

**SEMINAR ON THE POWER OF JUDICIAL REVIEW: SCOPE  
AND DIMENSION**

**(P-978)**

**18<sup>th</sup>-20<sup>th</sup> March, 2016**



---

**VERBATIM REPORT**

**PREPARED BY:**

DIKSHA GAREWAL

INTERN

**NATIONAL JUDICIAL ACADEMY**

**BHOPAL**

## Table of Contents

Session 1 .....	3
Session-2 .....	19
Session-3 .....	38
Session 4 .....	53
Session-5 .....	73
Session-6 .....	90
Session 7 .....	112
Session-8 .....	128
Session-9 .....	144
Session-10 .....	158
Session-11 .....	183

## **Seminar on the Power of Judicial Review: Scope and Dimension (P-978), 18<sup>TH</sup>. 20<sup>TH</sup> March, 2016**

### **Session 1**

#### **Judicial Duty Vis a Vis Doctrine of Recusal**

**Justice Gyan Sudha Mishra:** Let shall have a thing and very fruitful one I am very happy to be here especially because this wing is called gyan manthan, so I think and truly relevant... So, Instead of my introducing to each other, I guess you now of course professor Baxi perhaps does not need any introduction. We all are very fortunate to have him here and Dr. Gupta and... Oh! And celebrated... So I would request all of you to introduce yourselves to each other. You're...

#### **Introduction of Participants...**

So all of them are quite familiar, the faces are now before us. Pleasant of coordination. . So you all are aware of the subject and interestingly I noticed a report also. There is a concern about the subject of recusal in the system of administration of justice. so, it's extremely relevant because all of us litigants and members of the society, we are getting concerned, and the concern is that why there is recusal, there should be reason for recusal or not, because after hearing the matters for several months or may be years, if you accused then are we, in supposed to give reasons also. I think this is an extremely relevant subject and the contemporary administration of justice, but in state of my, in case I am chairing so I would, I am a beneficiary because I would be listening to all the views that would be filtered and come up before this guest audience and I have the privilege of inviting the key speaker professor Baxi on the subject because he will give us a wider horizon and the direction what should we as judges do, what you think is correct, they are the guiding light, what should be exactly done. It could be the right course for us.

**Professor Upendra Baxi:** thank you very much Justice Gyan Sudha Mishra, judges, my friend balram gupta, it's a great pleasure again to be here and to meet many of you. I by definition do not have to take major decision that you have to do in your offices, I respect the justices very much,

because you decide it and corp the destiny of the nation. We don't, we are just the law teachers. We educate some of you, to become lawyers and some of you to become judges. I try to empower jurisprudence to you and now the. I adopted. Which I will talk about it. Demonsprudence and I mobilize the computer spell check because his lordships are certainly not demons. But, the computer never encounter that word, so it awaits us correct status demonsprudence. Now, it's a big pleasure. I am very grateful to ruchi for incorporating large number of posterity. As you have concluded I am fond of my work... All these articles are mine, which is a pity but, I become some, it is a good book and I urge you to read the materials and refer to some of them to other self. I had become somewhat professor in my life an expert in recusal and I owe the wisdom, the expertise to the...by justice Kehar and justice Krishnan of Supreme Court. In what is called Sahara decision, subroto Roy Sahara, and that is the first time and the very major decision for the relation between the bench and the bar. The bench is attacked by the lawyers, the. Of the Indian bar among the doens and others my friend, and how did the bench response and says a new chapterie, aggressive advocacy is now opened up and justice Kehar absolutely comes hammer and thorns at the Indian bar, at its judgement, last portion of it, it's a long judgement, you can read it when you get time, because it binds the article 141, you know it's not to read it. You can probably distinguish it that's it, but not overrule it and distinguish you got to read it sub portion of it. You know the tricks I don't know it. so justice Kehar in that case said that, there is no convention on recusal excepting pecuniary bars and ever since then I have been studying recusal, common law, a background, the American norm and ruchi is being kind to and director is being kind to incorporate decision and beyond which I sent to them and something on Bush V. Gore, which I sent to them in the book of readings. You kindly do read it, otherwise discussion. What I will do is in this session to discuss the problem recusal in comparative constitutional provisions and the next session I will discuss the Indian situation, and as the Justice Gyan Sudha Mishra has already. There is something in the Hindustan times that forbid recusal. Made available in case you do not know it. We will discuss it in second session. The first session I would like to deal with this delicate difficult subject. In terms of conflict of two doctrines. The doctrine of recusal that would be the one doctrine and the doctrine which is in common law or in other jurisdictions known as duty to sit. Which justice Kehar translace in India, both in the subroto Roy Sahara decision as we all as seek on opportunity to have the bench in the NJAC case. In NJAC case the first to understand is of recusal each judge writes

their opinion about recusal. So, that first recusal decision and then the NJAC decision and you can't understand the NJAC decision without the recusal decision, I will come to them.

Justice Kehar adds a third dimension, namely third schedule of the constitution of India. we will come to that at the second session, but, in common law, in America and England and I take much of civil laws so the distinction is between duty to sit and duty to recusal, and I look there is material on literature of common law and the research is not yet over and therefore I request dr. oberoi to share with you a book on judicial duty, ruchi should mail, now I don't have it, please do give it to me. That book is leisurely reading. It goes back into the history of common law and the principle, so what is judicial duty? And it is a book by Philip Hamburger, it's a fascinating book. You kindly read it at your leisure, but here is nothing much to say about the recusal as far as I can see. So my expertise is not a great danger. I can and lit about it, but in case something in that book on recusal please help me with it. As far as I can see it does not discuss it very much, but it does discuss the common law principle, the principles underlying common law, and I think it want to be fair to say that the Indian constitution continues the common law, and Indian justice opaque's the common law, even when they appraise the constitution. In a sense as there is a continuity also, there is discontinuity because the constitution in line of demons prudential reasons by the Supreme Court and high courts, that we will discuss. So, what is the conflict? The conflict is between duty to recuse and duty to sit. Now, in USA, in England and in India there has been a long convention that a counsel mentions, by the particular justice should not sit on the bench. The practice is being so far, that particular justice withdraws and then the chief justice through. Which he does. Justice Kehar questions this convention, now, this convention also is being questioned in common law and other jurisdictions I will come to that why? Judges have insisted the America and England on sitting, duty to sit and not duty to recourse, on the down, one is entailing questions of judicial integrity and partiality. Penance of judicial integrity and impartiality is very relevant, and therefore there is slightest doubt on our integrity or neutrality or impartial being absolute. Very recent in India the Hindustan times says you the story that how many Supreme Court justices have read. In 2015 and 2014. And some...so, one is appearance of integrity and impartiality. Second is people's faith in the judicial forum, it's only when you maintain the integrity and impartiality as said, that people have faith. Of course the standards of integrity does not apply to other benches of

governance. Parliament may do any, it likes and we have to obey its decision, resulting into a law. That is our problem we have to obey.

So, it is one have never heard of legislative recusal, idea of recusal is very strange. You must be not neutral, you must be committed, you must be partial in order to have power to rule, and that's what our constitution says. You must follow rule, all that you know. So, there is no question there, under government legislature is bound by any convention recusal. their interest is to pull the decision, whatever and legislature...executive are not bound by anybody, saying you are partial or you are required to maintain the image of people's faith to the constitution, I don't think this is the time...is written in some of my papers. There are six or seven kinds of citizenship that Indian constitution contemplates. One the major distinction between the oath citizen and non oathed citizens. The generality of people like me are on oath, but judicial, which are oath and the executive the cabinet, are under the oath. Their oath is and I hope you go back to your oath...by...when you sit on your chairs, the judges will oath the continuing. The SI model requirement. The integrity of the nation and the constitution as by. And wonder about today's constitution as by law established. A constitution is normally is higher law. It scrutinizes the validity of the lesser law, and the executive always, so how can a constitution be established by law? Then here is the basic structure doctrine, keshvananda Bharati. So, what you administering the justice says it is not constitution of India as printed by government of India press, by law ministry or interpreting the constitution as declared by the supreme court and as interpreted by you. So, your oath is quite...now, let us come quickly to this business of recusal. Any number of decisions can be found in recusals. A few key terms we take into discussion, one is neutrality, what is neutrality? And the article of Bush V. Gore in your booklet, discusses this concept, so I won't discuss, as extensively as he has discussed. Second is bias, that you should avoid any kind of leaning toward the party that is the bias. Prejudice, that you should avoid. is defined as a general disposition towards the case, or the word is used by the booklet by the author Bush V. Gore, by Walter sinnot Armstrong, he used the word due process for highest for recusal is governed by the due process, I don't think pro without a ceiling, I don't know, I am not a builder but so due process fro and ceiling are matters of judges. So, common law and other jurisdictions are quite clear, that you cannot have pecuniary interest bias. A judge now, pecuniary interest bias is perhaps evident, that a judge should not be interest in the outcome of the case, where money is involved. take the phenomenon of what I describe is son

stroke, I am very sensitive to stroke because I had a very massive stroke on right side of my brain and I had tough years and I am seeking splitting, so I am very sensitive, I coined this word, and is available in my article, bar council of India's journal, after which they quietly, and also the justice hidaytullah, the chairperson from the other committee, we used the bar council's own decision on rental lawyers, the disciplinary committee proceeding to write about pathology of Indian profession, and the bar council discontinued publishing in Indian bar reviews old decisions, and thereafter, and it also, removed from...but, the article is still there. We have coined the expression son stroke, and the spouse stroke, daughter stroke, and so on. Now if a son is practicing in a legal firm, should a judge recuse? if you look at article 8, on Bush V. Gore you will find, by Armstrong, on page 89, of your book, you will find that justice kaniya, who recently died of medical suffering, justice kaniya was a great judge but, in this case of Bush V. Gore, justice kania's two sons were practicing, one was practicing in 248 strong lawyer firm, in labour law, nothing to do with constitutional law, and his second son was practicing in a smaller firm but, it was a firm that was representing one of the Bush brother, should justice kania have recused himself on the ground of pecuniary interest, was question. if there would common law convention, it was due process ceiling of law, justice kania should...justice Thomas, I think it was, justice Thomas's wife I think was working as paid employee of the republican party of Mr. Bush, who was Presidential candidate, in American supreme court... hearing appeals from Florida court on both, quite interesting case.. Bush would never have become a president...he would never have become the president, if kania and Thomas would have....been because of pecuniary. Then the Supreme Court in...Disqualified, I don't know, but I have enough of jurisprudence to make our court to decide and...But, I leave it. In **Penochet** case in England, which is not in your readings, which should have been there. one of the, we sat on the appeal are Chile and president case, his wife was an honourary worker in amnesty international, an amnesty international was of **Penochet**, who is held guilty by this court, now, what we did, if you say pecuniary bars in these three cases, of **Penochet** and Bush V. Gore...neither of these three cases the judges recused themselves and one they did not give the...the just decided. The **Penochet** case went to the house of lords and I would not go into the detail, because less of the time and you must follow it because it referred to it in NJAC decision on recusal, so unfortunately you have to read it and his lordship has referred to two cases, one is... and other is penochet two English cases. What is the, to...on this any situation, was pecuniary interest in more,

**Participant:** it is very difficult in somebody else's...

**Professor Upendra Baxi:** no! But this cases are chosen in American supreme court,

**Participant:** noted posts which are generally involved in these kinds of situation, there are totally by the person who has interest in these kinds of situations,

**Professor Upendra Baxi:** so each case is, so the guidelines are meaningless, guidelines, that you should not stick when you are pecuniary bias, it is meaningless. You decide what constantious, not the other fellow is.

In Bush V. Gore, the argument was that the son is directly involved in the legal firm and the legal firm tends to benefit, and it benefited it eventually, because he practiced, that was before the judge.my, son is a labour lawyer and not a constitutional lawyer. after I sat with the bench and decided the, every time so, all I mean to say is that moment is to say that it is easy to say what is pecuniary bias is, judge the view that will decide by case, can the chief justice withdraw the case from you and say, not supreme court and high court to settle the case, justice Kehar as noted, it is a real danger pecuniary bias. The judge must recuse and he says high court would be bound by my decision. In NJAC case it is very clear, you have no choice but to recuse. It has sufficient danger, clear and present danger that the decision would affect the outcome, then you can returned. Suppose you enjoy this work in on a mediation mode, beside they over by attorney general, is was the case of Trinidad and Tobago, which one is it? reading 6, page 73, and with a long discussion, in judgement, it's a common bench judgement, is from Trinidad and Tobago supreme court...before the NJAC happened this held, the council had the power to condone pecuniary bars, then the judges disclose this is it is, the council might say, other is that the difficult question and law is agree make a concession that we don't. Because we have disclosed interest, pecuniary interest, which otherwise would be bias. Supposing in that case and any other case law is insisting on recusal, one sided, supposing there was a list, suppose urban side, recuse and other side did not recuse, take the case of subroto Roy Sahara, there two eminent lawyers said you need not recuse, you need not. Anil Dave, no one recuse himself earlier, in the NJAC case because it's a part of collegium, I will come to that in second half, but it is in the established rule that you will recuse only when you are pecuniary biased, but bias, somebody says, it is for me to decide how, I will

decide? someday supreme courts directs it to strike down, but can a supreme court direct high court judge to strike down?, but high court judge said that I am not biased, and suppose the high court justice choose this to ignore 141, ignore the direction and continues hearing the case can the supreme court order in NJAC like, the judgement is in breach of the other. This is an important question, what would happen now, because justice Kehar has constitutional laws recusal that is duty to sit. pecuniary bars has lot of cases I won't be here but you will be here, you will face lot of cases, now, look at paragraph 19, and 18 of page 83 of your book. I am talking about a judge working on mediation boards standing on a where. Influential party or chairperson, and the judge is, not office of profit, he is just working in relation to high court, it says there are two arguments in the court which are there in page 83 of your book, that the bias must be determined by the test of suspicion by man in strict. Whereas the other test was 19, fair minded observer, fair minded observer is different, is a mere suspicion, and the family is very suspicious, in there is not like that, is it, I don't know the politics. what para 19 says, I read the The fair-minded observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at, Although he will have a general appreciation of the legal professional culture and behavioral norms, will choose his sources of information with care, he will be aware of political parties, when exercising the judgement, to recite, he would know the difference between the relevant and irrelevant and when exercising his judgment to decide what weight should be given to the facts.. CHUCKLES...I have referred but generally, what is being said by the high court or Supreme Court of Trinidad that you cannot impartiality the image of the court is not affected by the politician person things. only it is affected by what is fair minded person things, and the fair minded person has ten features, and it all touches Upto the citizens and, if in any test and this is not idle question, this is question before parliament now, since UPA 1 and UPA 2 government, now, Mr. Modi's government. There is judicial standards bill, pending and if NJAC was passed, judicial standard bill would be next. judicial standard bill kindly circulate them the, last time we did 2014then the Mr. modi's government, you must seek something interesting, by did they implement, principle I do not know, that there was Bangalore principle. It is now universal, it is Trinidad and Tobago to Bangalore principles, so, kindly look at that, so what is the fair minded person? and who is a common person, who is suspicious of everybody, how judges make the distinction, so the question is now, complicated question further, your lordships question, I decide when the matter comes to me and my contrasts tells me to sit, very important thing, because it is the conscience, gandhiji

said, more voice of that conscience, that's how India got its freedom. But, the freedom of India was a good thing which I think, it was by one man, but as a people. So conscious and under my conscious nobody can judge, I can't judge her conscious and she can't judge my conscious, it is the article 25 of the constitution, speaks of the freedom of conscious, and it is the only constitution in the world which guarantees freedom of conscious and freedom of religion. It is subject to three restrictions, article 25 begins with those three restrictions, morality, public order and health, alright, now health and public order. These conscious, who's conscious, will morality will regulate my conscious, it is the question, it is my right, exercising my right to conscience that I exercise, I become a Hindu or choose to be a Muslim, parse or Christian, so whose morality is regulating my conscious? ask this question, asked many people, what is the interpreted right to religion, but religion is only a phenomenon, which comes into being when my conscience exercises the right, I chose to be that case, like I am, even myself I don't believe anything, that is superfluous, so, right to conscience comes before right to religion, and whose morality, person's morality, constitutional morality, is the preamble constitutional morality, it is judicial morality, my morality, what is this thing called..

**Participant:** it is the subject to be taken or object, conscience is a subject

**Professor Upendra Baxi:** conscience is the faculty, moral faculty which everybody has it, and everybody has a conscience. To have a human is to have some conscience

**Participant:** public conscience which. Even there is no test to judge the prejudice or bias of that observer also, mark of the public conscience also gets the conscience of the judge, and my moral conscience would be more than the public conscience...

**Professor Upendra Baxi:** the founder of modern sociology, Durkheim

**Participant:** it depends on the perceptions many times and then every society has its own, kind of lifestyle, difference between other society and Indian society, our moral value is different than their moral value and every judge has a different character, whether the judge has to lift the society up, if he has a such, if he has a high character, you have to lift..

**Professor Upendra Baxi:** I see the point here, French sociologist Durkheim, who invented a term collective conscious, and the collective conscious is superior, subjective, objective, and he is all, being a law, sanctions of criminal law are indications of collective conscious, now, take Durkheim rightly in the 18th century, but take the article 377, that's why the justice Shah, Justice Murlidhar, Delhi high court, ruled that gay sex, is punishable, and why they said that it's a rule, the original petition was filed in the supreme court, the supreme court passed the speaking order, and referred the matter Delhi high court, and it said, supreme court ordered the Delhi high court to consider all aspects of the matter and comprehensively go into the matter, which is what the high court did, now, what basis the justice Shah has. Get apologist, and justice... was there, to intervene in the matter, I told council appearing in the matter, I said you simply just read out the lordships all the petition, and carving out the legitimate technique by the supreme court to the high court, district court, like the human rights commission they come out, contact out, they contacted it out, these fellow did a justices did a job...comprehensive examined all the better age and all. And this thing held, everything examined, they went and collected all the pros and cons and they decided the gay sex is...they practice in their privacy. What business had justice Shah and justice? There to impose, and there also high court, also discussed the doctrine of severability, justice Shah, and justice Mukopadhyaya has cite the same cases, which the high court cited. I can say that with the same cases they come to different conclusions, they come to the same conclusions, that is severable and just they see to conscience higher and lower, conscious belongs to all of us. The criminal law can occasionally go wrong

**Participant:** I eventually agree with them. We have large number of. And it's not only in section it is commonly known, that it's an interest of a judge, in recusal or recusing, there can be large number of factors that can be. With an example, this is very sensitive matter, I had this matter, and the matter when came before me, when I was sitting with a brother judge, I recuse, but so much of publicity was given, people don't know why the case has been recused, so, and so the bar knows, people do not know, when I say people I am talking about the people who are not actually concerned, or public at large, that is how it goes, citizens who are aware in the court that why the judge is recusing, that the people who are not directly concerned they are not aware, I don't think that it should be the matter before those who are really not concerned

**Professor Upendra Baxi:** so it should be effecting the courts also, between the lawyers and judges. Judges should be. And affair between the lawyers and judges, to outsiders

(All speaking at once)

**Professor Upendra Baxi:** he is saying, his lordship is saying

**Participant:** what matters is administration of justice, it is the judicial duty of the judge and this affects the administration of the justice, so if this is a kind of situation, then obviously in

**Professor Upendra Baxi:** when the lawyers, my lord please withdraw. And ten how do you decide to withdraw...

**Participant:** even this is something which is coming before the judge himself, but

**Professor Upendra Baxi:** but, where does it come from, how do we know?

**Participant:** just to supplement,

**Participant:** like the lawyers, you have a small evidence, see I have a case of a company, and I have...and you disclose to the bar that, sorry I see little difficulty. Capital of 100s of crores. So immediately the bar members would say, absolutely we are all. This is the normal situation, but there is one more angel to it, what happens is when the lawyers do have a duty towards the court and other officers of the court, they will say yes, we have absolutely no difficulty, they always want to be in good, so there would be, and absolutely very nice, but this kind of lawyers have come into difficulties because the clients were some reasons after the verdict is out or the judgement is out, so, before the bar council, we concerned the lawyer, the advocates on record and also that particular judge to the chief justice, or to the India, this is what has happened and we are under that. The lawyers have difficulty, so the lawyers would not even, clear this issue rather come forward...

