested.. So the data which they gave, was very interesting reading, at least 70 % whose conviction was confirmed up to five years ago, have still not been arrested. What they do is, I will say, the same thing we were examining in Punjab also, we found most of the cases are like this. That they will change the name, they will be living there only, with the changed name, of course those who have properties, different things, those who have the properties will manage, with the local police station and give them monthly, some amount.....and there are substituted accused also.....but here is the person who has committed the murder he is going free, he is sentenced.....in collusion with the police. He is never arrested, so we constituted a committee, headed by the Home Secretary, the Register of the High Court and the Secretary of the legal Service authority to monitor. I am sure, that persons whose conviction is firmed, within a reasonable time, they are arrested, to fix a time table to make an action plane, within how much period they will be arrested, first to take up the cases, which are oldest, excetra.....excetra.....so this is a matter of governance, or the criminal justice system, where.....which are various other aspects of sentencing in a way. of course we have not at all covered the aspect of sentencing where no trial takes place or where no F. I. R is lodged, rampant criminals, rampant crimes, but no F. I. R. Law is not able to cope up, we have been thinking of rule Law but the law is not able to cope up with the level of crime, like crime by

hard people, people in power or the position. I am reminded of a very important scene in Ramayana, where Bali is killed, and there is a very interesting debate, when Bali is killed by Ram, for having unauthorized kept wife of his younger brother Sugriv. So he had the power that nobody could kill him on his face, facing him, he had a boon, fifty percent of his opponent will come to him pulse his own power so he will out smart, always, and so Ram killed him from Behind. When he killed him from behind, before his death, he hit him with an arrow. He asked Ram, you are saying that you are a righteous person, what is this? I don't mind dying, but what is this you have done? You have hit me from behind, is this your ideal, is this the ethics that you are followed? So he says, I have not violated any ethics, let me tell you, let me explained to you. See the offence which you have committed calls for the death sentence, and justice demand that you are given death sentence. But who will give you death sentence, you are king yourself, and you are armed with this boon, which makes it impossible to execute death sentence. Therefore for demand of the justice, this is the only remedy which was available. this is a situation of course, which law doesn't permit today and of course he also cited an higher authority, he said, I am also king, and it's my duty to do justice and I am bigger king which covers this jurisdiction. Because I am king in exile. He also cited that authority. But that's a different situation, but the situation today is that there are so many Bali's who can't be punished, There are above the law, our system is not able to cope up, say the....we have made yesterday, the conference is going on, today also it is going on, organized by the Green Tribunal in Delhi, on environmental subjects. See the violation of the environment, we have made law that all right, the person who pollutes will pay. And he will reverse the damage to the environment, that's called a precautionary principle, or polluter's pay principle, but neither, precautionary principle nor polluters pay principle, can be fully applied in this situation in which we are. We are sitting Bhopal, where three thousand people died, with the toxic gases. have we been able to do the justice, as required under the rule of law, of course we have reconciled to the situation that some damages are given that some compensation is given, but that not the only thing, have been able to reverse the damage, people have died, people, their next generation is suffering from cancer and the whole are is and we are also, I was wondering yesterday, I read a news, that..... And there was a great appreciation for that. That America has now sent people to kill people in Iraq, what is the name of that gentleman, who is I.S., Islamic State, so they have been authorized to kill, with a mission to kill him, to, read his secret hide outs, and they are there now, and they are experts in carrying out this operation America earlier,