**Participant:** can I say? Is acceptable, but the routines of public voice, is also very important. The evolution of ...as in the European countries or in America. There is always a general likelihood of bias or prejudice of even the public morals, interested just for public morals and India is also an

important factor to be seen, while taking care of it or taking it into view before the judges. As mentioned by the professor Baxi who said gay sex, it is not more of public morals or personal pleasure, it is the violation of, or it is to be seen as, nature had permitted,

**Participant:** why are we doubting the capability of the judge, these instances...not even that, so I think it should rest with the judge, who are appointed people, they have gone through a very strict process of selection

**Professor Upendra Baxi:** I am not on this,

**Participant:** I think it should be left to the judges

**Professor Upendra Baxi:** I am only saying, judges have taken different position, I am not, we can be more clear when we discuss, the Indian situation in a moment, after tea or whatever it is, in the second session.

while I will take two or three things very quickly, nobody is doubting the judges, second the Trinidad and Tobago case, raise the issue of the financial bias and Bush V. Gore raised the issue of the financial bias, my son was practicing in the firm, may be not because I decided, but I decided and independently it was decided, I don't know, but, likely a bias, a real danger bias, of financial bias. So, son stroke, starter nobody worries about the. Situation, but, this to generalize pecuniary bias to all situations perhaps, wrong, and one of the justices in the NJAC case said, we need to revoke, articulate and we should give reasons in the judgements, as to why we are recusing, and justice also said, that parliament should also consider passing, nobody gave in NJAC case, but he said, what he said, and I think, his lordship is perhaps tried to set some norms, where you should give recent judgements and all should be stated. Pecuniary bias is slight, but there are two conflicting principles, duty to sit and duty to recuse, and you have to make a choice. You cannot say the duty to sit is always compelled by the oath, can you say that? Or duty to recuse is compelled by, in Sahara argument, now, conscience is third point, anil Dave, recuse himself, justice anil Dave, from recusal in NJAC case. Justice Kehar says, I would not say anything about Justice Dave, justice Chandreshwar, invokes the doctrine of necessity, I will come to that later. So, matter of bias, apart from pecuniary can there be institutional bias of the court? The Supreme Court has developed a jurisprudence in administrative law, so it will tell us about the judicial review, I am worried about

recusal, and how can duty to sit, how far you can carry it? To absolute constitutional requirement, that's the question, how can you constitutionalized recusal that is the question? Leave it to conscious. Judges of two, end this discussion roughly, when we come to the other part very shortly. this is two choices, I thereby can say, as far I can say, that the administration of justice primarily mattered between in the family, of lawyers and the eminent lawyers, between the lawyers and judges, and outsiders don't come in. or justices can appeal widely as I have said earlier, to the integrity, to the people's faith in the institution of the judiciary, you can take in both ways. if you appeal to the people's faith, and you must because all jurisprudence ultimately rest on your faith in people, and your struggle with the executive, when you detached the law, you go to the people, people have faith and confidence in you. you have to make up your mind and which is your conscious and your priority says, is it a matter of as Sheela Dixit former chief minister of Delhi said, she coined a very nice word, BHAGIDARI, a partnership with people

**Participant:** to share a personal dilemma, you know having serve the university for over 20 years, my brother happens to be elevated. I was in the personal dilemma, whether to come over to the bar and take over his practice. At that time. One thought which came to my mind was people would say brother has become a judge and he has stepped in. which was bothering my mind as my conscious was pretty... In that particular background. at the same time I thought to; that I am not coming to the place and It owned me a thought that how I conduct myself at the bar, and therefore this fear, that the people would say, the brother has become the judge and therefore he has come to the bar, I don't think that I should really bother myself of that, and finally I decided to switch over to the bar. When I came to the bar, a year later, my chief justice called and says Balram we are considering you to be designated as a senior advocate. I thought for 30 seconds and said no! He said why? I said people would say to you that just for he happens to be the brother of so and so and therefore you are designating him as a senior advocate. He realized that, and that never happened at that particular point of time. Later he came over this. In due course of time, there were number of sons, daughters, in laws who worked a...judges in that particular period time. One of the chief justices thought that this needs to be checked and a specific order was passed. the 10 lawyers, their case would not be fixed at in the courts of the respective different judges, for instance the son of the judge A, his cases would not be fixed in his father's court, by even the other 9 judges as such. I thought myself what could be the possible reason for that. The reason how to conduct

yourself, and therefore the collective conscious, that we are talking about, plays a significant role, as to how we conduct ourselves and that become significant

**Professor Upendra Baxi:** that what the lordship said, the collective conscious, but the difficulty is not with you as justice, but Durkheim... collective conscious of the time had, it prevailed we would not have become independent, at all, because the collective conscious was of the...you know there is no prescribed to go with the Gandhi, and many other people with civil disobedience as, rightly, but I won't go into all that, so, if the people who have interest in the colonial rule, business men, business people, ambedkar has said, that minority will never be secured in India itself, at that time, during round table conference, he called the Gandhi. thereby number of people who had different interest in the British empire being subject to British empire for long time, a cherish goal of many people in India, against Gandhi, and others who struggled for independence, neither I will go into history. difficulty with collective conscious is not what as you said it is, the collective conscious, constant to particular caste which rules, then you rise against it, and this is very important question today, it always been an important question, the past there was a question, the future also. So, individual conscious vs. collective conscious, where would be individual conscious come into play? And the recusal Mr. justice Dave, and nobody doubts and the question which had arisen. So, it is not question of integrity, question of conscious. now, Mr. Dave thought being the judge of supreme court he thought, he knew the member of both the NJAC and the member of the collegium, should his conscious bestowed by the chief justice of India or by justice Kehar, but, if his conscious prevails, he will recuse, after justice kehar's decision which will come now, is 141 decision, and he specifically said all adjudicators will now follow my decision, in NJAC case, so you can ignore this and the supreme court will decide ultimately what is to be done. But, if it is the question of recusal, it can be led to collective conscious all the time, most of the time yes! Whose conscious is collective conscious, is a very important question. of course nobody asks the judges to continue on the bench, if the conscious does not permit them, or the chief justice say, rather you should sit, and you can say my conscious does not permit, now, can you recognize judicial organization on that basis, can you allow, people to give up their...

**Participant:** collective conscious to have its impact in playing, the ground on which it has to have, played, strictly to have played, equally sensitive and responsive. Now, as sir, gave the example of collective conscious, equality of justice concerned, that worked because British were very sensitive

and conscious, now, if Hitler have ruled India, Hitler had no conscious, guided by the Nazism philosophy. He would not have listened the voice of either public conscious, because he was totally insensitive. It depends normally, so...

**Professor Upendra Baxi:** there is...Bhopal, Hitler general store, there is one in Ahmedabad, even consider Subhas Bose also, when you consider this

**Participant:** sir can we... because the collectivism because, as the preamble says WE THE PEOPLE, so the creation of state as I could understand, is a basis of social contract theory, that is the recourse to the modern theory of democracy, if that be so, individually I may think that what I was thinking is correct, but, I have to take people at large. Sometimes the thoughts of the people, we are guided, as my father has said, that may be some are motivated. then there is group functioning, they don't want the particular judge possible to hear a matter, but when we come back to the larger perspective of it, so that by giving a judgement, I don't, one way or the other, I may not face a criticism, that well I had some interest in the matter, although I, may be in the core of the heart I may feel that I don't have any interest

**Professor Upendra Baxi:** I fully agree, I point out the justice chinnappa decision in a particular case and there he said I may begin with the opinion, question was whether, these people, government of India, can take over for one year. And four judges who had their own god persons, I can name them, in my article justice chandrachud, parmash Mishra and other people, they went to this swami and that swami, I mentioned those swamis, I forgot now, chinnappa begins by saying, my ideology as a person is that of Marxist, and Marxist do not believe in religion. However, I am a judge of a supreme court and I am bound by the constitution of India, I mean my opinion. as a judge of supreme court I don't think, I am forgetting the name now, one of them is minority institution, he said for me there is article 25, there is the preamble, whatever I think as an individual conscious thinks to justice lies, I shall do justice according to the constitution, and according to constitution this is it. Collective conscious how it is in sabrimala situation. The woman want to go there, the temple and the temple says, you cannot come to sabrimala, how do we do it? Gender tears apart the collective conscious. Women...not allowed in trimbhkeshwar or whatever it is, women are going... sabrimala the gender women...so it will come and again you....believe in god or...

**Justice Gyan Sudha Mishra:** I think at that point of time, can a woman judge recuse herself?

CHUCKLES...

ALL SPEAKING AT ONCE

**Participants:** the gender equality... the chairperson. Hahaha

**Justice Gyan Sudha Mishra:** no! We are not concluding, we will take it forward in the next session

**Participant:** that was different, what was the justice in 70s or in 80s, then in 2016, it is completely different social status. Thoughts of the people are different and many judges were treated at that point of time is absolutely different from what we are today. So, ultimately it depends on the psychology, how they perceive things

**Justice Gyan Sudha Mishra:** I think we need to deliberate that, if there is clash of class interest in some way,

**Participant:** there are number of interest I mean

**Justice Gyan Sudha Mishra:** no! The class interest, and not individual interest, then the judge would recuse and that will be, going beyond the boundaries of this session

**Participant:** we need to list out the interest, it should be the nature of the interest,

**Justice Gyan Sudha Mishra:** basically I think everything comes from the age-old dictum, justice should not be done but it seems to have been done. These are all the manifestation are done.

**Participant:** one question,

**Justice Gyan Sudha Mishra:** I have the unpleasant duty to be a time keeper also, so, but I would not like to. CHUCKLES

**Participant:** I don't want to discuss, but something to say important. sometimes there is judges have a special knowledge, and that special knowledge is you need to tell and cases and the hearing, should they recuse themselves on the fact that, there would be some kind of a bias in their thinking, against one party, so they just disclose the interest that I am fully aware of the, suppose how this particular product is manufactured, I know this before, or he is likely to hear this case or should not. My first question, I am not answering it. second session, second question the particular statute, have one member who has got the special knowledge of the field, is a specialist officer of the department, who is the member of the tribunal, whose decision will come to the high court, should he pour his knowledge because it is obviously a bias knowledge in the decision making process when he writes the judgement, he can't recuse himself. He is the member of that particular bar. So, these are two questions which do require attention, and particularly we are in the regulation review, it will keep arising.

**Justice Gyan Sudha Mishra:** yeah! We will try to...CHUCKLES. So, we can rise for the break, not like the TV. Break...CHUCKLES, so, we will be assembled at 11:30 or 11:40...11:40 would be fine.

## Session-2

### **Does the Constitutional Court Forbid Recusal?**

**Justice Gyan Sudha Mishra:** so, welcome again, the enlightened audience, and the experienced audience, who can really...so, I welcome once again and this is topic now, which is a manifestation of the key topic, judicial review, scope and dimensions.as you see it, the programme, does the constitutional court forbid recusal? so, this is the subject on which we have to apply our minds, share our experience and of course the special knowledge and special views of an expert on this subject, professor Baxi, and of course the experienced audience who can perhaps also correct and rectify, if there is a need to do so and I am quite sure it's a subject where we need to share our experience so that our experience gets enriched that we have faced any you have confronted any dilemma on this nature, what would be the correct approach of a particular judge, because the manifestations of recusal are varied, and more you get deep and sit, deliberate and collectively think about it forget about the collective conscious; the collective responsibility of the various dimensions of recusal which a judge faces. like you know it was just an of the cut remark, on my part that if you know there is a class dispute like, this you know, the bar for women to enter into a temple and may be a PIL is listed before a particular judge and that to a women judge, should she recuse herself that, she would have a class bias? Or not? My answer would be no! Because a judge, and a judge is a 100% judge and when a judge inside is alive then obviously it will compel you and that we are already trained and we have taken oath that, you have to or rather you deliver justice without fear of favor. Once you take that oath then obviously whether it is a class or whether it is something kind of bias in a different form that would not prevail on you. like you know one of the commence once it was made by one of the lawyer, some point of time, earlier days, when I was shaping judge or a baby judge also that would be referred to at times, one of the councils, he said, no your lordship is a petitioner oriented judge. As you know I am not petitioner oriented but I am justice oriented judge, please bear and mind about this, so if you have to keep in mind that justice has to prevail over everything, obviously all kinds of bias, prejudices is going to prevail in any situation. But, yes. We do confront and we do have a very like we do come across situations where your inner conscious compels you that, what would be the right course. I will just share one of my experience, is a very, in fact in my entire career of, just one or two occasions when I recused myself. one I would not diverge why, or maybe I can diverge that in a friend of a, a very respected

gentlemen and a friend of my brother in law, said that please put in a word that person is you know in a difficult situation, and would she be able to help him out, then that also in my really earlier years, and I had learnt all this you know just like a formula of algebra and said NO, I have heard it that if anyone approaches you, the fastest course of action is that you have to transfer it to another bench and I did that. in other occasion because as chief justice I was dealing with a case of a well-known politician, and now that I have office, and I know how do you diverge it that. I was dealing with Madhu koda was chief minister of Jharkhand and his disproportionate as his scheme case I was dealing, and thereafter I was elevated to the supreme court, and in the supreme court, and in the supreme court the bail application of the koda came before me, of course by my companion judge and there you know since I was already dealing with the matter as the chief justice of that court, and my views were already known through my observation and because it never got concluded during my career as chief justice, it went on and on and later on also. Now, it was a different kind of dilemma, should I hear this bail application or should I recuse? Because here I would be doing justice to the PIL petitioner, but, would he also get the same quality of justice from me? I felt that I already had my views and I was about to transfer that for CBI investigation. Now, will he get justice from me? Because 99% I would be rejecting his bail application and that compelled me to transfer that matter before another bench. so, this is just a small illustration that this recusal are now, that we are sitting collectively, there are variety of reasons, three of course but, they emerge from the same power point, which professor Baxi mentioned, it is either bias, it suffers from bias, it effects neutrality and the third pecuniary bias, that might happen and one might confront. so, these are the, and all other it emerges out of that, that what would be the duty of a judge in such a situation, but the third thing I just never thought of it, that there can be also a class bias and specially woman judges do face, because there is a perception that ohh! she is a woman, so may be in a matrimonial matter, you know, she the litigant might get more relief from a woman judge, there would be tussle that, let the matter be before that particular judge and in the bar there is a mindset of choosing the bench, not merely for partiality or affecting the neutrality but, to have justice from a judge, who might tilt in his or her favor, but, in my experience the our other counterpart deliver more justice to women then they do to men. I always say, yesterday think I had a casual discussion with the director Geeta and I said you know, it's just the other way round, that all the accused, that men are bias against women, but all reforms are taken place at the hands of men, so, we don't have confrontation with men. With over the years you know, small minded

thinking erupts in some way which you know which makes us feel that is gender discrimination. We tend to think that yes it is a male psychology. But, it's not a male psychology, it's a particular interest which generates that. so, of course you know I am going little beyond the subject, and I have been very intelligently briefed by dr. Geeta oberoi, that absolutely please tell me what is the function of a chairman, because I get confused to what I am supposed to do as a chairman, so she said, you know most of the time you have to keep a time check. CHUCKLES...and I said but, I am a little vocal and my vocal got sharpened when I sat with justice katju....hahahahah...I said but I like to keep myself contained, so in the first session I was very quiet, compelled myself to be quite and I do feel that I should give the chance to the speakers and specially the key note speaker, but after he speaks, we spare some time so that all of you can you know react to that and share your own experiences. We do not get time, otherwise what is the good of sitting collectively, if you are obsessed with your own ideas and points. So, with that I invite Dr. Baxi to...

**Professor Upendra Baxi:** thank you! Thank you! Very valuable observation, I think Dr. Geeta was not quite justified in only to keep time, we want to hear you. We want to hear you as well. So, I take your suggestions

**Participant:** the decision passed by the Supreme Court...

**Justice Gyan Sudha Mishra:** I have not expressed it right now, because otherwise it will be some kind of sort of you know, let's not float my views on that

**Professor Upendra Baxi:** I know, but immediately, I would say something firstly about the submission just made, with of last session and then come to justice kehar's view, then I will open up for discussion, I will actually open the gates for speaking and do speak as much as you can, because you pack into yourself and lots of experience at the bar and particularly bench. Now, for you never know why you recused yourself, in those two cases, probably chief justice might, but you would never know, so it is important to serve for public at some time or the other, and why rescue in some cases. So, it's very important to wake up to the statement and certainly justice Mishra was completely right, that you should not allow recusal to be a weapon for the bar in choosing the forum or a judge. That is one of the standard recusist of saying NO to recusal perception. Lawyers have to great regard to do; I mean lawyers have no business to choose the

forum in which they choose where the petition is to be tried and recusal is not a proper weapon in the court, we have to use other weapon. That's a very important contribution and we would have missed it. On the question that which dr. gupta raised, I still call him professor, an eminent member of bar, certainly he became the director of a place and we welcome him with his discussion. he remind me that some of the incident that happened, they are very warming, and insisted that personality, the dignity which one carries, ultimate assurance of one's credentials or partiality, and the great founder of European sociology in Rome a man called early, said best guarantee of justice lies in the personality of a judge, a very tremendous observation, best guarantee of justice lies also in the personality of a lawyer, of course you cannot go beyond lawyers and judges, when it comes to justice according to Rawls, justice and other kind of justices, the justice beyond the law. You know there are three kinds of adalat in India, one is kachari- your court, one is called lok adalat and one is parlok adalat...hahaha... where godman appoints the judges not the president. I won't mention the state, where he got appointed and said publicly, he is no more, but he said when he was alive, where he appointed the judges, and I repeat the statement at the bar councils of the state and I said your lordship I can name people, judges who have not been appointed by the president of India, but by this god person and deeply shocked, the chief justice told me I should not have made the statement, so, I said I don't know the parlok adalat, I can rest the lok adalat, and I don't know how to do it. When the question of recusal arises in parlok adalat and whether the judges should exercise the recusal power as in the parlok adalat. That's a very big question for me as a citizen, as a student of law. You have a cosmological adalat, so that has to be minded. I think the justice was raising the question, and the question was, whether recusal occurs in tribunal, and he says it does occur, and may not be required and it does create curse, for judicial members. now, thank you very much, I have not read this aspect, I will, but I take your statement at face value, it deserve that practice of recusal also occurs in tribunals and sometimes the member of the tribunal prevent somebody from recusing himself or self becomes the so called special knowledge, now, it's a welcome addition to our discussion, I thank you for that. I was asked that why did not mention this by justice Kehar and why I mentioned my favorite case of Pamela naiser case, .I was very fond of her, she was chairperson of Karnataka sahitya samiti, and she met a judge and so a lawyer, met a judge called Mr. naisergi and so she became Mrs. naisergi, and many of the lordships enjoyed, in Bangalore they drink mine, kingfisher formally and other kinds of drinks and we cooked for them and they enjoyed completely by then. one day she.... and they called us...there was a social

party at my home, and I have been there and then she went to the chief justice and chief justice said I cannot do anything about it, she was a spouse of a judge, but a lawyer now, should recusal extend to a situation of this kind of sonstroke, I wrote enormously about naisergi, and then the matter came to the supreme court, but supreme court is the specialist in an encounter case it kills number petition. It does not take up for the hearing and naisergi became one of the cases which is never heard

**Participant:** the matter was referred to the bar council, the bar council decided against naisergi which was challenged before the Karnataka high court, then again the matter went to the supreme court. That's what I remember

**Professor Upendra Baxi:** supreme court occasionally delivers advisory opinion, it is not fully convenient to say this, but it is said to be correct or not, keshvananda was strictly an advisory opinion and it said the petitions before us, should be dismissed just to be considered in accordance with the law declared it, there were six petitions. I referred the record books of the petitions to the Supreme Court are with them. I in my public lecture kept quiet about it, but in years of 85 not the six petitions were disposed of in law declared in the keshvananda Bharati. So, keshvananda laid advisory opinion and difficult to say what is the law or what law was declared by the keshvananda, so, it is very difficult to ascertain what happened in one case, Supreme Court in one petition, rani jethmalani and I filed as a social action litigation. Not saying government is obliged to undertake or implement all the committee reports but, inform the, we the people of India, what is done; rani jethmalani lived a long life but, she is no more and I will go soon or later with her

**Justice Gyan Sudha Mishra:** I will follow you...

**Professor Upendra Baxi:** LAUGH...no, no please don't, you all will live very long, but my dr. desai, he said you come in, and said when you look out everybody's forehead, I was confused to all what he was talking about to look at forehead, then he said just as medicine have expiry date written on the forehead, then their expiry date written on their forehead. I said dr. I cannot do anything, I am going to die, I have got expert date now, written on my forehead. So, my case is different than anybody else's. With the expiry date written on my forehead, I do not think...

**Justice Gyan Sudha Mishra:** as Mr. Jethmalani said, I am waiting at the airport, the flight is delayed,

**Professor Upendra Baxi:** and he joined to him along, so anyway the supreme court is very specialist in actually they could recuse or they should decide one way or the other, filed the petition on Shah Bano, so in the judgement...today is what, 2016...then followed by Madhu Mehta, then the Lotika Sarkar, just left the world two three years ago, now, it's my turn, and the supreme court is still silent. I said I have written my article, I am the lone survivor of this petition and the court has not heard me, but this practice is also followed in high court, I do not know, I have not studied that closely, may be, so, that is the way of doing justice, which I don't particularly, a kind of collective recusal. Which I do not think is inscribed in common law, or our constitution. Never mind, now, coming to the subject page 6 to 10 of the book, where I have a lot about NJAC case, so, I would let you read that, but, I will make the following points to facilitate the conversation. One is that, that the convention of recusal is of long standing and that is where council normally tell the judge to recuse himself and judges almost regularly recuse themselves. Even after the Justice Kehar's decision, on NJAC before Justice Kehar's book in NJAC, but after his book in Subroto Roy Sahara introduction J, J the Hindustan Times of today tells you that it gives you, three senses of March 2016. One is in 2011 and one in 2012. where lordships of the supreme court recused themselves in one case, and recused themselves after hearing a case or party hearing the case, for two years, suddenly they have recused. Now, this is simply I don't know what you think but, this is not justice. Two years you have heard the party, you must have said the oust whether you want to share, Anil Dave,

**Justice Gyan Sudha Mishra:** at this point I just want to share one experience, not my experience but a judge of a high court, who had heard a criminal appeal and the judgement was reserved and may be two more instances so, the accused while the judgement was reserved the accused perhaps, not perhaps approached the judge not merely to have a judgement in his favor but, he had caught the mood of the judge and may be had an inclination reservations that he might not deliver a judgement in his favor, acquitting him or giving him any relief. So, he approached the judge and with great you know huge dilemma was suffered by the judge in a situation, so many a times behind the screen one does really know that what have happened with the judge that, at this stage after hearing the entire matter, what has happened with the judgement. Many a times the judge

might share, he might not share. Now, this body, should think about it, what would be the correct approach in for future judges, that if in a situation, because nobody has a readymade answer. What would be the correct approach, should he recuse himself and give reasons, if he gives reasons then obviously the situation definitely bound to blow up the, but, what would be the correct approach because every time you cannot only, this is the hard truth that every time you cannot make an issue out of it. It happens you know when the judges sit in the division bench many at times it happens that, they might not 100% agree with your companion judge when it is getting dismissed. Admission of courts you know there is saying grace that later on it might get the due justice but, when it is dismissed you might not 100% agree. So, but overall you have to withdraw your consensus, so, also in a matter where you have to recuse then what would be the correct approach? At least we can have a guideline that, this should be the, what you do, that might be your own. Or what would be the correct approach. I think all of us should express our, we don't have a written code of conduct or a statement of vale that what a particular judge is supposed to do. We have a broad idea that this is what a judge is supposed to do, but, in matter where you know, where the perception is that before a judge has heard the matter first and for such a long time, and he has recused himself and now, he has got...what should be the correct thing

**Professor Upendra Baxi:** I totally agree with the learned observations, I think this particular case, I don't know the facts, and the citizen would never know the fact that why justice recused himself in Bangalore blast case after hearing it for two years and adjudication bench or something but, I would have accepted justice Chandreshwar at least to pass a speaking order, in the for which he was approached. I do not know

**Justice Gyan Sudha Mishra:** I believe in absolute transparency,

**Professor Upendra Baxi:** and it would be the chief justice, it was the chief justice to overrule him or support him and, but in a terror case, an accused his next best or her next best friend or a lawyer on her behalf should not be allowed to choose the bench. After all that is the fundamental principle of transparency and justice, so, judges if they feel they are approached. I mean this is a wider question as to how come judges are approachable by the accused or on the behalf of the accused midway.

**justice gyan Sudha Mishra:** I will tell you because you know, what happens is the approach is not directly by the party, n, you live in a society it's not that you are living on an island or on some different planet, so, there are ways and means where you can be approached, may be discretely, may be informed way, so let us not go into that, but, in some way it is not that the party or it is not like a movie that the party comes and approaches you, very discretely if it is approached and you know that it is an approach and may be a time, may be in so,

**Professor Upendra Baxi:** in Gujrati we say, we pronounce English our own way, and I know that there are 18 varieties of Indian English, we practice one. In gunlish we call it, subtle approach but subtle approach, subtle approach are for many justices who have proved that they have been approached. I will not go into that, but my answer to the problem is that however subtly you approach, if you are a judge you mention to chief justice, you may not mention to chief justice, you go ahead with the case, mere fact of an approach without the justice given in the question of interest in the matter. Extra judicial interest. not judicial, I assume as a citizen that judges may be approached but, in principle they are unapproachable and they should remain so, so, I do not say justice, Jasti Chelameshwar, Jasti I call him because I know him, but he is a judge in supreme court so I respect him, chelameshwar has a good point to, he can introduce the word constitutional courts, there is no constitutional court in India, he introduced this heavily in NJAC decision. He writes in capital letter, Constitutional COURT, but writing in capital letter does not makes so. Supreme Court is the court of miscellaneous. my friend justice Praful Bhagwati once considered a sales tax matter and the issue was whether green ginger is saag, sabzi or tarkari, and the learned opinion he gave, in which he said I deal on something said in 1750s or something, that the laws must be interpreted in the light of ordinary language, so I hold green ginger is a sabzi, saag, or tarkari, and is taxable. so, I went to him and asked him that Praful Bhai what happened to this judgement, I have to write on it, he said, door hutt, I said one thing, I can deal on something happened 17th century by the supreme court or something, and he said that legitimate...I said why can't you say that the judgement or the statutes must be interpreted in the light of ordinary, but my question is different, I said the question is do you any Bengali? And he said NO, so, I said how do you interpreted according to how ginger is not a sabzi or tarkari, he said councils tells me so. He said, it is not evidence according to Indian evidence act. you can theoretically never interpret the statute in the light of what people present it differently, in assumes, in Bengali, in Gujrati, saag, sabzi,

tarkari have different meaning, so its affection and you take the authority of an English judge, colonialism is gone and there are progressive judge, so why can't you resort to decide, we have no constitutional court. we have courts of jurisdiction, it takes up Mahabharata, you were there in supreme court words, I take you permission may I, to utter, in Mahabharata character called muktodhara, muktodhara is a man, gigantic appetite, and the supreme court is the moral incarnation of the story muktodhara, it is a vast, it takes anything and everything, sales tax, rent control, how many, I mean there is no constitutional court and it will never be a constitutional court because of the theoretical difficulty of determining. when the judges says, the cricket control board is it a state as the supreme court says it is not a state, then the matter end, but it says it has some public interest, and therefore we have its jurisdiction, now, where they got the jurisdiction from, now, it is they asked the high court, the high court from where they got the jurisdiction from, they themselves were the, article 142, to do complete justice, or completing justice in the case may be. so, this is the, it was the serious constitutional, I am sorry ruchi, I don't know why you took this constitutional court but, you have put it so I respect it, and I addressed but, I don't think we have constitutional court in India. we have supreme court and high court, we have decide constitutional matters but they also decide.... what is until 2013 this was the matter of convention and recusal was the matter of the convention and any judge decided in the good conscious, what should be done? Enters subroto Roy Sahara, and nobody else unfortunately read the judgement, but please read it. for the first time in Indian independent history any common law history a judge said, although the justice Kehar does not gives, this is not the common law, duty to sit, is not in his judgement, so he does not probably argued for it, but, justice Kehar said, is a constitutional matter, not a matter of convention. recusal is not the matter of convention, is the matter involved in the constitutional list in 2014, and he said, the recusal convention, and I read, "essence of calculated psychological offences and mind games which are played by the council on the court" mind games and psychological offences, this is what the law should say, in 2014, and they recommended that all other high courts should adopt the civil approach referred in this convention. It does not matter, the 141 matter, they further held in high court not sharing a matter, both constituted an act of breach of our oath of office. So, they argued, that they had duty to hear. in the NJAC case, that is the second point, justice Kehar now, had a five judgement, his own ruling in subroto Roy Sahara, it was two judgement and he says that when a judge give his own interested to him by the chief justice,...I agree that male judges have been given long, they are male judges, they never, made a

women chief justice so far, anyway the third schedule of the constitution, and in NJAC case it was said that an office on oath to recuse the matter, now, that is a very strong statement. Duty to sit under common law is now translated in breach of...my third point...the five judge bench was Justice Dave, justice chelameshwar, justice lokur, Dave recused himself and then Kehar. I don't know why justice Dave recused himself, it was done by both the collegium and...Recuse of a particular matter or resign, because he cannot sit on the bench now, because the chief justice always asked you to sit on the bench, it is the constitutional request, simple request now, it's an order, and the order is constitutional order, by the chief justice. He has power in the constitution, although for me I do not see why chief justice alone have been vested with this power, this this the fifth object. Why on urge should chief justice should constitute alone the benches? Why not the group of judges should, sit and decide who is a good judge for the case or bench. I don't know the judges side of the stories, I would not go into that. I do remind you, sometimes chief justice of India has constituted a bench, and I remember justice, telling me and has only judicial bar, you have to write one, and please write one and follow that the judges in their five volumes, I said the story he, told me, justice...ever to sit on a bench, one of the, he said to me upen, you must read some of the colonial law, at time there was English chief justice and asked that...and went to ask the registrar, all the registrar Nagpur bench and asked him, file a contempt petition against the chief justice. But it is important, every judge is coordinates equal stretcher, chief justice's is not the boss of the judges, so I don't understand why the, I refer my subject. so, my third point is that beside form pecuniary bias justice Kehar ruled in subroto Roy and NJAC case, many face pecuniary bias with the real danger the judge will decide because the judge has taken some favor,. Every judge has duty to sit. Fourth point official bias, it's a very difficult matter because the duty of impartiality if you see the article on the Bush V. Gore, and elsewhere, Tobago judgement. supreme court has developed the doctrine of the official bias in administrative law, in gullapalli Rao cases, two cases gullapalli Rao 1 and 2, and since then, in Andra Pradesh and it has been followed, where minister secretary of road transport cannot decide the nationalized system of bus services, because it is party to the, impartiality of a decision maker. So, how do you decide a judicial commission case? Basically every judge is bias officially, institutionally every judge is bias, and in favor of the autonomy unless it descends like justice chelameshwar, dissented, but he did not really descent. That is the separate matter, but the matter is official bias, is a problem for the doctrine of recusal. on the one side, there is always the institutional official bias in the court, justice

chelameshwar...both ruled that this was not the case, official bias is significant power and if accepted in the court would render all the judges of this court would disqualified from the court and create controversy. So, there is no official bias. Official bias cannot be a ground of recusal. Justice Lokur in recusal part of his judgement said that there should not be a distinction between automatic recusal and non-automatic recusal. Automatic recusal is pecuniary bias, non-automatic recusal is considered as recusal. justice says you must give transparent and give reasons for the recusal, now, reasons for recusal, whether the judges own decision is based on the subjective satisfaction or objective satisfaction again to go to the administrative law, if it is based on satisfaction that is objective, when reasons are given then it can be subject matter of further litigation but, therefore justice goel says that there must be some steps taken, and rules of the court should be framed or rules should be made by the parliament. This is the question of judicial standards and the question as was the code of conduct by justice beig, we call him Mr. Justice Beig, but justice Beig and subsequently by justice verma. the court is binding against the oath on the third schedule, very important legal question, is it binding any law, I do not know. I think the answer is that application to do justice without fear of favor, probably includes duty to sit and not to recuse. This aspect is to be judicially considered. When you approach the judge, when you are forum shopping, you disqualify the judge from hearing the particular case, that is not allowed and, there is a case in the third schedule in the NJAC rule. I will limit it to five categories, I won't take your time with it. One is I have conveyed my reasons to chief justice and I recuse myself. I don't need to be transparent. Where difficulty with this kind of recusal is, that people of India, who have faith in your judgement and the institution, perhaps greater faith in court than in executive or the legislature. These so called people of India never know why if you only communicate with you, there is problem with that. Now, high court of India. Second is automatic recusal, where there is pecuniary bias, but then the judge denies it. The affected judge denies it. If she or he denies it, in judgement is the found for SLP, probably. If she only communicates with chief justice of India, is it transparent? Automatic recusal, there are marginal problem with the automatic recusal. So, the affected judge tells the entire court or the chief justice alone. this is the good way when you recuse on the ground of pecuniary bias, even you contest the pecuniary bias, there is no bias, you tells it to the whole court, why only to the chief justice, and if any judge object that no judge whether you can recuse...either the chief justice collegium may decide or some procedures be found. You cannot recuse just because you want to recuse. That is the one way out, I don't know.

The fourth ground is institutional bias which I discussed, but here what I have not discussed is the doctrine of necessity. Justice Chelameshwar, invoked the doctrine of necessity in regard to recusal. That is very interesting, because we all know what the doctrine is, now, or even any constitutional law, like Pakistani, brilliant decisions, they have given in the doctrine of necessity, or jurisprudence on which I will not go, but, essentially the question is, doctrine of necessity means that it invoked as an institution suffers. Therefore there is duty to sit, unless there is pecuniary bias. other is if this is the case, the other aspect is can one might look at the doctrine, because necessity...how can you be said to be institutional bias, so, the courts have to take the view, whether to extend the doctrine of necessity to all the third schedule beings. If recusal is justified under necessity, I don't know what justice thinks about it, but rests Upto him. The fifth problematic ground is of conscious and we discussed it. conscious confirmed, collective in your terms, the collective conscious does it confirm with the ethics of the bar, or it is the judicial conscious, vs. legal conscious of the bar. Legal fraternity is different course of ethics, different kind of conscious, so, individual conscious, so called religious of the bar. Like you all I have respect Mr. Palkiwala but, I have told him the word jurist is very much abuse to this country, everybody is a jurist. Who is not a jurist, the law minister is a jurist, his P.A. is a jurist every judge is a jurist, everybody is a jurist in this country, and the old people, myself also I respect all others too, so, if ex-officio...living legends of law, I don't know what this word mean, but, I used and so, who do you concern, you concern the eminent lawyers, palkiwala wrote a book called BUSY PEOPLE, if main objection was to the constitution, was adult suffrage, and he always wanted to be finance minister, but he could not contest the election and he was not nominated. He wrote in his book, that the great mistake to an adult franchise, as now, justice chemleshwar agree in one Haryana case, that's the different matter. only in India such person would be called as jurist, who argues against adult franchise as a basis over the independence, so, but consult this jurist also, there are different kinds of jurists, palkiwala is different kind of jurist, so, you can, whose conscious is collective conscious? So, these are five or six categories of collective conscious and you can read five or six categories of recusal. The only thing I can say is, this gone are the days, if they ever were, gone all the days after justice Kehar, judgement is NJAC, where automatic recusal is a rule. It is not even the exception. Gone are the days where you can say individual judicial conscious justify recusal, it does not, because you take oath according to him. Here you have a duty to sit, so long as you are in every case because you have taken an oath on the third schedule by which you are bound.

Recusal is no longer, your privilege or right as a judge. what parliament would do, when it adopts judicial standards bill, because the panelist have themselves said, Jaithely sahab...recently in real estate builder, we are only passing the bills, which could not be passed by the UPA 1 and UPA 2. So standard bill is by UPA 2. It will come up in parliament anytime and that bill will have to include something about recusal. because one judge, justice adarsh Kumar goel, in appeal, that if there is no supreme court rule, then there must be rule made by the parliament. So, that would be the duty to sit, and you may recuse only when there is pecuniary interest. That the present position of law, as I understand it but, you are the masters of law, Iam just a beginner in the law

**Participant:** bias in the judiciary is concerned, but, is that invitation of judicial bias. Here judiciary delivered in face of the judiciary, so as to the how the constitution functions and more specially, one of its required to be in with the constitution and independence of the constitution. if in the direct forward mission of the constitution in maintaining standard law, independence of judiciary, if any judge is the member of the constitutional bench to decide the issue, independence of the judiciary and do not think that there can be any, cannot be and should not be any official bias, what so ever

**Professor Upendra Baxi:** I think you are right, sir! you are right, in the minimum sense you are right, but under third schedule you have to put constitution, and therefore nobody is going to be bias, but, if you look at keshvananda, and is to the Maneka Upto that Bangalore, the famous case I forget now, right Upto the present time. Iam forgetting now, it is very famous case. Anyways it is very famous case, therefore, constitution as by your submission is the oath you have taken, but, article 41 is a part of the constitution. Keshvananda is the constitution of India, basic structure so, all judges can be said to be an officio, adjudicatory policy that is the word to be used, adjudicatory policy. Namely, we are bound, not by precedent, but the magic of the precedent, with constitution as an identity. Now, executive. To bias of the judges always, they are crossing the limits, but the judiciary believes that it is not entertaining the bias. What are judiciary do, means the Supreme Court and high courts, say, where you can challenge the executive authority. Constitutional amendment, bomai extended this to executive powers, and now it is in the high court, administrative borders. Whether it is there in keshvananda or not it is different matter I will not go into that, judges are very busy people, they don't have time. Iam the only person who read the keshvananda 25 times, but it is the constitution, so, there is, I say to you if the adjudicatory

policy of the courts and particularly the supreme court, on which the basic structure is the judicial review, and any amendment and measure distracts the judicial review, then it is to be struck down. That's why the NJAC decision, I told everybody and that how can you predict, I say openly predict, that the basic structure will be effect, upheld and that was upheld, with one minority, justice chemleshwar. Dissent for the sake of it, like justice Khanna dissent, for the sake of it in the habeas corpus case, which was not logical dissent. I studies this opinion very closely, it does not holes unfortunately, as the legal opinion. Judicial opinion, it holds the judicial opinion, so, basic structure you have vested an interest. Judiciary has an adjudicatory policy, vested interest adjudicatory policy. alright the precedent, is the adjudicatory policy, nobody follows the precedent in legislature, policy not follow the precedent, any institution of government does not follow the precedent, only judges follow, the idea that judgement should be published, no judgements will be published although you can senses them, but you use the publishable judgements. You maintain the distinction between publishable and non-publishable judgement or sometime, but mostly courts publish them. open hearing, courts must be open to the public, is its adjudicatory policy, so adjudicatory policy, you have an interest official interest in maintaining as judges, you can change it, but you have an interest, so, in that sense I was talking about, official bias. that there is an official inclination towards the certain beliefs and you believe that it is good social thing, and I agree that judges must decide cases, the must consult the wisdom of the bar justices, they must pay regard to them, and they must do justice, justice must be seen, not seem to be done by public and not only done by you. These are something, means, you are bias, and you better terminate to the previous position to maintain the adjudicatory policy. It is the part of the judicial conduct, justice verma is a part of your institutional commitment, called commitment. you call it bias when it comes to the administration by the executive, more political bias, when you call it bias, judgements to show it, so, if they are bias, then you are also bias, thats matter, but it makes no difference, whether you call bias or commitment, this is so, Indira Gandhi or Sonia Gandhi, this is about Sonia Gandhi, Iam very weak on the memory of the masters, Indira Gandhi will invoke the doctrine of committal judiciary. You are committed to the basic structure, nothing wrong with the commitment, nothing wrong I say. I asked her, but it I was full height and she said, you don't understand anything about the committed judiciary, and I don't anything much. I say, what do you mean by the committees judiciary, she said, I meant committed to the constitution of India, so I said we are marvels lady, I mean you don't have to declare this, beyond this, but, she meant obviously, constitution of India

is interpreted by the Indian executive and you mean constitution is administered by the supreme court, and that is the big preference, so I say, don't tell the bias a commitment, commitment is a good phrase, so you say inclination, whatever you use, probably not material. the words are not material, the real thing is adjudicatory policy, now, what happens to adjudicatory policy, if you apply the oath, that will be general, now, I don't know what actually happened to the petition,...I don't remember much but, it said, I down with the basic structure and I down with the right to privacy, here is the petition pending, so, no right to privacy, the court is still considering it. I to say the article 21 has no abridgements, to the judicial policy, because the whole jurisprudence of the supreme court is based on substantive process, integrating procedure established by the law, life with dignity, right to environment, right to bail, right to this, right to housing, right to this and that. constitutional article 21, in effect, that is interpreted by the lordship right!, now, you cannot challenge that and that's where the courts will come in. you cannot challenge the power to say what the article means and it means what we say, it means it rests with the power, and the power is constituted by, now only constituted but the constitutional power. that's what I meant by, now, apply this recusal, new recusal doctrine to this, apply that you are bound by the oath, to the whole new commitment, adjudicatory policy evolved and that is difficult,

**Justice Gyan Sudha Mishra:** Ya! One nodding has got the enough indication...CHUCKLES. So, quickly if anyone has you know...Participant: one more aspect, the judge is more concerned with his reputation, and also what his judgement would be reflecting,

**Participant:** In situation of this kind. Two things that are required to be with judge. he is the best person so, as to what should be the decision, whether to recuse it or go ahead and pass the, this happened in the case recently which was closed for judgement, the judgement was delayed for about 10 days, and the draft judgement was, sent to a brother judge. the litigant, got a mobile phone call on his cell phone and he answered that, it was missed call so, he answered that call, and that was the phone number of the particular litigant in the judgement, so, returning of that call, itself made the judge very conscious, I had made a call, and now a days, your calls, your numbers everything is open, and you can approach the telephone company and obtain it easily, so the dilemma was whether to recuse in these kinds of situation, because he had called, and you don't know, what could be the information. the judge has called the particular number from his cell phone, he received a call which was a missed call, and then he gave him the call back, so, what

should be done, so it was lot of thought and the other brother judges involved and ultimately it was decided not to get involved in this, better throw the matter out and the judgement which was written after a lot of efforts, everything was...this is a very

All speaking at once

**Justice Gyan Sudha Mishra:** I think there is a very important aspect and this is where we have to Deliberate, that by doing this, are we not, violating the oath of office, that you have to deliver justice without fear or favor, so the judge has to be courageous enough, that he, and it is not that he would be writing the judgement without reason. He would be giving the valid reasons, which will reflect the strength and the reasons on the basis of which he has delivered a particular judgement.