three years back or four years back carried out an operation, to kill Osama Bin Laden.....O.K they said that the rule of law requires a person must be tried in accordance with the law, then only he can be punished, see America is going to be different country, and killing him, it's not a genuine encounter as such.....that exceptional clause I have mentioned at the time of killing of Bali, and perhaps killing of Bali, at that time has sought to be justified, but today, of course our law doesn't permit encounter, biggest terrorist, biggest person must be arrested and tried according to the law, that's all it's not possible, to do it, in a situation, that's another issue of debate, how to tackle with a situation where a person cannot be punished at all, either he is armed with so much power, or arms power or the offence is of such a nature, two three years back I read a newspaper report, about the judicial order, remove all religious places from the main roads, unauthorized built religious places from the main roads, but I don't know how it can be implemented, it's a fact that, Supreme Court passed that order perhaps, yes....circular has been issued to all the states, all the religious places unauthorized built on the main roads, yes.....yes....yes....against such action.....against the implementation of this order, but what i find, while going to the Supreme Court from my house, there are many places on the main road itself, which are clearly unauthorized, no....there can't be any adverse possession against the state first of all, if it is a public land, if it is a private land may be....public land in question.....but the encroachment of public land.....there can be adverse possession against the State, because adverse possession also requires the person, who is the owner, he should know it, from his knowledge it is been done and to whom you will attribute the knowledge in case State, I don't know, I didn't studied, but any way this is the serious subject when we have, we are thinking of rule of law, how the rule of law can prevail in certain situations, may be a matter of some scholarly study, how do we do it. Like environment pollution I am walking on the road, there is no fresh air available now, air and water, fresh water is not available we used to as children in villages, we used to drink water from the wells or from the rivers, but now in Delhi unless it is RO water it is not safe to drink and somebody told me, if it is RO water it will lose all minerals, it will be safe to drink but, it will be without necessary minerals, which are required by the body. There is I am fleshing, I am breathing polluted air, and I can't punish anyone. I am also subject to the noise pollution all the time I thought at least as judges we can enforce our rights but when I became Judge for the first time I used to have noise all the time in the night, when sitting in my office there will be very high sound, I asked my PSO, he says sir, there is a marriage palace is there, thereby the highest volume the band will be going on or

the music will be going on. Supreme Court has given a direction in a PIL in 2005, but not more than 50 decibel sound and not beyond 10 p.m. then I think most of the places I have gone I have found the problem is still continuing, now it is continuing in Delhi also. Long back in Delhi, I remember, there was a PIL to remove encroachment from the public lands and if I correctly remember the figures was that of almost fifty percent of land, public land in Delhi is under the encroachment, about the 25 percent land of the railway and about 25 percent of the land of the other department of the government including defense, one. More than fifty per cent land, buildings are constructed without legal permission, or contrary to the notified land user. may be a criminal offence but who will punish and to whom, we all know only area, it was a farm houses no construction was allowed, only the plea was in the farm we have made a house, to look after the farms there is no farm now, only houses now commercial buildings, I don't know master plan has been amended and all that has been legalized or continues illegally, but certainly if it is illegal, it's not possible to enforce the law, therefore these are of course different areas not perhaps directly, we are studying only sentencing by which, our common man can be in custody, but those I am only trying to think, that there are serious offenders, and they may have a great benefit to a great extent, and they may be in high position, perhaps law is not sufficient to cope up, and who will make law for that, is another question. We are dealing with the black money, there is so much black money sat in foreign countries and two three years back there was a lot of debate, baba Ramdev used to say that all right, this black money will come back, everybody will get this much money and people started making calculations that we are going to get that money. But how we are going to get it? The law has to be ahead of the offender, this is perhaps the law enforcing machinery or law is not ahead of crime, so everything is not possible, so we have to limit ourselves to the extent, we can. Ultimately, therefore the idea was only to.....as sister Joshi said that we also think of the family of the accused which is also a victim. I agree to some extent, family of the accused is also but we have to enforce the law to the extent the law permits punishment and some people also said, why we have any sympathy to the accused, after all he has committed the crime, this is one view. He has committed the crime can you give him a punishment, more than the prescribed punishment. Perhaps, what is needed is, we were discussing the Japan model, what is really needed is, a.... stiff punishment, which is lacking in our system, and to deal with a repeat offender, can we reach a situation where, online offence is committed which is registered online and in continuity the person is apprehended and the investigation is done and trial concluded