**Participant:** we should be never afraid of the consequences,

**Justice Gyan Sudha Mishra:** maybe we can be a little more unconventional and let the judge call in the open court, the lawyers may be, I mean this is very unconventional, the judges can summon the lawyers, just put it to them and let them say, whether he should go ahead with the judgement, because after all, we need assistance in some situation, but, in getting intimidated by such tactics would be in some sense you know

**Participant:** I had some discussion with the Hon'ble supreme court, decided in 1996, when justice... was in practice, he was an advocate of employee of the corporation, who was suspended, when that case was going on, he was delegated as the judge of the high court, Gujarat. the suspension was referred by the corporation and the matter was settled in the court, subsequently the corporation dismissed the particular employee after holding the departmental enquiry etc., that gentleman filed petition against the corporation, which came up with the Hon'ble justice V.J. Swetha, there the advocate under the corporation took the objection, that justice Swetha should not take particular matter, because he was the advocate of that party, when he was suspended, inspite on that objection, taken by the advocate of the corporation,

**Justice Gyan Sudha Mishra:** there you know, I don't think this is one of those instances, where judge would be suffering a dilemma, it is clear cut that he was not supposed to hear it because

**Participant:** inspite of the objection taken by the concerned party, it has taken the matter, and he also delivered the decision also

**Justice Gyan Sudha Mishra:** I would just like to sum up, where you don't have a dilemma, and the code of conduct, where normal conduct we all are aware, but if decide that, then there is no need for us to deliberate on that, we all know what could have been the right course of that thing. So, this would be an illustration of a judge, violating the normal behavior for which we don't need guidance and enlightenment. we are supposed to know, what are we exactly supposed to do, it's only when there is you know, there is two courses of action or when it is very difficult to decide what to do about it, so, what you are saying is the judge must supposed to know, what should have been the right course of action, and if it is just a normal situation where he or she is supposed to know and yet would try to shut the eyes, then it was for collective behavior and a correct course of action, and supreme court has to interfere, because it was a situation of ordinary code of conduct, which a judge is supposed to know. He is supposed to know atleast, he is violating the basics.

**Participant:** suppose there is no such bias, and if the concerned has taken the objection, thats where he should not have taken the particular matter, and despite of that the judge has taken the matter if he has delivered the decision, against that party, so that would not be a ground, of challenge before the high court

**Justice Gyan Sudha Mishra:** challenging is you know, challenge is anything on this planet or earth

**Participant:** the distinction that we find out, is that the statute requires the disclosure, we are bound by the constitution, so that bar does not operate on us,

**Justice Gyan Sudha Mishra:** not only the conscious or morality but more than that, that what should be the correct course of action. It is mix of both morality and what you are supposed to do.so, it has to not merely a morality, and you might be thinking that, ohh! so wat, I know I am not a bias person, so, what if I know, the persons or so what if I have taken his company, yet I would not sacrifice with the course of justice, but what you are supposed to do is that you have to go by that, like you know your son might appear, your daughter might appear before you, your wife may appear, yet you can the absolutely impartial, many a times I say that in your, or even in

your private conversation, in your family conversation, you are all related. yet you disagree with your own people, so you may be very confident that I would do complete justice and would not deliver a biased view in the form of a judgement, yet, you think that what would be again that justice should not only be done but it should seem to have been done, by that dictum you are supposed to hear it. not merely because you will be bias, but you have to prove that, you are not bias and therefore, and so what you are saying that what a reasonable judge even as a reasonable course of action, he is supposed to know that what he should to do, and yet if he is ignoring it and unmindful of that of having such reasons defined or the normal code of conduct, which a judge is supposed to follow

**Participant:** with the view of judgement the likelihood off bias is replaced with the real danger now,

**Professor Upendra Baxi:** I don't know, this judgement and I, but I think all the past jurisprudence is by five judge bench, now even in pecuniary bias, it is to be real danger of pecuniary bias, that is notional bias I say, and they took recusal and recusal conflict with the oath of office, so justice Kehar in NJAC case, specially goes out of the way to say this applies to the high court as well. We hope that the high courts would follow this, now, it is Upto you to follow or not to follow...LAUGH...

**Justice Gyan Sudha Mishra:** I don't think anybody can afford not to follow,

**Participant:** I said I will not hear the case for reasons one, two, three, and four...

**Professor Upendra Baxi:** it goes to the SLP or it goes into 226,

**Participant:** if the recusal is administrative order

**Justice Gyan Sudha Mishra:** if Justice Dave refusing to hear it, direct conflict of interest,

**Professor Upendra Baxi:** if it is after the NJAC judgement, the justices who participated in NJAC have themselves resolved form the justice Kehar, so there is what you can say, if Supreme Court is supreme. I think in Bush V. Gore, and you do read the article

**Justice Gyan Sudha Mishra:** you are violating the code of the clock...LAUGH...

**Participant:** pre independence judges... there was a judge in the Bombay high court, where his sons were appearing before him, two of his very eminent lawyers, were appearing before the judge,

All speaking at once

**Professor Upendra Baxi:** earlier there was no such thing as son stroke, because you believe in the people, constitutional faith and before adjudicatory policy says, justice should not only be done but seem to be done, so it was the policy which was bring the people's faith in you, which is not the problem. Show, actually demonstrate, that there is pecuniary...if justice Kehar bench, there is no recusal at all

**Justice Gyan Sudha Mishra:** but, recusal in order to pull out the case from a particular bench, that should be discouraged, what I think the judge would need institutional support, because I have some illustrations of that also, but may be some other time, this is absolutely the subject I think, is of great relevance and value for all of us and more so, because you be still you know confronting such situations, so, I wish that we could you know go a little more on this, but we have already you know cross the boundary line of the clock, I for the one do not much bother about it ,but I have to see the consensus. So, now we rescheduling we have to disperse. Right to food. Shall we reassemble at 2?

2 in any case it has to be. Okay then we will reassemble at 2.

Thank you

### Session-3

#### **Judicial Review and Challenges of Durability and Longevity of Indian Constitution**

**Justice Gyan Sudha Mishra:** good afternoon, we had a very extremely thought provoking subject in the previous session. The judicial review and challenges of durability and longevity of Indian constitution, there can be more opinion about it, I think professor gupta only be doing reinstatement of the judicial review. That we would love to have, the future vision of the judicial review, so it can add to the value of our young fraternity who is going to shape up the new horizon for our institution so please

**Dr. Balram Gupta:** thank you so much, Justice Gyan Sudha Mishra, who brings such experience of judicial review. Professor Upendra Baxi, what should I say, I was sharing yesterday only, in which I genuinely believe the best living law teacher in the country today and on my left Mr. Arshad Hidaytullah, the senior advocate from Bombay. Hon'ble justices of different high courts. I thought that this would be something of interest for the future to be looked into about the durability and longevity of the constitution, I recall having participated in a conference, on the occasion of bi central celebration of the USA constitution, in 1987. That time I spoke on the longevity of the USA constitution, what has actually and factually contributed to its durability and longevity? I thought it is good time to talk about the longevity of the Indian constitution as well.

the USA constitution 229 years old, with only 27 amendments to its credits and therefore, we need to look into what kind of a role which have been played by judicial review in making the USA constitution a living constitution which continues to serve the changed circumstances, situations even today as well. Our constitution we deliberated upon it seriously we took a reasonably long time to be precise two years, eleven months and seventeen days to draft the Indian constitution. Today we have 66 years old, and therefore this plant and not a fossil, how it is grown actually, what has contributed to its growth, is the real aspect through the medium of judicial review as such. you know the constitution during this 66 years have been amended 99 times, is known to every one as such, and therefore when we look at this, as to how the parliament has contributed and how the supreme court and the high courts have contributed towards the durability of the Indian constitution and before I actually address myself to that, one particular aspect to mine is

very significant, if today in present political situation we were to draft or craft the Indian constitution, it would have been an impossible exercise. Therefore we crafted the constitution in good time, and we hope that it would last us long to continue to govern us as such. I have always felt that judges are not the actually the engines of power. they are the engines of justice as we were talking, justice as reflected in the personality of a judge, that is in fact judges do justice by removing injustice, through the process of judicial review and this therefore to mind is the main focus when we look at the main recipe of the Indian constitution, in the sense fundamental rights, the directive principles, the fundamental duties. This particular recipe the final product today is really going to meet the challenge of three dimensional justice, as contemplated in the Indian preamble, constitution. preamble as such, justice social economic and political and therefore when we find that the directive principles and the fundamental duties being not justiciable, what can be the coordination or harmonization of these two components with the component of fundamental rights, that actually is the challenge which is there to be met with, which would actually lead us to the future durability and longevity of the constitution. so far as the fundamental rights and directive principles are concerned, I wish not to go into any detail as such but, in case it has been so well interpreted, that the two have to be harmonized, a balance have to be maintained and this balancing exercise is the role which is for the future of the constitution to be played, so that whatever the preamble ensures to the people of India, able to see it through in that particular process, that is what as such is this. in this harmonized exercise has already shown the results in the sense many of the directive principles are read into article 21 of the constitution through the judicial process, similarly if we look into another aspect article 14, that also is leading us in that particular direction. the main challenge today is in the context of fundamental duties again they are not justiciable, and therefore many of the problems that we encountered today in the society emanate in that particular context, to refer to one of the fundamental duties, that is to protect public property and to adjourn violence, that is the duty of every citizen of the country. the recent episode, state of Haryana, what all happened we know as such, and therefore is it the fundamental duties being non justiciable, or meaningless or consequences as such and only as constitutional platitudes, or the judicial review has the significant role to play in this particular context, how do we really, if we have been able to harmonize fundamental rights and directive principles, would not be equally a challenging exercise to look forward, how the fundamental duties can also be harmonized in that process. if I destroy somebody's property as a consequence

of which, that somebody even cannot carry on his right to business profession of his choice, or the residence of a hawkers is demolished and therefore the right to living is effected as such in that particular process. How to deal with such a person, how to deal with the violation of fundamental duty in this context? Can the violation of the fundamental duties be read into the limitations on the exercise of the right of the fundamental rights or not? That is the matter which leads consideration through the medium of the judicial review for the future in that particular context. I think that is indeed a very challenging situation that we need to meet. We were talking about in the morning sessions, justice, the entire approach is justice oriented as such. It is in that orientation that the constitution of the future which would provide durability has to be looked into, and in that context justice or as article 142 of the constitution contemplates complete justice. How do we deal with that? one view has been taken in regard to article 142 of the constitution, it is the rule of law which is to prevail, the rigors of law cannot be compromised and therefore even in the presence of article 142, no order can be passed which may be what in consonance with the law of that particular issue as such. The law is to prevail. The rule of law is to prevail, that has given the view which has been taken. the second aspect to my mind which leads us serious consideration and that is why not interpret that particular law or provisions of that law, in such manner through the medium of judicial review, that you are aiming to achieve the objective of the article 142, to do complete justice and therefore in that particular context, the interpretational process should be such that justice orientation or complete justice which the apex court of the country is to do with the article 142, interpret the law so that you are able to do justice to parties in different situations and circumstances. The third option to mind is equally relevant to be considered. What is the third option which needs consideration as such? now, the third option to my mind is if the supreme court finds that the particular law is failing to do complete justice and is not meeting the ends of justice as such now, article 142 is the part of the constitutional any other law is brought under the sense the constitution is to prevail over the ordinary legislation as such and therefore, why not interpret that particular law, that it is not being justice in this given situation, and therefore it is not in consonance with the requirements of the constitution, and therefore this law is unconstitutional, set aside on that particular score, so, that let the legislature take cognizance of the entire situation, that after all the mandate of article 142 should be maintained and carried after, that is what the constitution requires, though this particular jurisdiction is only with the apex court, and not even with the high courts as such. If you really looked at the civil procedure code section 151, to meet

the end of justice, any particular order, can be passed or section 482 of the criminal procedure code, similarly the high courts to meet the ends of justice can pass such orders. I am referring to these only with the idea with the object that ultimate goal of the constitution is justice and justice orientation leads to re paramount through the judicial review process, and that to my mind if kept in mind, is going to give a challenge for the future to actually provide durability to the constitution. this would raise a very controversial issue, the role of the constitutional court, if I use the expression with all, or if I say this that in this particular process, normally what we say the judicial activism as such, whether that needs to be encourage even if the mandate of the constitution being to do justice, or it needs to be with restrained to be exercised. Justice Kurian Joseph, recently delivered the fifth lala amarchand sood, memorial lecture at the Himachal high court in 2015. on the theme of judicial legislation, and in that he has effectively projected that, this judicial activism, I would put it, that is the boundant duty of the judges to bring the life into the laws to make them living laws as such, to deal with the different situations. It is the boundant duty to make the law functional and very effectively he has projected that, if Iam permitted to read that particular aspect. justice Kurian Joseph says, however it is the constitutional parody of the superior courts to decide also as to whether the law is according to justice and if not, to interpret the same in accordance with justice, in the process the role of a judge sometimes, shifts from interpreter of the decision maker to that of breathing life into war, and making the rule of law functional. though this process is popularly known as judicial activism I would like to see it as the boundant duty of a judge, it is the judicial response to the cry of justice, and therefore this aspect to my mind it needs to be given a serious thought and consideration so that, we can shave for the future this particular aspect. Let me come over to the basic structure aspect of it. We all are so aware of the entire exercise of the background, but, let me touch so that I can project for the future as to what actually. You know to begin with what is the role that parliament played. The very first amendment to the constitution, introduced the ninth schedule to the constitution, along with article 31-B of the constitution. all in that process parliament of the state legislature could do something which may not be in conformity with the fundamental rights passed the legislation in regard of that, and the parliament by amending the constitution include that particular legislation into the ninth schedule and provide the protected umbrella to that legislation which could not anyway be touched or the touched stone of the constitution as such, that was the very first amendment to the Indian constitution. If we look at the parliamentary history of 1950 to 1975, the first 25 years as such.<sup>39</sup> constitutional amendments

were made. 66 different legislations were included in the ninth schedule by different amendments to the constitution, now, that is where it is challenge for the durability of the longevity of the constitution. That was the challenge as to what kind of a shape actually would be there of the constitution. That was the challenge as to what kind of a shape actually would be there of the constitution. May be after 50 years as such. we know shankri Prasad case, came up before the supreme court in the year 1951, followed by the sajjan Singh's case in 1964, by that time, 64 different amendments had been included, 64 legislations have been included by different amendments into the ninth schedule to give a protective layer as such. the supreme court to preview, that yes the parliament can do that, which means by legislations, you can as the legislation which is not in conformity with the fundamental rights. you know that it is not with the conformity and is going to be challenged as such and which is likely to be declared to be not in consonance with the fundamental rights, and therefore amend the constitution, included in the ninth schedule, put it in the ninth schedule so that it stands protected. There was majority in the parliament, this all was possible and then in the two decisions of the Supreme Court, 1951 and 1964 the view taken was straight, yes the parliament can do that. It got the stand from the court of the country. few years later golaknath's case came in, in that they took a different view, that even a constitutional amendment is violative of article 13(2) of the constitution, because constitutional law is also law and therefore no law can be enacted which abridges or takes away the fundamental rights as such under article 13(2), and therefore it took different view from the view which was taken in 1951 and 1964, but, then overruling those two decisions would have created chaotic situation to my mind and therefore the Indian supreme court invoked the American concept of prospective overruling. Protect the past, resolve the past and protect the future that was what it did as such. In future this cannot be done and whatever has been done in the past is preserved as such. Now, have marched up-to this extent 1973, came up keshvanda Bharati, 6 years later from golaknath's case. The picture was very clear before the Supreme Court, constitution 36 amendments and in that process the ninth schedules storing was so, as such. On the other hand the limitations on the power to amend the constitution, the constitution was silent totally silent as such. Two aspects silence of the constitution, coupled with the fact that this particular aspect as to how the journey the parliament radiating to the entire background of the constitutional amendments. the supreme court to step in, 13 judges bench 6-6 and justice Khanna's judgement as such which projected the entire situation, particularly the efforts put in by nani palkiwala in this did bear fruit and therefore brought in the basic structure to the constitution, not to be damages, not to be destroyed, not to abridged as

such, basic structure to be retained, that was by the thin majority the view taken by the apex court of the country. even here the situation was rather delicate, and soon prime minister Indira Gandhi's election petition being dismissed as such, appeal before the supreme court and she was advised to amend the constitution, it is how the 39th amendment to the constitution came into p-lay, wherein what major change was introduced. The election dispute relating to the prime minister, relating to the speaker, for that no judicial review would be exercised by the courts. The dispute shall be adjudicated by a body which would be created by the parliament, outside the purview of the courts as such and normal election laws would not be applicable to these two particular constitutional positions in that particular context. therefore in that background the situation was very clear, with regard to the basic structure, it was a bench of five judges, it was held that judicial review is integral to the basic structure of the constitution and therefore this theory of basic structure or the doctrine of the basic structure got firm in that particular judgement of the year 1975. then comes Minerva mills case in 1980, to which I have made the reference as such, but, through the 42nd amendment, clause 5 to article 368 had also been included, and therefore in that light clause 5 provided that even any provision to repeal the constitution that particular power was vested with the parliament under article 368 as such. Which means repealing amounts to destroying of part of the constitution and in this particular process again the Supreme Court held that this is violative of the basic structure of the constitution and that's how it got gradually affirmed and continued. from 1973 if we look at the journey of judicial review in different situations, which have come up before the, we find that the court have been stepping in wherever the court found that yes, it is violating the basic structure and the latest to which the reference were being made in the 99th amendment, national judicial commission as such, that also had been held to be not in consonance with the basic structure of the constitution, which means the entire journey is gradually affirming, crystallizing, clearing the basic structure from time to time. we do not know what all constitutes the basic structure as such of the constitution, but, from time to time whenever the different situations have been arisen, judicial review medium have been found to be useful in preserving the basic of the constitution. you know for the first time the expression basic structure or basic feature of the constitution, justice J.R. Mudholkar had used in sajjan Singh case in 1964, and ensures that it is the Pakistan supreme court in 1963, which used this expression, that under the constitution of Pakistan of year 1956, difficulties can be removed, but the essentials cannot be touched or removed as such. 1963 to 1973 did follow that exercise as such, and consequently this has been something

which has seen the situations and allowed the constitution not to be reshaped, its shape to be retained with the basic structure to be maintained and as long as this is going to be protection to my mind the challenge of judicial review to sustain the durability of the Indian constitution to my mind is absolutely, that it would be able to serve the future generations to come. you know, with this and then how meaningfully different situations have been interpreted by the judicial review process take the situation of the trans genders, rights article 21, how meaningfully it has been interpreted and such variety of rights have been included as to that as such. Public interest litigation or social action litigation with limitations of course has connected the people of India with the constitution of India with a three dimensional justice, which is to be there in that context, to be retained for that matter. I personally feel that we have a future for the constitution as long as we have judicial review to sustain that at the same time it is the fundamental duty of everyone. In the sense that the constitutional discipline must be followed. The constitutional discipline is something which is basic to everything, may it be the three organs of the state, maybe WE THE PEOPLE of India, may be everyone, to follow the discipline of the constitution, certainly will provide the durability to the constitution of the future and therefore this challenge can be through the medium of judicial review. I would like to respond to this, thank you very much

**Justice Gyan Sudha Mishra:** thank you, professor gupta, there can no two opinion on what you expressed that the power of judicial review is meant to adopt an approach which is justice oriented and it cannot be any other thing then the delivery of justice and in this context I would like to share just a few thoughts which I was just wondering that constitutional courts of course, we don't have technically constitutional courts, but the constitutional powers are exercised by the high courts and the supreme court and not the sub ordinate courts, because we are generally guided by the statute and the provisions of the laws. there is a lot of creativity which is reflected by the high court, while exercising their power under 226 and 227 and of course the sky is the limit for the supreme court for the ideas except for their own limitations that they exercise, in so far, giving shape to the constitutional duties and I firmly believe that the approach of the courts which exercise constitutional powers should give a shape and dimension to the approach which delivers justice not in theoretical sense but also give effect in practical sense, and I just want to illustrate one of my experience in this context, like when we were deciding the sentence imposed on an officer of block development officer, who had been held guilty of the charge under section 494 IPC, which

lays down, it is just an illustration that how justice you know, like what should be the approach and of course the supreme court judgement is you know has number of judgements and citations where we have, where the supreme court has given an adopted justice oriented approach, but, what I am trying to impress upon is that even in the so called the ordinary cases which we call routine case, they are also this justice oriented approach may be adopted and in that context I am sharing this. that under 494 the section says, when a man makes a woman believe that she is his legally married wife and cohabits with her and has you know physical relationship with her, and there after she is deserted then , whether the offence under section 494 would be made out or not, now, the approach since you had in the divisional bench, the approach of one of the judge was that the companion judge, that I want to interfere in the matter, in the judgement of the high court, because this man cannot be held guilty of the offence, because the woman is not a minor, she is a major and it is not that, she does not know that she is not his legally wedded wife because he never took her to any temple, he never got for a registered marriage or in not even you know marriage simple marriage in a temple and therefore he did nothing which could make her believe that she is his married wife, and therefore the offence is not made out, now, I am before you, you judge, and my view was that forget you may not hold the , charge of my oppression but, I can share only my experience, so my approach was that yes! if you had been a magistrate or a district judge dealing with this case, since you are bound by the letter of the law, your interpretation would be absolutely correct that should be the view, because they have to decide on the evidences and evidence does not indicate that she is legally married wife, but, sitting in the supreme court and even in the high courts I would say now, you know the interpretation that how you exercise the power of judicial review by giving a shape to justice orientation now, justices that he has definitely, the man is definitely being extremely to the guilt, doing injustice to the woman, but you cannot bring him under the net of 494, but, my view was of course he has not taken her to the temple or brought her or did anything which she could infer that she is legally wedded wife and she knew that she is not legally wedded wife, but, now come to the other part, why do we believe the evidence of marriage or registered marriage by you know some informal marriage. Here he has done much more. He has lived with this woman for 15 years and they have lived completely like a couple, they have two children. The children were admitted in a school, where the column of the father's name of that person who is not her legally married husband. It is given out there. Then the voters list. everywhere, all such evidences, now, you will ignore all such evidence and say that

he has not taken her to the temple or a registered marriage, and therefore that ingredient is missing, sorry I cannot subscribe to this, because the ingredient of 494 is much far, far more grave than what it is. What do we take that instance because that is just an indication that you have taken a legally married wife, but he has done much more, so, if sitting in supreme court, like where you have the constitutional power and the power of judicial review, where you can, give you know can give tooth to the judicial review, justice oriented approach, I don't think it would be right in having that interpretation. Unfortunately as I keep saying one journalist somewhere had asked me, that what are your moments of joy and what are your moments of you know disappointment? I said I have many, but moment of disappointment is that why do my views get upheld only when it goes before a larger bench, only when I disagree and it goes before a three judges bench, then my views gets upheld, I think this is the disappointment, as an indication or may be gender bias also, so it as usual we did not agree and it before the larger bench and finally that man had to undergo the sentence, and it was held that yes 494 offence is made out. I know I just shared this that as constitution, as a court exercising constitutional authority and the power of judicial review, we should definitely have an approach which gives effect to the real justice and not illusory justice and not justice according to the letter of the law and therefore what professor gupta said I absolutely agree and of course you know that power of judicial review is not merely to give effect to the letter of the law, but, it has to be justice oriented, but, most of the time when we talk of justice orientation generally what happens is that we talk of lofty things like you know giving rent to the fundamental rights and of course you know no one underestimate that, but, when we give justice to the common man, why do we do not adopt that approach which gives effect to the real justice and to the common man, and revive you I would decision impress upon you that you don't have to really go and but you have to go behind the spirit of the provision under the statute, where it can give acceptations to the masses that you give effect to the real justice, where it comes as I know as an exemplary punishment that not merely you can dodge the law, by having a little literal interpretation giving spirit, because the view was taken by my companion judge is not that I could brush it aside, because in a way he also had a point that how can you punish him, he has not you know and she is a major, it is a different matter that later on I came to know that they were the Adivasi couple where this kind of a marriage was acceptable so, it was not really an informal marriage but, it was also a marriage. so, small cases also we have to rise above the literal interpretation and we have to exercise you know our justice review at least at the level of the high

court and the supreme court of course, and it is not that it is lacking, they have done it but, what I have felt that this barrier of judicial review on that exercise of judicial review is generally executed when we have very lofty ideals in terms of you know giving shape to the constitution, like you know the amendment of the constitution, whether you can exercise, give judgement where you can take a review that, amendment power of the parliament, so, that of course no one can you know ignore that, but while delivering justice to the common man also I think this exercise of power of judicial review even in matter of so called the commoners needs to be emphasized, highlighted and exercised with due diligence. this was my reaction to this subject and as I said you know I also, it would be you know that it's my benefit that I could now know the views of the new generations which I have tried that it will take it forward, and I am quite hopeful that it will not lead backward, so, anyone of you who would like to add to inside or maybe share your experience or questions, you are most welcome.

**Participant:** the only matter of concern of today is situation is that we have to draw the distinction between what they popularly call judicial or the judiciary encroaching on the rights of the executive or the powers of the executive, these are the focus issues, when we talk about the judicial review and the background of course.

**Justice Gyan Sudha Mishra:** I think that is the very valid concern that you have raised, and my reaction to this you know what is that I am not very good at sher or shayari, but, I remember that *tabiyat Se patthar ko uchalo, toh...hahaha*. It keeps started even at the cost of your peril

**Participant:** because we are coming across situations where there is lot of vacuum and you don't have laws on particular issues so, we have to interpret the constitution, the data which is the urgent need of the society, the Vaisakha's case, where it was very important for the supreme court and justice verma's judgement to address the issue and the judgement,

**Justice Gyan Sudha Mishra:** but I have always believed and I still believe it that you know, if there is what you do is packed with substance sooner or later then it is bound to have an impact, like I am giving you an illustration of euthanasia, the euthanasia judgement we had given and where we have said that you know, under the active euthanasia of course he rejected, passive euthanasia we have accepted under the court's supervision and there was a lot of reaction on that

also, that why should the courts should be there, now, when the matter has gone to the constitution bench, on day 1 of course it has I read it in a newspaper report that the initial view of the government was, that it is not going to accept euthanasia either active or passive but, recently I read it that now, they will accept passive euthanasia under court's supervision and for this they will bring in a legislation but, they will await the judgement of the constitution bench on this, so, if you really truly do with sincerity and commitment, you do your part and rest you know,

**Participant:** we have situations like surrogacy, and lots of pressure from foreign citizens, and you know foreign citizens come to India for surrogacy and surrogate mothers

**Dr. Balram Gupta:** justice Gogoi has come out with a very positive order on surrogacy as such, and we look forward to it, let's see how things shape up

**Participant:** we also had, there are lots of problems on that

Dr. Balram Gupta: there is lot of change now, and the whole concern is therefore of the vacuum and the judiciary required to struck down, then the judicial review

Purposive interpretation, will fill up the vacuum,

**Participant:** social, economic and political inequality enshrined in the constitution is so vast, that the government and the administration is shutting, public interest litigant, manipulation, corruption, it is like breaking up the administration, and

**Justice Gyan Sudha Mishra:** we have to take it like forward you know, we cannot really harp on our past professions.

All speaking at once.

Breakdown of law and order is a concern...judicial interpretation of 21...

**Justice Gyan Sudha Mishra:** we have fortunately one session for that also, committed to the rights first. Hahaha...

All speaking at once

**Justice Gyan Sudha Mishra:** committed to justice

**Participant:** so many encroachments from the government which the high courts ordered to be removed, warrant issued, some or the other we want to create some legislation so that we order the high court judge you know,

**Professor Upendra Baxi:** I agree with you that there is something called judicial activism and the word term used, in 1985, set out my reasons for not using the word judicial activism, because the label we affix at the back or the front of a judge who may like or dislike, narrow the word you use the word judicial activism so, did, in 2014, various people, judicial activism as mark of disapproval, so, I think the word is theoretically vacant, it has no future, no integrity. We must think of some new dimension and that is adjudicating the leadership of the country. This is what the courts are doing now, the high courts are doing. namely within the appointed sphere, while interpreting the constitution, they exercise leadership of the country and you should not, it is leadership can be judged only and only on the ground of effectiveness, there is something called symbolic, that is education to values, the courts saying bill was about the black money, now, people are asking... so, the court responsibly invent in invention of new right, invention of new enforcement structure, invention of new remedies, invention of new jurisdiction. This is where the strength of the judicial leadership lies. so it will be activism there, a future lies in the adjudicating the leadership of the country including sexual harassment, including making policies for the nation, where did the right to information come from, it is supreme court considered obiter which lead to right where the thing called suggesting jurisprudence , where court does not only rely on the policy but tells you what the policy might may be, and that is the, similarly harassment it took from 50th year of independence till 2013, for the parliament,

so parliament took 30 long years and made a nest of what had justice verma said, because the sexual harassment law is a terrible law, wicked law, I give respect. It includes prudence or excludes prudence. You whole idea I interpret as ragging law, ragging policy, made by the Supreme Court. Till legislature finds, and takes it in extremely wrong way, so adjudicating leadership or demons prudential leadership of the country rest as much as with the court effective, that's the very important question, as much as with the legislators. Nobody prevails legislations making good laws. The courts like MNREGA...very long time back, how to remember

it...hahahahah, on food security, ohh! That's the matter of memory so, my basic point is... first is the new phenomena, it recognizes the new ground and secondly you must also read the history right, it was not justice Mudholkar who was important figure but justice Hidaytullah, the two judges who dissented, who had highly conquering opinion, Mudholkar was quite wrong about the...it was first time given by the lordship, in 1951, in re Delhi law act, case, advisory opinion, very essential feature which cannot be delegated, though the language of essential feature does not come from Pakistan, it comes from, wherever it comes from, similarly, that was the starting point of Golaknath, and fundamental rights are not free things of a majority, cannot be the play things of a majority. And from that is where Golaknath happened, it did not happen because of Pakistan or Germany, it happened independently. So, called judicial activism, lordship said in 1954, which when keshvananda is acknowledged. So, misleading of law continued under various myths

**Dr. Balram Gupta:** see Nariman in one of his recent articles in the few cases, general part as such, and relating to ideals of constitutional cases as such, there he make he makes the reference to the Pakistan supreme court judgement of 1965.

**Professor Upendra Baxi:** I often get engaged with the Indian supreme court, I go to Pakistan and Sri lan ka, so I know what they have done, the real innovation comes our justices talking about India, and not talking about America or Pakistan or Nepal or Bangladesh, I am talking about our context, and that is important for everybody including Lordships.

**Participant:** judicial activism is considered as two fold function, that is protection of constitution and legitimizing the action of the government, I think now, in one of the reservation policy, that is thing coming up, we for instance in sajjan's case, the supreme court judgement in....now, another again Maharashtra also government made laws, restrict of aarakshan, and then there it was...so, the high court decided that, Maratha are considered as socially economically backward class...now, what happened in Gujarat now, Patel andolan is there, the judge of Gujarat who gave this...he had to withdraw his observation because of the political pressure,

**Participant:** the criteria of social and economic backwardness which has been formed the basis for reservation of caste, that has to on the basis of some statistical data for determining the social and economic backwardness and this is also, and should be, it should not be accepted as it is

**Professor Upendra Baxi:** there has been the case, where the supreme court and high courts, supreme court has self-stated difference between article 32 and article 226, and always said that 226, powers are larger, then, so, I am sorry but the case, people of various, will bring this matter before the 226, it is judicial discussion not, duty, to admit the matter or not, but, in justice palkiwala case, saying in the lunch time to someone, that, the judge obviously made it actual error, which no judge of a high court should make, namely made error by saying that reservations are for 10 years, now 10 years, there are only for legislature and not for educational employment, here that can be unaided, and even for legislature that is reservations are extended, so as the dr. gupta said, amended 99 times, actually most amendments are routine, every 10 years to pass the amendment to give more safe, so if you count out the routine amendments the actual number of amendments which really affect the constitution of future of India are very few, in fact there is something that you may not know, but, it is only find in the next, for about 30 years law in India and elsewhere, I did not know that there is article 35 A of the constitution, which is not printed by this government of India or commercial press and it is article 35A, whose text you can find only on internet and it is relating to Kashmir and it says that the state of Jammu and Kashmir certain residencies required and president passed an order creating article 35 a now, nobody pointed out, that this is not the way to make the law. Article 368 prescribes a procedure for the amendment of the constitution and it should have taken the whole procedure, and you cannot make an ordinance, so the government give two constitutions, one is secret constitution, which nobody knows about and other is the largest written constitution everybody seems to know about. Supposing the court says that article 35A is invalid, because they did not follow the procedure prescribed under article 368 of amendment, is that judicial activism? Or it is just a dispose of a king? the problem with judicial activism is you will say in fact is so challenge and dilemma appears on the side of saying that there is no need for amendment, 35A stands by itself and Jammu and Kashmir assembly apparently passed the resolution in favor of 35A, supposed I do not know what has happened to the petition, that I argued before the supreme court, supreme court as far as I know has not given a judgement but, can you insert a new article in the constitution excepting by the procedure prescribed in the 368, and the supreme court eventually holds that this against the basic structure because you have not followed the procedure, is that activism? It is simple application of the constitution

**Participant:** Professor M.P. Jain has not used the word judicial control,

**Professor Upendra Baxi:** administrative action, and that is the different matter, but basic structure is unhold, of the constitution itself, after all before the court took, what was the argument in 368, the argument was parliamentary supremacy, which means parliament can repeal the constitution. Parliament may convert India into a monarchy from republic, parliament may convert India into Hindu Rastra from secular republic and so on, and parliament's power is known to be amendment. No limitation, there are no inherent limitations there are no implied limitation. then the supreme court said that this is too much, you cannot argue like this, of course you can argue, but you cannot argue, being a judge you have taken an oath, basic structure is of two parts, one is basic structure and one is essential features, and I compare it with constitutional...give parliament preliminary powers to amend the constitution when it came to the last, then the lordship said sorry, you cannot part with this thing...hahaha...and that thing is judicial review, because the power of the judicial review which enables it to say that the amendment is valid or not and whether the amendment is essential feature or not,

**Justice Gyan Sudha Mishra:** I can assure you that, we will forget all the task that you have learnt but never this one,

**Participant:** judicial review gives the longevity and durability to the constitution, and times has come sir! Where the power of judicial review should also be exercised through inclusion and exclusion of caste for the purpose of article 16, or ground of reservation to any class, which is backed by the statistical data which is on economically backward, also rests on the statistical data, we cannot assume.

**Justice Gyan Sudha Mishra:** so, justice Thakur, our professor has to take another class, so we will better push out for the coffee, yes he has to go. I have to end up abruptly. We have a tea break, so, we will come after 3:30.

## Session 4

### **Judicial Review in the Context of Tax Decision**

**Justice Gyan Sudha Mishra:** so, welcome back to the and after this judicial review and its limitations on the constitution and doctrine of recusal in judicial duty now, which I guess, was a mix of academics and practicality but, we are hardcore utilitarian school of thoughts and the utility of the subject, that is the judicial review in the context of tax decisions and, hahaha...because whenever it is tax we go for the deductions, so, it will be very interesting specially for me because although in my career in all branches of law and of course, once I clash with the tax also, but I always wanted that I need to be informed rather than you know, inform and decide for others, so, it is good opportunity to improve at least my insight, I don't know about them, most of us would like to you know to add to our information and bank to our knowledge bank so far as the tax decisions and judicial review in the context of tax decisions are concerned. we have an eminent speaker Mr. Hidaytullah, and I tend to call him justice Hidaytullah, because his dad's name is so ingrained in my tongue ever since my college days, when he used to be the CJI and we used to be you know, not even the upcoming lawyers, but struggling to be the lawyers, because I think I was doing graduation at that time, so , I am very careful when I am calling, I have to remind myself that he is Arshad Hidaytullah and not justice hidaytullah...hahaha. Or maybe justice Hidaytullah in future.

**Arshad Hidaytullah:** actually somebody asked me that how old are you? If I had been made the chief justice I would have been retired by now. I think that answers the question...this particular subject is more should we say mundane, more practical and one which possibly happens, at least once or twice in a day, or in a week for a judge who is sitting in the writ jurisdiction under article 226. I chose this subject because the judicial review can be in various courts and various sentiments. The most obvious place where judicial review happens on a daily basis is in exercise of the plenary power under article 226, where you had essentially 4 writs, the writ of certiorari, mandamus, prohibition and habeas corpus. It is these writs which the constitution has given, a judge sitting to control the actions of the executive in any direction. Now, this is not pitched on the level of constitution validity or striking out a particular legislation or an amendment, is small mundane you have decision which has been taken by an officer

**Justice Gyan Sudha Mishra:** it may be mundane but we cannot get away with it,

**Arshad Hidaytullah:** yeah! You cannot, unfortunately, there is a way of shocking it off, but that does not work on the time. When I started my practice, there was no system of so called alternative remedy. I can explain what do I mean by that, there was no statutory tribunal set up to consider these cases and since the acts were consented the sales tax act, excise act, customs act that time were based on the English concept, the precept was that an officer would take a decision, the appeal would lie to another officer, within the department and from him to the third officer higher in category, but, then after that what, because there was no finality or anything in those orders so, the only thing to do was either to ask writ of certiorari or if the end result of this whole exercise was that you had gone through the process, even then the order was informed, get it set aside by the writ certiorari, so, my speech today is actually based on probably discussion on the writ of certiorari as if there it was, what's the concept was and how it has developed over time to come back to what is actually today, the same writ of certiorari as it was in 1958, or the easiest way to describe the writ of certiorari is to see the pleadings, and any that person, judge who is going to see this from time to time. Therefore the prayer says for the writ of certiorari or writ in the nature of certiorari to call for the records of the petition of the case, to go into what the majority and society thereof and to quash and set aside. That means in another words that the judges want to scrutinize the record for the purpose of deciding whether the decision making process which was itself correct or improper, because if improper it is set aside, if it is proper it is of course upheld. there is one more devension to this, which I will come to in a minute, which is that the court can interfere in its plenary power to decide the whole issue to one more innings before the particular officer or any other officer, now, you may say is this the practical writ, the writ of certiorari, and I am happy to say this that only 4 days ago justice dhrmadhikari and justice sahai., actually issued a writ in the form of direction asking the collector of the customs to produce the entire report before him and they will scrutinize this in the next couple of weeks, whenever it is produced to consider the legality of a particular customs, I will not go into the merits of that, this is how the writ should work. another example in the Kerala high court, my lord justice was CJ Kerala high court actually called for the records of the decision which was taken by the ministry of state to decide as to whether the ban on palm oil, was valid or not, in a policy, so, there was writ of certiorari really calls you to ask for the record, you may not call for the actual physical record but, I have seen this

been done also, papers have been brought to the court. if you find the order is banned then the Kerala high court and in the Karnataka high court I have seen that the whole order is marked with the red pen and the ribbon is put at the end of it, dangling saying it is nullified. I don't think we have this practice anywhere. let me tell you what is the writ of certiorari as it was first discussed based on English law and this was on the famous case...let me read this because after all this discussion you will see that nothing has changed. the paragraph is if therefore the existence of other adequate legal remedies is not per Se abide to the issue of the writ of certiorari and if in a proper case it will be the duty of the superior court to issue a writ of certiorari to correct the errors of inferior courts or tribunal called upon to exercise the judicial or quasi-judicial functions and not to relegate the petitioner to the other legal remedies available to him and if the superior court carrying a proper case exercise the jurisdiction in the favor of the petitioner who has allowed the time to appeal to expire or has not perfected his appeal example by.. To security required by the statute. it should then be laid down as an inflexible rule that the superior court must not deny the writ of certiorari whether the inferior court or tribunal by discarding all principles of natural justice and all accepted rules of procedure arrives at a conclusion which shocks the sense of justice and faith laid merely because such decision has been upheld by another inferior officer or court or tribunal. if an inferior court or tribunal at first instance acts wholly without jurisdiction or patently in excessive jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior courts sense of fair play, the superior court may rethink quite properly exercise its power to issue the prorating the writ of certiorari to correct the error of the tribunal first instance even if the appeal or other inferior tribunal or court is available and records was not held to it or records was held to it, it confirms what expression was nullity for the reasons of the formation, this would be even more so by the tribunals holding the original trial or the tribunals hearing the appeal are merely, departmental trials composed of persons belonging to the departmental hierarchy without adequate training and background and whose glaring lapses occasionally to our notice. so,, two points arise in this decision if I may say so, one is when should this power be exercised and that is summarized in the first part which is in paragraph 10, that if the particular officer has exercised his power which is not in consonance with the principles of the natural justice or procedure or it is decision which is based or extreme circumstances you don't relegate into an appeal, you set aside the order. This principle was found

avored in the leading judgement of the supreme court in a custom's case in tarachand gupta and there the concept which arose was when is an order without jurisdiction, when is an order in excess of jurisdiction. This applies across the board and this does not mean that this mean that this principle is only applicable to a tax court. It applies to any decision which is taken as to whether an order is excess of jurisdiction and this what law read, as nobody has said it better to my mind. that is he says it is sometimes been said that it has only when a tribunal acts without jurisdiction that is its decision in nullity, and in such cases the word jurisdiction has been used in a very wide sense and I come to the conclusion that is better not too use the term excepting the narrower original sense of the tribunal being entitled to enter the enquiry in question. There are many instances where although the tribunal had jurisdiction to enter on the enquiry it has done or failed to do something at the course of the enquiry which is of such a nature that if the decision is a nullity. The decision has been given in a bad faith. They have made a decision which it had no power to make, it may failed in the course of the enquiry to comply the requirement of the natural justice. it means perfect good faith have mis construed the provisions giving the power to act, so, that it fail to deal with the question related to it, and decided some question which was not related to it, that have refused to take in to account something which was required to take into account or mere vest its decision on some matter which under the provision setting it up it had no right to take into account. I do not make this exhaustive but if we decides the question related to it for decision without taking any of these errors it is as much entitled to decide that question from the as it is to decide it right here. Now, this is very felicitous English language of a Scottish judge. in the emergency some justices had occasion to consider this very issue as to when to issue a writ of certiorari to quash in that case a censorship order, and they summaries the legal provisions and the power of the court in the following manner, may I think this judgement which is 78 Bombay court of 125, is worth reading, it's in four pages the entire principle of the scope of the judicial review has been analyzed. Just 4 pages, you don't have to read anything more. The courts scrutiny and review are not totally void in a case where in the exercise of statutory powers and authorities empowered to make an order it is discretion or its subjective satisfaction. The order made by an authority on subjective satisfaction can be satisfied by the court on the following grounds and this is very important

A. that the authority has not applied his mind.

B. where the power is exercised dishonestly.

C. where the power is exercised malafide.

D. where the power is exercised for the purpose not contemplated by the statute that is to say it is exercised for the collateral purpose.