in one week or on third. We can reach that situation, perhaps that may be the ideal, that the sentence as Professor Chokalingum gave figures and views of some experts that it's not the severity of the punishment, which is the answer, two three years back we had a Nirbhaya Case in Delhi and a committee was set up seeking views of every person, and some people suggested give death sentence as a minimum sentence for a rape, perhaps they were under the impression that doing it may control the crime. But this is also a study that it is not just a severity of the sentence which will help always in preventing the crime. so our focus was only this that the Japan model, yes we have to take ideas from everywhere, but before taking to our system, to understand the entirety of that system, as I was reading from the presentation that most of the cases court is concerned only with the sentence part. The confession before the public prosecutor or confession in police custody, is admissible, we took that idea in TADA cases, we have amended section 25, we have amended a....what is the section in the TADA section 9 or .....fifteen section fifteen was reintroduced in TADA in 1987 which was upheld by the Supreme Court in Kartar Singh's case, that you can a confession in a police custody before an officer of a particular rank, and that will be admissible and on that basis you can convict. So they have provisions in Singapore, they have provisions in many countries where confession in police custody is the main basis of conviction, and there conviction rate is almost 99 % to hundred percent, but in India we have not accepted that principle even TADA was an exception situation, wherein it was upheld, but I think very exceptionally, even in new cases, now the new law which corresponds to TADA , NI Act is there, perhaps this provision is not there, confession in police custody, confession in police custody, therefore we depend on the evidence, and in certain circumstances evidence is not available at all. He says I will give evidence, but who will protect me? That question is still, that question still remains. Therefore ultimately, we will have to focus on, the areas which are immediately before us these are the matters, still left to Professor Chokalingam and other experts who go into the various issues. But as Judges we have to go, you can go only to the issue before us, and apply the law as it stands, give me some level of discretion or some amount of discretion in giving interpretation or the purposive interpretation, but ultimately we have to limit ourselves to the sentences prescribed, basically, Prof. Chokalingam I think, is thrust, his thrust of his presentation is that some level of discretion should be there but not total discretion, Japanese model perhaps gives total discretion, and the recommendation is total discretion is not good, there has to be some guidelines, Law must provide some guidelines for the court to enforce, experts must study and

provide a sentencing manual that is what Malimath has also suggested, Malimath Committee has also suggested and that work has not been carried out, to my knowledge, I am not sure whether it's a .....its high time that such manuals are prepared but some elements must be left with the court. But not totally without any guideline. Sentencing discretion should not be unlimited, but sentencing discretion should be there, so it should be minimized to some extent.

**Prof. Mrinal Satish:** So I think as spoken on some of these issues yesterday, so what I will try to do just, what Justice Goel mentioned, like I said yesterday that Malimath Committee report said that we should include sentencing guidelines, using what the model is there in U. K. without really understanding, what the U. K model was, so also what the U. S. model is and was, so what I am trying to in next few minutes, just to given an overview of those models, to understand the context that they are speaking in and house about is does not apply to India at all. And can take some ideas from it and within the framework of a law, but them we need to, we need to try and understand exactly how that system operates. So just to give a brief background to the English sentencing system, as we know pre 19th century, England has mandatory death penalty for all felonies. So judges absolutely had no discretion at all. In 1861 they introduced a court, which is similar again, we can see 1860 herein 1861 there, and the frame work that we had is I. P. C where only maximum punishment was fixed with absolute discretion with the judges to sentence, depending upon the facts and circumstances of each case. It was only in 1908 that Appellate review of sentencing was introduced, so you go to an Appellate Court on the issue of sentence but the only the accused could go the Appellate court on the issue of sentencing, that was introduced only in 1908. Then the reform happened in 1967 when the Parole was introduced, parole as understood in the U. K context is not like, not that terminology that we use in India, it meant that the decision went to release the prisoners, could not be with the judge but with the prison authorities who is looking at the person whether the person has reformed or not to release the prisoner, then in 1970's the court....the court of Criminal Appeal started issuing the guideline judgment. As discussed guideline judgments are little bit later, but that one model that they followed, and law reform with respect to the sentencing in U. K has taken place in the last 25 years, first with the enactment of the criminal justice Act of 1981, which said that, they should move towards the just dessert model, where the focus would be on the offence and not the offenders, but at the same time, they introduced mandatory pre-sentence reports, which meant that every case, that the judge has to appoint the Probation officer to go and look at the background of the offender and get information