E. where the authority has acted under the dictates of the body of authority.

F. where the authority is disabled itself from applying its mind to the facts in each individual case, by self-created rules of the policy or in any other manner.

There where satisfaction of the authority is based on the application of a wrong test. Where the satisfaction authority is based on the misconstruction of the statute. Where the grounds of which the satisfaction is based and is irrelevant to the subject matter of enquiry and extraneous to the scope and purpose of the statute. Where the authority has failed to have regard to the matter which the statute expressly or by implication requires to take into consideration and where the decision based on subjective satisfaction is such that no reasonable person could possibly would have arrived at, that is to say the satisfaction of the authority is not real and rational. Now, all these principles obviously are available when examining an order, which is put before you in a writ petition. question which arises is what should we do after you have gone through this, if one of the several grounds upon by the authority to support an order passed by subjective satisfaction is vague, irrelevant or bad, whole order must fail, because it would not be possible for the court to say whether the interim order has been passed in the absence of such ground, though it were the case of order passed of objective satisfaction, the court might endeavor upon the order of surviving grounds. The authority cannot avoid the scrutiny of the court by failing to give reasons. In such a case, the court can compel the authority to stay its decisions. the last part where the reasons given are bad, and the authority has not taken into consideration the relevant factors or real grounds on which the order could have been passed, but the court had directly authority to reconsider the matter, but however the reasons can be given for holding the order which has been found by the court to be bare and unsustainable, the court will not direct the authority to reconsider the matter for that there is nothing for the authority to reconsider but the court will direct the authority to carry out what it has by the interim order. In a summary, these are the principles on which the writ

of certiorari has been issued. Now, whether one will apply or two will apply or three will apply depends on the nature of the order which you are facing. supposing there is a statute which says you will take into account of particular state of affairs, and the authority does not take into account state of affairs which the statute, you will say you have not taken into account that set aside the order remit it to, supposing the state of affairs not supposed to be taken into account and the authority has taken into account you will set it aside and at the end of the exercise this is the process of leaving with the order, where is nothing left to be done after taking into account to the...which was supposed to be or disregarded, why send it back for another round because there is nothing to send it back for. these principles found themselves considered themselves shifting to in another judgement of the Bombay high court, where justice S.B.Sinha and later on justice Thakur and Deepak Mishra applied the same principles in the context of a quasi-judicial decision and the two decisions which are there are the decisions of union of India vs...where the whole lot of the law has been summarized by justice Sinha and thereafter in the decision of the Deepak Mishra and justice Thakur in the decision of Heinz, I am not giving you the citation it is there on...too many paragraphs which are there in the judgement of Heinz, but, I would like to only refer to two aspects of it., which have been the subject matter of discussion just now. this was a taxing case where it says, the provision enacted for the benefit of an assessee should be so construed that it enables the assessee to get its benefit, however the principle of purposive construction will be adhere to the literal meaning result in absurdity or anomaly so, the court has given the sanction, that if you find that is anomaly you can use the principle of purposive construction to validate the statute or to validate the particular provision. In Francis book, the principle of purposive construction was not excluded in the taxing statutes, particular acts of statutes are not excluded from the strained and purposive construction. the presumption as to purposive construction then applies as to all other acts, some people think that the taxing statutes has been interpreted strictly but to gain the benefit of the statute which is supposed to be for the purpose of the benefiting a particular assessee or class of assessee, the court can strain the line which will give effect to the policy not to negate it, not to say that we are helpless, because I am sure as you say rightly just now, the whole idea of the justice system is the justice should be delivered by saying I don't have power to do it and leave it to the legislature to do it means that you are adjudicating what is your responsibility under the constitution to do justice however decision to say that you should make law I don't subscribe to that theory, where the judge should make law, or a judge gets so interpret the law so that if there

is a gap between two laws, you can fill it up. You can even to the extent now as we have said, you can insert words into it. the last part of what I wanted to talk about is the time now, is this principle of what is known in England and now developed in India, the once the principle of arbitrariness and unreasonableness, and that is something which is growing so fast that it does not matter as to whether if other norms by which the court could interfere, if satisfied or not. but, if the court finds that immensely the principle of arbitrariness is applicable it will strike down the decision without anything, or it would not say file an appeal or anything like that, and that is exactly what was said in Heinz and I will read this, where justice Deepak Mishra has summarized it in paragraph 49, the power of judicial review is neither unqualified or unlimited, it has its own limitations. the scope and extent of the power that is so very often invoked, I am sorry...when one talks of judicial review one is instantly reminded of the classic and of quoted passage of the council of civil services union vs. minister of civil services where lord... conduct permissible grounds for judicial review, judicial review I think developed to a stage today where without reiterating any analysis of the steps by which the development has come about, one can conveniently classify three heads the grounds at which administrative action is subject to controlled by judicial review. The first ground I would call illegality, the second irrationality and the third procedural impropriety. now, according to me this is without jurisdiction, arbitrary absurd and procedural, means of principles of natural justice, but the right to, fancy language there. by legality as a ground for judicial review I mean that the decision maker must understand the predicting the law, that regulates its decision making power and must give effect to it, whether he has or not this power excellence to justiciable question to be decided in the event of dispute by those persons or the judges by whom the judicial power of state is exercisable. By irrationality I mean what could now be referring to unreasonableness. It applies to decision which is outrageous, it is the defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether, the decision falls in miss category is the question which the judges by the training and experience should be able to answer or else there would be something badly wrong with our judicial system. I have described the third head as procedural impropriety, rather than failure to observe the basic rules of natural justice or failure to procedural fairness, to the person who will be affected by the decision. This is because acceptability in the judicial review under this head covers also failure of an administrative tribunal, procedural rules that are expressly laid down by the legislating instrument, by which the jurisdiction is confirmed, even such failure does not

involve in the denial of natural justice. of this particular passage was summarized in Tata cellular case, and in the following terms, whether the decision making process authority exceeded its powers, committed an error of law, committed a breach of principles of natural justice, breached the decision which no reasonable man, could have breached or abused its powers, therefore it is not for the court to determine whether the particular policy or particular decision taken into fulfilment of that policy is fair, this is what I got hit by my lord justice Dattu, because he said it is not me to decide this, policy is fair. his only concern with the manner in which such decisions have been taken, extend to the duty to act fairly will vary from case to case, shortly put the grounds upon which an administrative action is subject to control by the judicial review, which is the nature, can be classified as under, illegality which means the decision maker must understand correctly the law that regulates the decision making power and must give effect to it.

Irrationality, unreasonableness and three procedural impropriety. in para 56 the judge has referred to another judgement of read vs. secretary of state, this is not lord Read, and it says exactly the same thing which lord Read has said it, I will just finish by reading that, we may while parting with the decisions, discussion on the legal dimension of judicial review, refer to the following passage from read vs. Scotland, it sums up in the legal proposition that judicial review does not allow the court of review to examine the evidence in the view of forming its own opinion about the substantial merits of the case. Judicial review draws also challenge to the legal validity of the decision, it does not allow the court to review, or examine the evidence, with the view to forming its own view, but the substantial merits of the case about the substantial merits of the case. It may be the tribunal whose decision has been challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or a common law, as a matter of fairness after it had observed. As regards the decisions itself it may be found to be irrational or worsly disproportional to what is required, so, therefore the principle on which the writ of certiorari was originally issued as a corrective measure, by the courts in England adopted by us in mohd... And in gupta...based on the later decisions of the Supreme Court. that judicial review is a very powerful weapon and the writ of certiorari is probably the most powerful in keeping the control over excessive action by the executive, at the moment we executives are all prevailing, the executive is taking the decisions and everything and it is only the courts which is there which should not show its helplessness, but,

should cease the jurisdiction and say that I see the manifest illegality and so I will step in and not leave it to somebody else, to do the correction and in some substance the idea is talk to you was since you all are judges is please use the jurisdiction which has been conferred by the constitution and if you find that the order is perverse don't say now, you file an appeal to yet another officer, which is an easy way out, but it does not correct it because it will come back to you, when I say it will come back to you, because an appeal from the decision of the inferior officer is to another officer of the government, is called the commissioner of office, is also a statutory functionary what a departmental, and if he is thinking about his seat and the remedy. So, you are not going to get away with it by saying that only when you get to the tribunal after a long winded process and I deny that order will be set aside, but you can short circuit the whole thing, exactly at the time of...

**Justice Gyan Sudha Mishra:** at this juncture it reminds me, would you like what would be your view or your contention do you suggest that the statutory provisions which are already there because when you come in the writ of certiorari or any other way the party has to give a declaration that there is no other alternative affications or remedy, so, would you suggest you know

**Arshad Hidyatullah:** depositing 50% of the tax as a precondition for the filing of an appeal, can be said to be equally, if an order is in breach of principles of natural justice

**Justice Gyan Sudha Mishra:** no! Do you say that I am the judges should interfere even though he has not exhausted all the alternative remedies

**Arshad Hidyatullah:** may I read the first passage from the first, I realize that this could be a problem, but

**Participant:** provision for deposit and in 1992, Supreme Court that these provisions are there which means deposit, the litigant.....

**Arshad Hidyatullah:** there are two views of this, I agree that quite a few judges and courts have held that where there is an alternative remedy per se, we will not interfere, but, there are others who look at the question a little more closely and who have interfered and who have interfered not by substituting their own reasoning, I am not trying to suggest that, but, by correcting the

process by saying that this order is given irrational, it's you know the breach of principle justice, so the interference is limited,

**Justice Gyan Sudha Mishra:** maybe you mean to say that, it would be an empty ritual like you know if you push him again to the same authority which is just would be stamping, and may be you can put it better,

**Arshad Hidyatullah:** no! I don't put it better

**Participant:** in certain circumstances, some evidences is required to be used before the authorities itself which may not be used before...

**Arshad Hidyatullah:** absolutely right! in fact I remember in the old days before the development of this statutory tribunals, under article 226, if particular evidence was found mounting, the supreme court also in exercise of appeal from article 226, in DCM cloth mill, 1963, ask the officer and the assesse to produce the affidavits and on the affidavits pronouncement the classification of the rules, that principle even continued right after wards, my lord justice had no such hesitation or for that matter justice Joseph had no hesitation in saying please file an affidavit and justify your order so, that principle what you are saying is correct, that ordinarily if you find that there is a plethora of evidence that is required to be produced, then you might send it there, but on the other hand if that evidence is not been looked at I am asking myself, if it does not exist then

**Participant:** it would be a situation where per se the order is perverse, or the appeal would not serve any purpose, in that kind of situation is

**Arshad Hidyatullah:** that is exactly what I am trying to suggest and I am not trying to raise it to the level that you should interfere from all the jurisdictions...what was my pet subject and my lord justice, he is not here just now, he is coming in the evening, when he said explain to me what is writ of prohibition, so I had to give speech to the whole bar, to what is the writ of prohibition and it is one of my pet subjects, at that time the decision was of a particular educational institute not been given permission to set up and so called notice was issued and I said none of the criteria which is there for denying the setting up of this is found in the so called notice, what authority you have got? Or what jurisdiction you have got? So, it is before I decide this lets have a speech.

I cannot say more obviously because it is personal decision of a judge who is faced to a particular set of facts what to do, but, since you have power under article 226, that it can be used and it should not be shut, it will help in the disposal of cases because if you file appeal in the tribunal, there will be a situation, where there will be a deposit, that deposit will be challenged in the court saying not..

**Justice Gyan Sudha Mishra:** matter wherever you challenge the order of a qualify judicial authority this situation, and you can short circuit

**Arshad Hidayatullah:** that is why I am saying certiorari which used to be the power from 1978 onwards until 1990 was used all the time. I have seen the court was developing the law of procedural reasonableness, I think more I am saying then, and equally well I discovered that when you found that the authority was not likely to give justice some judges were quite happy to forget about the process of setting you back to him because this is the point to exercise, he will only confirm rubber stamp is the same order, as I said to somebody I said now you are going to get another better order which your lordship will have to get. Whether he can

**Justice Gyan Sudha Mishra:** but, have come across even such cases where a refund order is there and that is under challenge and that is pending, but the party succeed in getting you know the entire refund. like you know I had confronted the situation that the refund, it was a commercial taxes officer's order but the refund was permitted the government challenged it, the writ is pending in the high court, the stay order was refused, then the effected party goes to the supreme court and in that he gets the order of refund and then on that basis he files one writ petition after the other, one after the other

**Arshad Hidayatullah:** not to pay tax, that is the unfortunate case, I am fully aware of that, litigation started ultimately the curative petition was tried but, did not work, so then they filed another curative petition ad it still going on, but it's a refund

**Justice Gyan Sudha Mishra:** I was chief justice, and I could anticipate it in advance which order he is going to slap me with, so I said it's not appealing to me, your writ petition is pending so, I am not going to entertain another you know petition of refund but, I give you a piece of advice free of cost, you go an file petition for compound interest...CHUCKLES. so, one has to balance

like where the cost is not sacrificed and yet if we also come across cases, where you know just allowing the party to the merry go round of you go and get it dismissed and then come again, that is also needs to be discouraged but, I think that vision, I think we need classes for top most court where they should be able to contain that kind of an order, if that had been done by the high court under 226 and 227 that should not be, that should be encouraged, or at least that should be precedent of that, so, because it is very relevant that was speedy justice we without sacrificing the cost we are able to arrive at a just conclusion, then definitely that should be done.

**Arshad Hidayatullah:** the idea of a writ, when the constitution was strained, why were these four writs were, it was there was supposed to be short circuit of the normal procedure of filing a suit, but until then specific relief act came it in the same, as they were given in this, but they were made wider, among other things, which means that your jurisdiction today as a judge under article 226, is wider than 32 because under among other things you can do anything for substantial justice. I have seen a judgement of the supreme court in the company law board matter, then they actually said to short circuit is litigation, we are going to ask for affidavits to be filed by both sides, and they decided the merits, this is the supreme court in bench of five sitting so, you cannot just say that this was a mistake, and that has been followed, if on affidavit there are been several cases that I have done where the court has invited the affidavits and dispose of the matter, not just setting it aside and sending it back, setting it back means this litigation will continue for another 3-4 years, while that officer passes an order. I had one extra ordinary situation which I will end with, which is that I have gone before the Karnataka high court single judge,, sorry division bench, the single judge had passed an order saying deposit this final appeal, and there is request in filing an appeal or a deposit at this stage where the proceeding is not completed, he nevertheless said yes, you deposit the amount and file an appeal, now,

**Justice Gyan Sudha Mishra:** see I will tell you, judge's point of view, many a times, because in our, inner circuit there are discussions on this kind also, like you know, the special you know you have to show disclosure chart, graph, so, instead of going into these cumbersome procedure, you have a short circuit, remedy alright, the petition is discussed with liberty to the petitioner to approach the alternative remedy,

**Arshad Hidayatullah:** that's your disposal but,

**Justice Gyan Sudha Mishra:** so therefore, there is forum like this if you are able to impress upon the please don't indulge in this, because I remember one of the former CJI was relating that, such and such you know, he goes to and dispose it off, by you know a routine order, and 50 petitions were disposed of, go for alternative remedy, without you know unmindful of the fact that this is going to get you know

**Participant:** what is the experience, that we discussed statute, there is provision for a pre deposit, and there is a writ, so what is the views

**Justice Gyan Sudha Mishra:** they succeed in the supreme court at least you know if it is not that person or some person, like you know if their deposit is 50%, he might succeed in going to the supreme court, that he might deposit only 10% or 25%, and there is no uniformity, in that, so, they are going trying the luck

**Arshad Hidayatullah:** these days the statute says you would deposit 30% or 40-50% depending on which statute it is. This is a deposit not for the purpose of the deposit, it is for the maintainability of the appeal, and there is a difference between the maintainability of the appeal to deposit and deposit for the purpose of the revenue. This deposit remains with the commissioner of the custom, you can't use it, it does not form part of the consolidated fund, and this distinction is being lost. If I deposit there, the revenue is not gaining. It is only just to maintain this appeal that I am doing it, so, in such a situation if you find, that there is no need for making this deposit an order could be passed saying yes this appeal can

**Justice Gyan Sudha Mishra:** don't you think that it's better to have the amendment in that regard instead of mandating upon the court to pass an order

**Arshad Hidayatullah:** until now, there was a discretionary power given even to the statutory authority to dispense with the pre deposit in certain cases, this is gone in the sales tax act, is 50% otherwise no maintainability. You cannot go to the court under article 226 and say I don't want to deposit 50% for maintaining this appeal, they won't entertain you.

**Participant:** I don't think you are, because the revenue officers are very expert now a days. they know their job, they know all the, therefore, this I was sitting on one of the excise bench for some

time, but very rarely we come across this kind of matter where parties are approaching the and invoking the writ of certiorari.

**Arshad Hidayatullah:** that's right, and that's because, over a period of time,

**Participant:** this was different, and about 15 years line it was totally different, but now the revenue, is also absolutely on their toes and they know the procedure, they know the law. They have expert officers and what we see that they are really following the procedure in the customs act, excise act, under the income tax act. There are very rarely writ petition on this

**Arshad Hidayatullah:** Ya! that's because the problem is since there is a tendency for the court to say, ok you file an appeal, and go for an alternative remedy, it's a question of cost, if you feel that you have got file a writ petition which is only going to be dismissed on the ground of alternate remedy, can you take your chance there? and as you rightly said, that you take a chance of getting an order of deposit which is less than the full amount and if it does not work then you come back to the court and say please reduce this amount, but then what is happening, you are only delaying the actual disposal of the case for another 3 years. The tribunal is also not in the position to dispose of every case in the phase of 2 months or 3 months, whereas here is the writ, who says yes, this is irrational please set it aside, and finish it. because in the old days there was no alternate remedy of this sort, so they used to interfere much, that's why I said, that if it an appeal to inferior court or a tribunal made up of departmental persons, then you would not relegate to it, because the order would be perfectly clear, as the rubber stamping of the original order and better, and there is one other thing which I forgot to say which I should have. You should decide the matter, that's the difference. If you see at, they have to be disposed of on the spot, that is substantive justice, if I may say so justice,

**Participant:** trend of your legal advice, looking at the initial trend, and there is one more aspect, which is very concerning to us, because if it is...

**Arshad Hidayatullah:** these days you get different kinds of consideration, I appreciate it, absolutely, and I am not entering into that

**Participant:** because what is important that the bar what we have seen is that the judicial trend, they would see the judicial trend and then advice the client

**Justice Gyan Sudha Mishra:** some prisoners are made to see and watch what exactly the trend is.

**Professor Upendra Baxi:** healthy relationship. We will come to this discussion, the decision...in 1976, now, why do you confine this merely to revenue and taxing statues and specific statutes, or I talk of judicial review, in these case, in each case, this is my question. I don't, I will look it up now, that you have mentioned it, ADM Jabalpur was decided in early 76, justice kaniya, who became CJI decided this, there is dynasty also in judiciary, you know that, this is bad thing...now, the point is the MISA judgment, it was totally based on the subjective satisfaction so, then the Bombay bar ever listen to the message of masani, because here judicial review is again subjective satisfaction not giving of reasons. Or other high courts, in the emergency, as they persuade, the person's not binding one or they just took ADM Jabalpur as the final authority.