accordingly, then the crime and the disorder Act 1998 where the Court of Appeal started drafting sentencing guidelines in appropriate cases, that power was given to the court, and also a sentencing advisory panel was set up an independent body which the court of Appeal could rely on to get advice, but once they got the advice they followed the advice mandatorily follow the sentencing guidelines.

Then 2003, Criminal Justice Act, was enacted this established what is called as sentencing guidelines council with mandate to draft sentencing guidelines. The Council has to draft guidelines, it could receive a proposal from the Advisory panel, or from the Secretary of the State, so earlier it was only the sentencing advisory panel only the judiciary had the power, here the Parliament introduced the power to the government as well, so the proposal could come either from the panel or from the secretary of the State who was the government functionary. Then the Coroners and the justice Act 2010, so you can see, you have between 1991 and here began 1998, 2002, 2010 so four substation in the period of....around 20 years going the confusion in the system trying to figure out how to, best way to achieve do the sentencing process. The Coroners and justice Act 2010 abolished the sentencing advisory panel and the sentencing guidelines council. Something that set up only 10 years back, abolished completely. Then they established a new body called as Sentencing Council of England and Wales, with mandate of drafting sentencing guidelines. Here the Courts are required to follow the guidelines suggested by the council unless they could given the reasons that it would be in conflict with the interest of the justice to do so, and the council was required.....is required to consult the Lord Chancellor and the Justice committee of the House of Commons. When the draft guidelines are ready, and in contrast of the sentencing advisory panel and the sentencing guidelines council, the majority of the members in this body of the sentencing council of England and Wales are judges. So in 2010 this is what is in a force right now, they are completely changed from what can added in 2003, which is what, Malimath Committee had took into consideration. Position in England has completely changed, so we say, that England system as it is in 2003 then, its actually completely different system, on the other hand United States a began with the completely discretionary model of sentencing, when again judges had full authority to do.....to give whatever they wanted and there were also a parole system, now the problem that U. S faced, this is in the federal system was that the Judge says, that the sentence is ten to thirty years. That decision when to release the person was with the executive with the prison authorities. So what ended up happening and like sir mentioned few

minutes back, it also become the people were released, predominantly were whites the black were kept in the prison with the extended periods of time. It became political, so for thirty, forty years they realized that judges had completely lost control of, how much a person spent the time in prison, so lot of studies, so they came back, to compress and said that there is a need for reform. Now the reform that happened was exactly opposite of what people were calling for in terms of change, the change they were seeking was a parole system, they said keep the discretion back to the judges and not to the executive, but when it came to the U. S Congress and they were legislating they did exactly the opposite. They said lets remove the judicial discretion completely.....lets.....and remove discretion of the parole officer also. We will make a legislation where you will have a mandatory sentencing guidelines and they introduced the sentencing reform Act 1984 and brought in Federal sentencing guidelines. Few other states also.....i will show you the sentencing guideline table. So this is the sentencing guideline table in the Unites States. There are people languishing in jail for thirty forty years also in US.....so what they did was they made this table. It look like a logarithm table like we were used to do in math's. On the vertical axis there is what they called offence level, zone A, B, C and D and on the horizontal axis they had a criminal history, so I will.....there is this website, its and informal thing what they call as sentencing calculator as it is called. So we see how actually sentencing would take place under the system. So 18 US C is the equivalent to the federal structure of the penal code, so let's take an offence, let's take kidnapping, so kidnapping is covered in 18 US c is 1201 capital.....small " a" so minimum punishment here is 120 months to 151 months, it is considered as zone D offence level 32 and history one to thirty five thousand to three hundred and fifty thousand is the fine. So the judge has absolutely, no discretion you have to give 121 months and minimum of thirty five thousand dollars as fine. So then there are few questions that the judge has to answer, was ransom demanded or a demand of ransom is made? If he says yes to this, you go up, you see, the punishment has increased immediately and remove this no ransom, then we say, victim sustained bodily injury was the injury was serous but better than the permanent or life threatening, dangerous weapon was used let see what happens to the sentence, it has gone up, then, we say victim was not released not before seven days had lapsed, it has further gone up. then we will say, what sort of victim in section 3 it has listed victims, say abuse of position of trust or a special skill then it ask you what sort of trust, the defendant reposed, was it a public or the private trust is used, the special skill and the manner in a significantly facilitated the commission or conceal the

element of the offence, we say yes, which become up much more so as you add few factors, sentence will just keep on increasing and then next thing they had was acceptance of the responsibility so we say that the defendant clearly accepts the responsibility, if you click yes, then it will come down immediately, taking that into a consideration, then we say criminal history, if its someone who has first offender, this is 235 months minimum, you make it higher it becomes 262, you make it one more step or two more step higher, so the sentence goes on increasing. So judges has no discretion, you had to give the sentence and if you didn't give the sentence as now it becomes 324, if you give.....so this is thirty years, twenty years sentence, and if you gave less than that, it is straight away misconduct on the part of the Judge, second you could go appeal, the prosecution went on appeal, saying that the sentence was 324 the judge has given twelve months.....there is no discretion. So that question came up before the.....the site is.....if you just google Sentencing calculator in this is the first hit. Sentencing calculator US, this is very informed, this is for the public, it is not an official site maintained by the US sentencing commission. So therefore we could clearly see that this was the problem.....this is what has been recommended for India also by Malimath committee, so he recommended that, Malimath committee has discussed.....But this issue was that, the challenge before the US Supreme Court in a case of Booker in 2005, the .....this man Booker went to the US Supreme Court and said that, how can you remove complete judicial discretion, then the question was discussed yesterday is on burden of proof, he said you can't increase my punishment like that, without giving me an opportunity to say anything in that regard and in US it is very interesting that Justice Stephan Brayer, who was the judge of the US Supreme Court, was the chairperson of the Sentencing Commission, he was an appellate judge then and he was a chairperson when this guideline were formed, so the issue comes up before him, and of course US Supreme Court said, and he also agrees, fifteen years later that this was the mistake. So what they do is, they cannot strike the entire thing down, because they say it's around for this many years so they removed one provision, they says that this mandatory, they say that the mandatory nature of the guideline is removed, but then the very interesting problem that happened that all the judges in that period of 1984 to 2007 were people who were sentencing using sentencing guidelines. So they didn't know and had no experience of judging without guideline, so even though they were Supreme Court said, that the guidelines are not mandatory judges kept sentencing using the guideline so in 2007 matter was brought again before the Supreme Court, saying that your judgment is not being followed. and so the US