**Arshad Hidayatullah:** my experience in 1977 was after this judgement Gujarat high court full bench followed it, and I don't remember the name of the case but it's a good one, and Gujarat high court full bench, in new India something or the other and this was never challenged in the supreme court, neither of these two decisions, and they continued to operate now, this is a decision on sensation that was a decision in a tax case, where after this amendment to the constitution, fundamental rights have been taken away. they have been left with the words among other things, so, this whole principle of administrative law was brought into effect, there, there was no fundamental right and in an excise case the full bench sat and said that these are the principles which should be governing administrative law and scrutinize the quasi-judicial decision and they made it applicable to everybody. I think its AIR 1977 Guj.1 it's a more detail judgement from this written by three judges, combine to what I was trying to say which is essentially, because you all are judges sitting here is that your power to scrutinize this continues to exist despite of alternate remedy and you are not in any way hampered by the mere existence of an alternate remedy I will take my other point, it has to be equally affications adequate alternate remedy, now if it is not equally affications, one point is may deposit large amount of the tax, two it is not adequate because it got to be very delayed, supposing there Is back log or three if you can give justice immediately

by saying that there is no case is made out by issuing a writ of certiorari, saying around on what basis did you issue this order, then why delay it, because judicial review is a concept which is not something into the air, it is something which has to be practically applied on daily basis from many people are actually sitting there and delivering justice, and it can't be just in the air, or saying go back and come back after 3 years. That is not solution to a litigant as such, and also one other thing what factor should be kept in mind? assessee in tax like certainty, that decision under article 226, is higher than a decision in by the tribunal, because the tribunal is subject to the high court's jurisdiction, so what are you doing if you are not disposing it off, it goes to the tribunal, it is not going to come back to you saying jurisdiction is not going anywhere, the statute provides two other judges would be hearing the same thing may be 3 years from now or two years from now, so, my interest is that both for the revenue as well as for the assessee and if the decision can be taken which does not require a huge scrutiny and I am not saying that you have to go into the evidence based decision, that is something which the tribunal can do where they are and everyone is not the same, there are decisions which can be disposed of with the space of exactly 15 minutes and I can only say this, justice chandrachud

**Justice Gyan Sudha Mishra:** only great danger is that at the instance of the revenue when an appeal is filed then you know, the high court accepts and it is done, and then the revenue goes up in the further appeal under 136, the I mean there is some risk that so it is the apex court which needs to be sensitized to uphold such because in supreme court I have seen that at least in matrimonial matters if somebody comes in transfer petition or against maintenance totally I mean at the order is passed even granting a decree of divorce directing a trial court to grant a decree, but I don't think if the high court does it and somebody is and on the other side is agreed and comes to the apex court I don't say what exactly would be the result, but the judge in the high court would, we all are you know, we judges, but, I don't think judges discharge divine functions yet, they are not you know, real lords in the sense that we are concerned that my order might not be misunderstood, my order may not have to you know get just, it might not be justified and that perception might not be appreciated by the apex court why I have done it? unless you know number of pages which a judge would not you know unless you know very small percentage, would go to the extent of taking of a very unconventional route and do something, which ultimately will get more, so that I guess this the apex court needs a training for this

**Arshad Hidyatullah:** we are hoping that everybody who is sitting here will end up in the Supreme Court, at some stage so, the training is starting here,

**Justice Gyan Sudha Mishra:** I am saying something else, the idea is very laudable, its worth appreciating but I guess you know, if some kind of a you know may be by virtue of article etc. like you know, some consensus should be build up that this should be the kind of approach should be appreciated at the highest level, also, so that I am not trying to discourage it, it catches up and has a real impact,

**Participant:** it actually, trial court judiciary on domestic violence act, interim orders are not, which is a key remedy in domestic violence act, and actually asked the judiciary...because it would be appealed,

**Justice Gyan Sudha Mishra:** I am telling you the other instance which I gave just sometime back, commercial taxes officers gives an order of refund alright! The revenue challenges it by the way of writ petition in the high court which is admitted, and also seeks an order of stay. that order of stay is granted by the high court while admitting the petition, now, the assessee goes, appeal not again because he couldn't have appeal against the admission, so he goes up and challenges the order by which against the stage and at the stage of stay, the supreme court might have thought that he has a strong case of refund and the commercial taxes officer order is perfectly correct, and he gets the order of refund from the supreme court so, making the entire exercise you know the writ petition of the revenue, so in one matter it gets that kind of I mean that nature of order and one after the other, you know in a similar circumstance, just an order issued, that this is the order of the apex court, some judges you know felt that he has on that basis, will pass that order, so one after the other, several crores, and somehow you know it didn't appeal to me, frankly speaking didn't appeal to me that when the commercial taxes refund order is challenged and that has been admitted, it is like you know jumping the forum and on that basis you are giving refund one after the other, I said no! I am going to reject it, please take it from the supreme court because that in which you got relief, that's an order in which you got a relief, but this is another number etc. so I am not going to accept it, please file another in the supreme court, get an order of refund and get file an application for compound interest also, so, as we say there is Sanskrit saying, like every mind, thinks in a different way, so I felt quite agitated that how come this order, this kind of an

order should be allowed to be sustained. then why there should be a writ petition at all, straight away you know go to the supreme court and take an order, so, I was in the high court at that time, I am just wait a minute, so my view will to get, but supposing I was in the supreme court, I were in the supreme court, and I would have that kind of a reaction which I suffered as the CJ in the high court, obviously in the supreme court I might go, it's quite likely that I would have made very strong observations against the judge who did its o I am saying that this is wrong, I am saying that a judge would not tend to take that kind of a risk that he while delivering justice, it is come what may, but he is also a concerned his own self, because we may discharge divine functions ultimately we are not even the gods, so, this mindset should be, we have to build up a consensus that the at the apex court level such orders should get protection in the interest of, because so far even how so ever speedy remedy it may be, apex court might not approve of an order which you may know, another way of looking at this alright! let supreme court do whatever it thinks, I will do this because I think this is the correct approach, but then you have to be a really,

**Participant:** not really because the power exists, if the criticism is that you exercise the power, I say ultimate this fear is the fear, what the upper court will say...

**Justice Gyan Sudha Mishra:** I would empress upon you that you can do more than these judges...

**Participant:** those are not judgement , those are of the under article 142, and if such an order comes, then whether that order should be followed that is ultimately with the discretion of the high court, because many times this question comes that supreme court has passed an order, it's not the binding,

**Arshad Hidyatullah:** it's not 141 order, it's an individual order, interim order

**Participant:** the problem is on conversion of, how while parqueting the major concern is that they are ready to go further...but, we are doing it, because again we will go and again we will file and

**Justice Gyan Sudha Mishra:** no! No! it's just possibility, it's quite lightly that you may get bouquets, that you know you cut short the whole thing, so, it's a different dimension, that you are discussing I am not saying that this is bound or this will happen, but, these are all you know,

apprehension, I won't say fear, sycosis, but, apprehensions, so, there is much a point in what you are saying and

**Arshad Hidayatullah:** idea was you know justice orient system I am suggesting a remedy which already exists. I am not trying to suggest something, which is something extra ordinary, who is going to say that issue the writ of certiorari, I am not allowed to do it, whether you should issue a writ of certiorari, it is something which is in your discretion

**Justice Gyan Sudha Mishra:** so, idea is that you know, try to cut it short as much as possible,

**Participant:** at times mam, the remedies are like that, high courts once serve the jurisdiction, obvious courts,...where there is assault and battery by the police station, and they have to acquire not evidence, by way of affidavits is not sufficient before the trial courts in the suits of battery or assault by police men during custody of legal, during the illegal detention,...not by way of writ procedure, because in tax matters there are certain instances where affidavit evidence may not be sufficient, and that does not constitute, evidence of,

**Arshad Hidayatullah:** then you relegate the suit and you don't handle the matter at all. You set it in not to an alternate remedy, but set it to

**Participant:** some of these matters and may be it make strength to tax matters, wherever it is required, for the production of evidence, and its varsity can be tested only by way of procedure

**Justice Gyan Sudha Mishra:** so, I guess the point that we crystalizes, that wherever possible we can,

**Arshad Hidayatullah:** thats what I am trying to say, instead of delaying the whole thing by asking the gentleman, if I may use an example, senior justice chandrachud, as he then was in Bombay he used to ask, what is the writ petition about and used to hear both sides and dispose it off, and how soon it was over and the space of two hours

**Participant:** all rules of evidence, evidence which is of real...

**Participant:** I would just like to make one query, regarding entertainment of petition, now, we have certain exceptions, come down to whirlpool corporation case, do, what the exceptions apply with equal, in writ petition and tax matters also, where you have hierarchy of statutory authorities, with provisions of pre deposits and don't compel the litigant or the person assessee to go through the, I don't find the decision on this point

**Arshad Hidayatullah:** in tax matters, Simmons and company vs. state of Maharashtra, justice S.B.Sinha wrote down the principles as to when the high court should interfere even at the stage of so cause notice, if it is quite clear that the hierarchy is not going to assist and that was available that is easy. the high court in fact the Bombay high court rejected the writ petition saying why will come here the so cause notice, the assessee filed an appeal to the supreme court under 136, and justice Sinha said, I can see that the mind of the authority is made up, and no relief is going to come to him so, therefore I will, he did not entertain, there is high court, would entertain this writ petition and dispose it off on the merits, now that remedy is also there. whirlpool is even larger thing, which set aside the whole so cause notice, but yes, they admit that they hear it on merits, now it's a balancing factor, but depending on whichever fact, you find for that particular case, what I am only trying to say to you just now is don't get, by saying that there is an alternative remedy and let him go there, that's all

**Justice Gyan Sudha Mishra:** may be that principle underlies in 482 in quashing matters, may be remotely you can say that you know, finish it off, at the threshold.so, we are done for today and I think. So thanks to the audience.

**Arshad Hidayatullah:** I said to my father Isn't it very easy for you to sit in that chair, because I am doing the work, so he said to me, you have finished your work and mine starts now, I have to write this judgement.

**Justice Gyan Sudha Mishra:** so see you tomorrow, thank you

## Session-5

### **Judicial Review of Natural Resources and Infrastructural Projects**

**Justice Gyan Sudha Mishra:** so, you already know, today's subject very contemporary very volatile and therefore very relevant also. judicial review of natural resources and infrastructural projects and I would like to kick start the subject because we have an expert and well-read and really informed speakers, so, I would straight away professor Sharma to start with the topic, in between all of can of course can raise and put our input and satisfy the curiosity and doubts and of course these doubts you know sometimes I feel who is going to satisfy whom. Hahaha...

**Professor Moolchand Sharma:** a very good morning to all Hon'ble judges, Hon'ble Justice Gyan Sudha Mishra, my own teacher, Mr. Upendra Baxi, colick balram and Dr. Geeta oberoi. let me outset make two confessional statement, one I am pitching in place of somebody else at the last moment, on a very late notice, I was supposed to figuring some other session but, then because of some reasons, yet I have been shifted to this and therefore, I seek your apology as I got the late notice

**Justice Gyan Sudha Mishra:** does not matter, where ever you falter, we will supplement

**Professor Moolchand Sharma:** and second, that I agree unlike you people all involved in an integrity and in the real application and interpretation, enforcement of laws, and therefore my purpose of spending few hours with you more on this and that exercise of learning from which I learn more and I don't know whether I would be able to contribute to anything which you want me to. As the chair has very rightly pointed out that today's topic is the most volatile topic and most relevant topic. I don't have to emphasize it because we all know, that on one side of school of thought there are people who are saying that even if some laxity of law, is to be tolerated, should be tolerated but it know rate, should economic growth be allowed to go down, while there is another school of thought, which says economic growth for the sake of economic growth is no growth. it has to be sensitized to the causes of democracy, to the causes of constitutionalism and constitutional commitment to assuring towards an egalitarian society and therefore, there are two schools of thought of course, there are many corollaries, integrity in public life, all those issues are involved but, I will not be able to catch upon and I don't think I am required to touch upon on most

of these aspects. We need to go 10 or 15 minutes if you allow me, to talk only about judicial review in administrative law and the allocation of natural resources and infrastructure. The dawn of economic liberalization and globalization as we all know, that projects are coming and infrastructure projects are coming, ports, airports, roads and also all kinds of natural resources are subjected to all kinds of purposes and the result of which what has happened lease, license, contract, contracts were there earlier also, but now you know the size, the complexity, complications layers of these kinds of contracts particularly in the global context and particularly keeping in view the national, of having greater economic growth. These contracts are assuming such proportion that the benefits that are acquired from these kinds of contracts, these kinds' licenses, and these kinds of permits are huge on both the sides. say for example when in disinvestment takes place, government earns the revenue, but at the same time when you grant license to lease for mining the ores then the beneficiary happens to be leasee, and the amount of money one gets when we heard about coalgate, 1.85 lac crores, and not accepting or rejecting the authenticity, but what the computer and auditor general said was, that total loss of revenue to the state for illegal allocation of coal mine was to the tune was 1.85 lac crores so, one can understand the size and that is why way back in 1979 Hon'ble justice Bhagwati in a case Dayaram Shetty vs. union of India, he said that mind in 1979, there was no globalization, no marketization, no deregulation, that was the time when probably welfare state was more the tune of the day rather than what kind of situation prevails today. even at that point of time, justice Bhagwati in the case openly said that licenses, contracts, lease they are new kind of property and because these are new kinds of properties the benefit which they involve and which state can confer by granting these lease contracts, are enormous and therefore these kinds of large, when state is granting or allocating to private players, should the state be allowed to or should the government be allowed to, at its own, and there we say that no government or any agency of the government which satisfy the test of state into it should be allowed to arbitrarily allocate these resources, there has to be constitutional principles adhered to when these kinds of resources are allocated. very interestingly, one other point he makes while giving his judgement which later on became the signature tune, in 2002, in Balco's case was, he said these new kinds of profits where benefits are being allocated, resources are being allocated to all kinds of players, these benefits are of various forms, these are of various kinds sometimes subsidies in the cash form is given by the state, sometimes the jobs are given by the state, so, these are all kinds of benefits which are a kind

of wealth which state is granting and therefore, when state is granting the employment, jobs, then naturally the question of article 14, equality will come, but when lease license and contracts are being allotted to private players, the question will arise whether, 32, can be a jurisdiction which can be attracted or not, and that question came up in balco, and that question has come later, that we can discuss later or may be at some other point of time but, what happened was that once justice Bhagwati came out with the concept of new property and he said that you know, whenever you are granting these new property, it has to be only transparent fair and he went to the extent of saying that public auction or a tender and advertisement and if there is some yardstick laid down or some marking system is laid down even that has to adhered to when these resources are allocated. Now, interestingly what happens is when these kinds of matters arise of allocation of these kinds of licenses, where there are so much huge state, and so much technicalities involved, judicial review of those kinds of action of the state should be allowed even to assess the policy choice, because many times the question of policy will arise, and therefore the question which came was, should policy issues be made the subject of judicial review in administrative law, so far as this area is concerned and that is where the court says in balco's case no! We will not look into, because in balco, what was involved was disinvestment and what the Supreme Court said was that no! so far as policy issues are concerned neither we think, that it is in our domain, nor we think that judicial review is in its scope, in compasses it and therefore policy issues we will not like to suggest which is wiser and which is better, which is rational, which can be substituted, this is not our question and they upheld the policy, but because in that case, balco being a government corporation, under the control of the government in meeting all parameters of the state in dual, another question which court was mindful was, of constitution article 14 and 16, and therefore the point was that the policy questions we are not going to examine so far as administrative judicial review is concerned, but otherwise whenever individuals, groups fundamental rights are violated, yes! Court can apply the jurisdiction. Let's not forget that even in Zee TV. case which was definitely not a government controlled or government owned corporation or company, even in Zee TV, although three of the judges said that Zee TV is not a private company but, there were majority of the judges they have said because it's not a state, it is not subjected to 32 jurisdiction but, until certain circumstances it can be subjected to jurisdiction of 226, and therefore whenever we are talking of these allocation of resources then two parallel jurisprudence are, one jurisprudence which talks of that fairness absence of arbitrariness following principles of

constitutionalism is very, very important, we are not going to look into policy choices which have been made. second which is coming parallel is that, if the government is bound to follow these principles then, are the corporations companies or even the society which are controlled by the state under the statutes or by the article of association are they, or even they are subjected to principles of constitutionalism and court answered in affirmative that yes! even these are bound by the principles constitutionalism, of course they only said in Pradeep Kumar's case that the control has to be financial, administrative, functional, it should be related to a particular company or particular corporation and should be pervasive, that should be the nature of the control, when judicial review in administrative law will be applied to these corporations controlled by the government, but control should not only be the regulatory, it has to be more. it has to be controlled in functioning, controlled in financing, controlled in administration not simply regulated and therefore, two very important jurisprudence have emerged, one follow constitution principles, to even the corporation which are identical to state in 12 are bound to follow the same. Now, it is in this context that this 2G came, but let us go back in 79, justice Bhagwati had already said that whenever you are allocating these natural resources, whenever you are giving these licenses cannot be arbitrary. auction or tender, advertisement for transparent accountable, these were the condition which were laid down by justice Bhagwati and when we come now to 2G that is center for public interest litigation v. union of India, we again see the same thing that though, directly they don't talk of, so what happens in this case again, what they say that look because natural resources are involved, public trust doctrine is involved, national asset doctrine is involved, 14 is involved, 38,39 particularly 39B is involved and is the result of which you cannot just allocate the spectrum at your own whims and you will have to be fair reasonable. you have to follow the constitutional principles and then they said that first comes and first served , is only giving license, to people and therefore this all is illegal, only way is the auction! Auction! auction, and therefore what they said was that whenever these kind of natural resources are to be allocated the auction, public auction is the mandated matter, now, that is where comes the real catch, that's where comes the real question, that alright you are not looking into policy choices, you are looking only into the process, and the process which you are in to that extent you are fine, but when you are talking of process what are you saying, you know it is too interventionist approach, when you are only mandating a single process which is to be applied in allocating these resources and particularly when you know that in today's context these resources themselves constitute a very complex web. These resources are

not ordinary kinds of resources and when you see this all, onslaught of MNCs right! and onslaught of economic growth then to expect that they will be bound only to one process is little too much and therefore, what happens when the reference was made by the President of India, because the government would never like to bind its hand, they went in reference to the supreme court and they said look there could be many cases where we may not be able to follow the auction ethics and interestingly enough the supreme court in that reference, tracked and they remained they said, by implication that their judgement was only specific to the case which was presented to them , but, situation may occur, and situation may arise where it may be reasonable to devise another methodology for allocation of these resources but, whatever be the methodology, that methodology should not be arbitrary, should be fair and meeting the grounds of principles of constitution. very interesting even before this reference that is spectrum 2 was decided, even before this another case had come which was overruled by the supreme court, and that was the case of Jilani v. union of India, where what happened was, Hindustan anti biotic, according to me, that case is very important and I have no clue, I have no idea why is supreme court while deciding 2G, did not go into that, or after having gone to it, the way they decided, then that raises the further question, so, let me just mention briefly what was the Jilani's case, in Jilani's case, the Hindustan anti-biotics which was manufacturing penicillin after from other things which was mentioned, penicillin, in India they wanted to have a joint venture and the idea of having the joint venture was to enhance the quantum of production and not only quantum of production, the quality of penicillin and also to ensure optimal-maximum use of the infrastructure which they had created, so, three things, optimal-maximum use of infrastructure, enhancing the quantity, enhancing the quality and they did not invite any tender, no tender was invited, only a Dutch company called Gois Brokade, was nominated and once that company Brokade from Dutch was nominated that company itself was controlling 25% production, all over the world of the penicillin, and had a long history of its standing. then naturally those who were unhappy they went to the court of law, and they said that this is wrong because no public auction, no tender, no bidding and it has gone, so therefore this is arbitrary and please mark in 2G also, first come first go, is an arbitrary, yes! Which was arbitrary, even I hold the view arbitrary. That conclusion of the court was right but, please mark here because what happens, they said it was arbitrary, it was unfair, Supreme Court looked into the matter and Supreme Court went to the extent of saying that look, no! We will uphold this decision, we will not call it to be unfair or arbitrary, why? because it was not only the question of enhancing the

quantity, it was the question of enhancing the quality and therefore what Hindustan biotics was looking was the best and what they found was a company having, already having control over 25%, production of penicillin over the globe and two they said these marks, these drug industries are very complicated affair, and there what happens, they will like to keep their formula secret, because they will like to keep their formula secret to expect public exposure inviting tender and tender filing those things may be little too much and therefore they said, that according to us not unfair, not arbitrary and that is perfect in principle what was considered was that it will depend upon the context of a case whether auction, bid or some other methodology so long as it remains inconsonance with the principles of the constitution transparent and fair and this position was further accepted in ML. Sharma's case that is what is popularly known as COALGATE case, that you know when these 218 coal blocks came and the question came that these all illegal, and the court said, the government had pleaded that look we did not follow auction method and we did not follow auction method because the requirement of the present day time and particularly of the industry in today's context did not justify us inviting tenders and interestingly supreme court on that aspect accepted the position of the government, that is following jilani, ignoring 2G, and also following 2G, because in 2G it was said, which is now only specific to that context and therefore what happened here they accepted that yes you could follow the method other than public auction. Despite of that 214 out of 218, allocations were declared illegal and why they were declared illegal is very important to notice. they were declared illegal because what was found was that there were no guidelines, when parties send their applications how to determine that merits, there were no guidelines, and even when guidelines were made those guidelines were quite irrelevant and third when allocation was finalized even those guidelines were not taken into consideration, and therefore illegal, arbitrary not adhering to constitution principles and thus, gone, and therefore in 2G, too much intervention which was later on compromised in reference when came to the supreme court and following that in COALGATE although, the requirement of going for public auction was ignored, was upheld but at the same time, it was considered illegal because there were no guidelines and even if there were guidelines they were irrelevant. this has raised another question of judicial review in the administrative law, and that question is suppose in COALGATE case the court itself said that, because there are no guidelines, irrelevant, supposing there were guidelines then did the domain of judicial review of administrative action should have been taken by the court, even to look into the reasonableness of those guidelines. they are simply questions, or

supposing as in this case these guidelines were not relevant, supposing these guidelines were relevant, guidelines were there, were relevant, don't took it to the sufficiency of the guidelines but at least presence of guidelines, relevance of guidelines, should in that case, say that these were not illegal, because please mark Bomai case 356, in 356, Bomai case, President satisfaction for imposition of President rule in a state, based on the report from the governor, two things are required, one grounds to be given in that report or ground to be collected, to the relevance of that material which is placed before the President is that relevant or not relevant, but after that judicial review does not go, that whether this question it would be relevant or irrelevant can be proved in. and therefore here also if supposing guidelines were there and guidelines were relevant then whether guidelines were applied arbitrarily that is the another question. I may frame the guidelines and guidelines may be relevant also but while applying the guidelines which I laid down, I laid unfair, arbitrarily then what happened, I am supposing my guidelines, I apply fairly, non-arbitrarily but, my guidelines were themselves not sufficient, what happened. These are some questions which may appear before the court and the policy maker in the time to come. I think I have crossed my limits by 5 minutes, I will say sorry and I stop here.