Supreme Court said, fine you can use the guidelines as a starting point but don't follow it mandatorily, the reasoning is important, if you are followed given treatment of five months, you have to say, why you are giving five months sentence, and you cannot say, because the guidelines, say that you have to give the reasoning, all these cases are actually cited by Indian Supreme Court showing what the situation is there in Premsagar.....State of Punjab V. Premsagar 2008 (7) SCC 550, and subsequently it was noted in both in Shradananda, the second Shradhananda and.....it is also in the recent judgment, five judge bench, noting this is what is happening.....Hariharan's case Talmil Nadu, this is what is happening so therefore blindly taking those guideline system is not going to work so in terms of models there have been three models that have been followed, the respective guideline one is the legislative model, second is Judicial model third is the sentencing Commission, this model is the sentencing commission model. Just to go very quickly on these model one is prescribing maximum punishment and no other guideline that's the legislative model, why it's a guideline is because there is a maximum punishment, if there is no maximum punishment, then its open, which means that you can give whatever sentence you want. then mandatory sentences and no judicial discretion that's very rare, where you say this is the only sentence you can give and other sentence you can give anything else, but mandatory minimum have been introduced like it is said yesterday amendment Act 2013, where, mandatory minimum of seven years, ten years, twenty years excetra, like sir mentioned earlier that the experience of the mandatory minimum is either the court just gives the minimum or they acquit, because there is the feeling that this is unfair because, you don't want to sentence someone to ten years, when you believe that, that person deserves that punishments. Then professor Chokalingam mentioning that there are other jurisdictions which have guiding principles like Sweden, Finland and Australia, like they provide a theory of punishment and factors that should be considered and not to be considered. So the weakness of this legislative model, it has the political nature of legislatures, like Justice Goel mentioned that the incident happened the legislature want to increase the punishment that is the first reaction there in US President Obama mentioned, it has a very interesting history, which goes back to the election of 1988, when this senior Bush was the Republican candidate and Mr. Dukaki was the Democratic candidate, now Dukaki was on his way to win that election, Bush was not really doing well in that election, so they were trying to find, what is the issue, that republicans can take up to actually get the public towards them. Dukaki was the Governor of state, I don't know which state, what he had done just one month earlier, he has

granted pardon to a man who has, committed an offence of rape and murder, entered a house raped and murdered a woman who had married woman, so in a Presidential debate, Dukaki was asked by Bush, how can you do something like this. Would you do it? This is very offence, would you do it if the victim was your wife, and Dukaki said, it was a matter of principle I would do it irrespective of who it was. Next morning, onwards adds here is the man who will give pardon to a person like this, slowly the election started, going against Dukaki and he lost the election. As the next presidential election candidate, was Bill Clinton. Bill Clinton followed what exactly Dukaki done earlier, not as the Clinton followed a different philosophy, but when it came to the election, he said no I am very strong man, i will increase sentences, I will ensure that people remain in jail for extended period of time and he bit Bush in the next election and the Narcotic laws were introduced, during Clinton's time. they started war on drugs, and that increased punishments to such a level now 25 years down the line, there is a saying in the US that black mother, a set of black mothers goes to a nursery, and you can say that, one of their four children will be in jail for eighteen years form then, because the legislation, the narcotic legislation is such and again the racial, issue comes in there, that crack has much, much higher sentence, possession of crack which is predominantly something that blacks used, had life sentences had absolutely, no discretion in the table it would get to the life straight away, but Cocaine, which is the purer form, which the Hollywood actors used, which the whites used has five years, three years, seven years like that. So, now 25 years down, look at the US prison statistics, people in prison are mostly, blacks, whites get a way like community service, which we were discussing yesterday, so that make to US have a relook at what, it had done in terms of letting the legislature getting influenced the entire sentencing process, now the judiciary is taking it back. In judicial models, we had the appellate review sentencing, like in India, where in Appellate Court looks at what the lower court has sentenced, within the framework of the law, can modify the sentence, all guideline judgments, this was used in Austrelia and England like I mentioned earlier, the classic example of guideline judgement India is the Bacchan Singh's Case, Bacchan Singh and Macchi Singh, they give you.....justice Thakkars Judgment, where they give you indicators of what is aggravating, what is mitigating, so that the Supreme Court giving you the guidelines on what should be done and, the sentencing commission model, which I already mentioned, sentencing commission are permanent bodies, set up by the legislature, which study the sentencing and then recommend to the court for a particular guideline, US now it is like the commission didn't exists, again you can go on to the website of

the sentencing commission of the US, it is not mandatory anymore, they do research on sentencing and give that information to Courts, which can use that information, however they want to in a sentencing process, the other thing that the US done is in some states, it set a body what is called as sentencing information system. that means any just sentence in a jurisdiction, they have to fill up, brief details and that some other judge sentencing can tap in to that, see o.k. a similar crime occurred in that jurisdiction, what their colleague, give, there is no, absolute disparity in the sentencing process, so that's basically how, the, how sentencing is happening on some of these jurisdictions, US and the UK and there is convention like that something which we can take, but saying that we can go completely to that system without understanding, what India would be a terrible mistake, like plea-bargaining, then it is bound to fail, if we do that. Thank You.....

**Justice A.K Goel:** We recommends that only those who are interested in studying there are two judgments which are recent, which you may like to study is the, this judgement of Union of India versus Shriaharan, second of December 2015, this the judgment by five judges, where the issue of correctness of the view taken in Shradhananda, Shradhananda we assume no, the question was rarest of rare case, and one of the judges Justice Sinha said, that there can be a third sentence, between the life and death, there is a third sentence instead of judges sometimes tend to give death sentence even in heinous offences, saying it's not a rarest of rare and the life is not enough, because the life means 14 years, after fourteen years of the imprisonment. So you can give a third sentence, you specify that he can't be released before twenty years, what in one case now, Delhi High Court has give thirty years in Katara case and, before thirty years he can't be released, that is the fix time, but this issue was referred, and in Hariharans case the majority view, justice Dattu, Chief Justice Dattu, Justice Khalifulla and Justice Ghosh have taken the view, yes it is open to the court, instead of, while giving life sentence to say that the person will not be released from custody for particular number of years, say twenty years, thirty years, forty years, fifty years, instead of giving death sentence, by saying that it's not an ordinary crime of a murder, but more serious and that gravity, you can define and thereafter say that these are the peculiar features or the special features, which warranted or has sentence, and there while giving life sentence, which is the only prescribed alternative to death. The court says that it, cannot.....cannot be released before particular number of years and of course two judges disagree, they dissenting that we can't go beyond the legislation either, we give life or death and remissions excetra is in the realm of the government you can't.....court can't it. That's

one judgment you may like to study because on this aspect of sentencing, if want to have an academic knowledge without this judgment of the Supreme Court, perhaps it will be incomplete. The other reason the judgment of 21st August 2015, on internet if give this date, this judgment will be available, or there is a site advocate khoj dot com, where date wise all the judgments are arranged. This is the Vikram Singh Versus Union of India, where it has been laid down, upholding 364 capital A" that legislative prescription of sentence would not be normally open to the judicial review, here the question was of validity of 364 capital "A" where minimum sentence is life, and the challenge was the ground that there may be a situation where a minor is kidnapped and released immediately and the court has no discretion and the court is bound to give minimum life, so this violates Article 14 and 21, you can't treat unequal as equal or, it's a grossly disproportionate, shockingly disproportionate which therefore, is foul of Article 21, is a question of course the Supreme Court said that, normally it will not be and in this case, the legislative prescription of minimum life sentence was upheld. But there is a discussion on the, on all available sentencing philosophy and sentencing options in different countries, there is a discussion in this two judgments.

**Dr. Geeta Oberoi:** Its time say good bye and give thanks to all our resource persons, first of all justice Gyan Sudha Misra, whose been with us patiently for three days chairing all the sessions, thank you mam, and Honorable Justice A. K. Goel, who distured his sleep and came at 6 O'clock flight, reached 7 O'clock here to be with us. professor Chokalingam who is been also with us for past three days, and giving us so many different insights, Mrinal Satish, my former colleague and of course, now professor at National Law School, so thank you all, also thank you to our intern Vaibhav, and Programme Coordinator, Milind and thank you to all of you, thank you so much, till we meet next time, for next conference, so we have given you a.....it's a two page feedback form if you can fill that and deposit it with programme coordinator. Can we have a big round of applause for all faculty, resource persons.....for patiently hearing this group has been really very good, seriously thank you so much, for being so nice, thank you.

**Dr. Geeta Oberoi:** I take opinion of the house, would you like to have fifteen minutes tea break, or would you like us to continue,

**Participant:** We will continue, but if the tea is served here fine....

**Dr. Geeta Oberoi:** O.....tea could be served here, tea coffee could be served here, yes.....fifteen minutes o. k. so we come back at eleven fifteen.