**Justice Gyan Sudha Mishra:** professor you know, I was just you know trying to rather would invite your insight and your thoughts what do you think and what would be your response and what would be your direction that you would like to give in government related projects, because the tender matters, commercial matters we have precedents but, when the court is confronted with projects like MNREGA, like I was confronted with a question of this nature where in fact, first of all it was filed in the high court, that the amount that was fixed by way of rural unemployment benefits these should not be, the amount should not be this much or it should be less or more and it was referred when the matter came before us in the apex court we had absolutely no proceed and such and we just had to be innovative about it, that whether the courts should interfere in matters which of projects, which are floated by the government by way of welfare schemes. then of course you know ultimately it's a common sense point of view and the common sense justice that we deliver but, in a such an enlightened gathering would you like to say something on that, what supposing you were to arbitrate on that what be your view, do you think that the courts are justified in interfering in such matters? Just to have you know point of view outside the judicial. If you really feel uncomfortable about my, then please don't answer

**Professor Moolchand Sharma:** no! No! I will definitely,

**Justice Gyan Sudha Mishra:** I am not cross examining, I just wanted to have the benefit of the views of the cross

**Professor Moolchand Sharma:** Hon'ble judge I can make out that it's not a question of saying yes or no, we are more in a process of generating dialogue and we are not finding out answering in yes or no. what you are saying I may not be able to answer, but I would surely like to reflect upon it. Especially you have given the example of MNREGA, this is not the place, but I will involve in that whole exercise. Now, let us go back to the justice Bhagwat's judgement which I just quoted and what he said that this new kind of property ad new kind of wealth which is emerging in crores cash benefit, benefit to senior political victims, social security benefits right! and therefore any such scheme which effects them negatively which definitely be hit by various provisions of constitution with respect to 21, if judges can use it creatively in that situation to what quantumly you determine there, how reasonable how fair it is, that will be another question and an important question, though this will involve policy matter because there will be economic dimensions also involved in it and therefore, I can understand the dilemma, but may be in the other session we have on judicial activism or may be right now, professor Baxi, may be able to throw more light, that when we are talking of judicial activism in today's context what kind of activism are we talking? are we talking of only technocratic judicial activism, are we only talking of a very that kind of activism which is only dealing with prison reforms or homes all we are definitely talking of activism, where social economic and cultural rights or people assume as much significant, and if we see from that parameter and if we see the expansion of 21, I think you doubt when the matter came before you, you are confronted with a very difficult situation, but coming out of that situation as you rightly did, as you said, is the beauty, and that is where the judicial review in administrative law will become more crucial.

**Justice Gyan Sudha Mishra:** we appreciate you whatever your inputs, the subject because, it becomes a complex question where the judge feels that it is a policy decision, whether the courts should have interfered like you know, you are confronted, because it was in appeal. High court of Karnataka kind of already interfered and given certain directions, now, the question was that should we interfere with the direction, which is as he said, law should be interpreted, judicial

review should be made in a way that it gives effects to the calls of justice. justice should prevail, now, if one judge from that standards from that legal yardstick then of course the interference was justified, that you can't decrease much less than what it is given in the scheme, but on the other hand it could be also treated as interference with the policy decisions and the supreme court decisions are also binding on the judges, so, it becomes the complex question that if you make into water tight compartment, then or in one box you have to say ou can interfere. In the other box you say no, you cannot interfere. One would say it serves the cause of justice, so you can interfere. policy decisions you cannot interfere, but it is a question of discrimination state get into, it was also a question, that some states are getting, particular states are getting, and other states are not getting, then discrimination. the question of discrimination article 14, etc. in terms of the benefits that were given to the states, that also cropped, so, of course the judges use their own discretion, their own wisdom, in whatever way they think it is correct course, is definitely adopted and that is how the law develops and precedents come in, but, in a gathering of this nature we would like to know what has been the view, like what would be the correct approach in such matters from academicians point of view or the cross section of society in such matters, should the court shut its eyes on the ground that it is a policy decision and they does not interfere or should we think I would not bother you

**Participant:** policy decisions in my mind, policy decisions made for the benefit of the court or their upliftment...if there are certain limitations leading to corruption or scandals , that you not should be given the objective of the policy made for the. You scrap the policies in the wholesome manner. The instances of the corruption as and when they come to light, it should be punished at the micro level not resulting in a macro scrapping of the policy. There are certain policy decision which are resulting in exploitation of natural resources in the name of infrastructure building, there also the balance has to be struck between the rights of the person to whom some tenders are awarded. The balancing of team, right of development of the nation by infrastructure building, the economic growth which the nation would achieve, basically the ecological degradation which it would begin, and also most importantly the competing rights of the genering of the posterity to

**Justice Gyan Sudha Mishra:** can I interrupt you? Would you like to crystallize what you want to put across?

**Participants:** I want to put across that the distinction has to be drawn between the policy meant for the upliftment of the poor should not be scrapped at in its, but which any aberrations or any corruptions

**Justice Gyan Sudha Mishra:** just one minute. the question is that no one is scrapping, it is not before the court for scrapping, but whether any improvement or you know decree, or may be tinkering with the policy is modification of the policy, would that be permissible? It is what on what we have to deliberate

**Participant:** modification or scrapping is also a part of my mind that modifications, scrapping or alterations or directing

**Justice Gyan Sudha Mishra:** in my mind scrapping is not, scrapping generally would not do

**Participant:** MNREGA is a policy, which is meant for the upliftment of the poor, there are certain instances of corruption even in the implementation of that policy, that the policy itself should not be scrapped in its entirety, it should permitted to be operated only and the instances of corruption which are highlighted, those are punishable and that policy should not be subjected to scrapping in wholesome manner to my mind. there are certain other instances of policies related to the infrastructure building, infrastructure development, where there is an exploitation of natural resources and minerals like mining, or instances in himachal Pradesh there are certain mining projects which have come up, and there were certain resistance and obstructionist measures on the part of the NGOs to the execution policies, but ultimately when the Hon'ble apex court has laid down certain parameters and guidelines that certain working plans have to be submitted and clearance is from the pollution control board, so therefore those parameters are made by these projects for the development of the nations and giving a boost to its economic growth but there are certain other things which you also got to be bothered in mind where infrastructure development so far as construction of roads are concerned that results in the depletion of the forest wealth as well and that forest wealth and the hydro projects also result in the people downstream, the hydro projects they have been deprived of the rights of the agitation and therefore there has to balance between the rights of the present generation to seek prompt

immediate benefits from the execution of the policy and the rights of posterity and its impacts upon the ecology also, that perspective I put across my point of view

**Participant:** I would just like to, when we talk of judicial review of any action on the part of the state, awarding contracts on tender basis, that is required to be taken into consideration in the constitutional scheme which as you very rightly pointed out, in Tamil Nadu there are, justice Bhagwati...directly came out with the public largest policy, now, the whole constitutional scheme few things are required to be borne in mind in my opinion, first is basic contents of the preamble, that have we conferred on our assets it is economic justice, it is very important aspect, number 1, number 2 is equality of status and opportunity, now these two contents of the preamble are required to be read, with the fundamental rights, which confer equality of opportunity, article 13, then comes the fundamental, the directive principles of state policy as you pointed out 39, it goes to the heart of the matter, 39 has been considered by the supreme court in R.D.Shetty case, and so on and so far in jalgaon corporation v. G.V. Mahajan which was a very important decision on this 298, and 299, the power of the state to contract. Then also in Cochin airport recently and ronak international, now ultimately in constitutional scheme would be to see that there is no arbitrariness, there has to be fairness, the constitutional standards in allotment of public, public contracts. There cannot be any discrimination, these are the basic parameters which are laid down. now, comes the question of policy now, supreme court in balco as you have said has, as well as policy concerned we would like to be careful, unless there is something drastically illegal, unconstitutional which does not appeal to the judicial conscious, in that case definitely we will say that the policies are arbitrary. per se policy as such we may not interfere, unless the policy has the color of this nature that which is going to absolutely brought it down the basic constitutional principles and what we have been observing on this. These are the basic parameters which are required to be taken into consideration in the policy matters or in state when it contracts. There are another category of the contracts where as you just discussed, that where tender may not be proper... and they may deviate from the normal course of calling public bids and awarding state targets etc. or entering into contracts, these are absolutely different categories for example, peculiar defense argument, where it is impossible to have a tender, say for urgent medical needs in that they have said that we distance with the tender requirement, and it is not necessary to have tender for this kind of urgent medical supplies, suppose there is out burst of cholera or something, in that case they have done away with

the requirement, normal rule where there are situations, where there are public state is involved in that case all the principles under article 14, of nondiscrimination, of equality or fairness, on arbitrariness are required to be adhered with, that is what supreme court consistently impressing upon. Justice Bhagwati judgement in Shetty case today, look from many angles, how many times you read the judgement and you every time find the new dimension, to this whole public law concept. Thankyou

**Participant:** DPSP, so when such policies...how the policies are to be drawn or adopted or implemented, so I think that when it comes of the policy matter, of course we are few concepts are there for not interfering the executive as separation of powers is there, but we have to test it as the, also consider that directive principles of state policy, by understanding it is, and how it is also advantages will count,

**Participant:** we all know that it is not justiciable, at the same time these are the principles of the governance and what some of the judgements have categorically said that they are at par with the fundamental rights, chapter IV is at par with the fundamental rights, and many times the supreme court has gone out of the way to implement what is there in part IV.

**Participant:** justifiability of tender matters within the corner stone of the legal principles, this is not the issue, I want to carry it much further, I want to say that even when there is complete compliance in the legally enshrined parameters, in awarding tenders, quotations, transparency also, no corrupt element. What should be utmost concern as initial builders? I am thinking for the prosperity is that there has to be an interventionist approach, may be at the level of the escort, with regard to execution of certain projects which do benefit the economy, but ultimately there has to be the effect and repercussion in depleting certain kinds of minerals, lands, destruction of the Adivasi's and the favorability of such development and the perennial loss to posterity of those wealth of natural resources, non reoccurability of the land for the agricultural use and also got to be given deep thought. They don't have to be kept at the hand's side. I want to get it slightly advanced.

**Justice Gyan Sudha Mishra:** I think a judge's psyche ultimately is guided by the fact what would be in the interest of the cause of justice, and you have to be innovative. You have to take the

precedents. You have to take the guidance from the precedents, and ultimately that prevails, and that is how

**Participant:** judges will have to dawn the role of nation builders also

**Justice Gyan Sudha Mishra:** they don't really

**Participant:** whether the constitution principles are, right of life

**Participant:** it has to be any way balanced, because today all these natural resources and all these big composition comes up before the apex court and they are coming up before the high court, who are these people who are coming before the high courts. They all are NGOs, and who have all material under the RTI act, and they have means, by showing that yes, this is completely arbitrary. And these are the cases court has intervened the high court and high court has intervened, the Supreme Court has intervened

**Justice Gyan Sudha Mishra:** so, I guess ultimately when it bricks the conscious in the mind of the judge,

**Participant:** at the same time we should know our parameters and we are not experts on this, but at the same time we have to see this balance

**Professor Upendra Baxi:** when it comes to policy, there are four or five kinds of big policies in mind, and judicial action would vary according to five points. One is agriculture sector. when the issue like farmer suicide comes before me, I am fully entitled to apply part III, part IV, preamble and say whether the amount fixed for that, or subsidy is sufficient or not? I would say, when it comes to great distress, there is one set of policy, and the judges could follow. the second set is in licensing or in the development, and Moolchand Sharma has explained very well, in the cricket control board case, the judges said good bye to article 12, they said BCCI is not a state, but they want jurisdiction over it, now...in BCCI however this is the matter of public interest and therefore we take the jurisdiction, is not the article 12 so, what happens I don't know, second is in the...third is the context of social economic rights, the MNREGA type issue, where the...and the fourth is ecological, where intergenerational equity, is the major factor, and very often, so, where judicial

intervention is relevant to what extent, the court submission depends on the type of policy context. The word policy by itself is useless. Everything is policy. There are de facto policy and de jure policy. The de facto policies are per se unconstitutional, there is no business to be there, but they are there, and when the opportunity arises, judges can strike down the de facto policies. By de facto, what is the matter of fact, corruption is matter of fact, and black money is matter of fact. These policies should not be interpreting statutes....so, my central submission is this much so, justice gyan sudha's question, a very important one said unless we distinguish among policies context, we cannot give an answer to this question. in socio economic rights, judges may not take it admissible to raise the amount of or the number of days for which the benefits are provided, but a grave distress context, I do not think judges should apply the colonial law as to read the constitution, as the lordship said about the preamble and four cornered structure, so idea is very essential to distinguish among policy context. You cannot apply that, is applicable to both socio economic rights context. Different context of policy, and what are the context of policies is the main question, according to me

**Justice Gyan Sudha Mishra:** we will carry forward in the next session, because ultimately you know what ever the topics we can always mingle them.

the intergenerational rule, justice or equity been done between the immediate benefits of infrastructure development and the future generations who would be deprived of certain lands or forest wealth or mineral wealth, what could possibly be the role of judiciary in that, intergenerational mediation measure, should the court formulate the policy for mitigating that intergenerational remediation or it should be left to experts to do that. and secondly so far the agrarian reforms are concerned those agrarian reforms so far as waiving of loans to the farmers in distress, that would be the government policy may or may not be fair able depending upon the quantum of loan, the quantum of loan of the waiver is high obviously higher is the boomerang effect on the economy of the country and India being not, developed nation as America is having the progressive economy with the strength of the dollar, having fiscal deficit. would it be advisable for the courts of law to condone such acts of the government waiving farmers loans or the giving in firmative not in the firmative to the agrarian reforms, where such not would tend amount of effecting the fiscal status of the country

**Professor Upendra Baxi:** South African constitutional court, has answers to some of your anxiety. By issuing what they called structural injunctions, what do structural injunctions imply? The structural injunctions means that in making the budget, the court gives certain guidelines, certain constituencies whose needs as you must assume some, the court should not make the budget. The himachal Pradesh high court gave a judgement in Bhagwati, saying that certain roads should be built by the government, and there is big discussion on this, I don't want go into it. Can court ask the government to intervene into extent of building roads, infrastructure. It was a huge discussion, in 80s, 90s. So, structuring method is a very good method or making the executive sensitive to constitutional requirements, we do not use that method. now, for example, in MNREGA, we may or may not raise the amount but, you can say in the next budget or the finance commission which the constitutional authority, which allocates that, why should the court, consider obiter, saying the planning commission or the finance commission or the finance ministry in considering the next budget may take the following observation of the court into account to the extent appropriate and report the matter. In their control the South African constitutional court has used of structural injunction. as to intergenerational equity, it is not enough to eat out of council, councils themselves are illiterate or they are able to pass through the judges, they get respect is the ignorance or the, theories of intergenerational justice are very complex, they are five or six, I won't go to them, the point is, the simple point in theory of intergenerational justice is can the present generation, determine the interest and the rights of the future generation? There is one epistemological difficulty. because if you have population planning, the people will not come to being, at all, so they are many other difficulties, in intergenerational justice and but difficulty is with the justice is my granddaughter, when she was 9 or 10, she said, Upendra, I love you but, you don't exist, and I said why do not I exist? You don't exist, because you are not on the Facebook...so, what is the next generation thinking we have no clue, as a teacher I can tell you that. As a judge you may not know, but as a teacher I can tell you because every time all of us know, the generation which I taught, everything was abbreviated. Then possibility to get inside the minds, they use twitter, Facebook, they have 78, channels, which have nothing to see, but that's what we think. They find something to see. Intergenerational justice, is not,

**Participant:** future generation for giving some solutions to this or providing to this intergenerational remediation

**Professor Upendra Baxi:** if you in one area and now, Marshall island, India before...justice before 6 other countries on climate change, Marshall island case is now before the international court of justice and India's answer to Marshall island is worth reading, India says it has no jurisdiction the court has no jurisdiction, the international court of justice, now, I would say one area and India is responsible so, as the other nations, where you are bound to disappear in next 25 years, as a country, because the sea levels rise and all that, global warming and you contribute to it by your policies, now, there were the entire countries, there intergenerational justice makes sense, mitigation and rehabilitation duties are very much duties of justice, but beyond that how the next generation should or next generations should order there, you and I don't have any clue so as to what the next generations have in their mind, so there is very big difficulty in talking about IJ,

**Justice Gyan Sudha Mishra:** no, no it is very interesting you know, and we all know, when it is highlighted, then you get to realize more, so you wanted to add something?

**Professor Moolchand Sharma:** no, no I don't think, because ether entire discussion went on some different way, therefore I will just only say for half a second, and two things, one its very important that when judges are performing their role and particularly in a matter like judicial review or when they want to take advantage of the source called activism, they need to be careful rest things may be bound, that the activism creativity or whatever vision they want to bring in, should largely remain in their areas of human rights, social justice and making the system of participating, but, if you enter into other domain then, probably larger hostility is waiting, I think thats one. Two

**Justice Gyan Sudha Mishra:** are you hinting at separation of powers

**Professor Moolchand Sharma:** no, madam, what I am saying is that whenever you are using for example, when you come to give interpretation to 21, you are using your creativity for a cause, house, and shelter. it may be very difficult for the executive or for the legislature to be hostile to you when you pronounce that kind of judgement and therefore, when there is issues of human rights social, justice equality, those are the arena, where there is lot of scope and second we should, which is more a foot note, to what the Upendra Baxi has said, that this entire creativity in this approach, in fact the whole judicial power, judicial process, should aim at sensitizing the processes, because when we do piece meal, law making or piece meal ordering, instantaneously for immediate

reasons, but if you really want to get in the system then it is very important that what he said structures, I am using one more word in addition, structure, structure changes in the processes itself, or may be. Once if you start doing that, the hostility, will be less and results will be may be, little after wait, but results will be fruitful

**Justice Gyan Sudha Mishra:** thank you professor Sharma and thanks everybody so let us disperse, for the tea break and we will reassemble at 11.

Thank you.

## Session-6

### **Judicial Review: Critical Analysis of Best Practices in High Courts**

**Justice Gyan Sudha Mishra:** so welcome back all of you and of course the warm welcome to the key note speaker today, Professor dr. Shashikala Gurpur and you see her introduction in this placard itself, and two of you who are not there two of the Hon'ble judges, I guess you are from Jammu and Kashmir, and one of you Chhattisgarh, Gautama bhaduri, so, a very warm welcome, a belated one though, to both of you and of course, the it's a sub division of the topic but, basically we all you know it is all like a bouquet, so bouquet of thought and bouquet of subject. we are only exploring the various dimensions of the judicial review, and now, as you see we will be discussing judicial review: critical analysis of best practices in high courts and I guess this would be extremely relevant because, I mean the almost not only the almost the entire the listening fraternity is from the high court and you an academician, a professor, you will you know widen our horizon, and at insight to the, warm welcome to you sir, I still feel nervous....hahaha. There was a time when I used to line up for briefing him, then there was a time when I was grueling him, from the other side of the fence and now, I am again the same student in front of you faltering. So, very warm welcome to you sir. It's our privilege and our pleasure to have you here, very warm welcome to you sir, and we were just introducing the subject and the Participants so, I think you are already aware the entire fraternity, mostly are from the high court, with one exception I think. And of course the think tank from the academicians fraternity, who do not need any introduction, you already know them, so and last but not the least who are assisting listening and adding to the charm of this auditorium and you will not be taken for granted, the director dr. Geeta oberoi, the rose in the bouquet. bouquet of listeners, and Participants of course, so, Professor Shashikala Gurpur, would be addressing us, and of course we will, if you have any innovative way of going about it, of the session, please you can give a direction to that also, you see because it's not, all thing that we will do this way that way, that you have any other idea please float it, so, please go ahead professor.

**Professor Shashikala Gurpur:** thank you madam justice. First of all very warm good morning to all of you. in a way I feel that I am a little child in front of you because all of you are experienced and you have more practical experience than a law teacher can have, but I have been one of those

odd law teachers who has had a little dabble with law reform, movement, participating in people struggle for justice, right from the student days much before I entered the law school, so, there is little bit of emotion that you will see. little bit of anger that you will see about the judiciary, so forgive me if somewhere I am crossing the expectation that you have in terms of a very structured, very academically focused, definition focused to a Bose kind of presentations. I have organized this perspective of mine based on some experience which I have had with the law commission, Mrs. verma, then also was in the law commission as she is today, as an officer. The work that we did was a bi product of the pressure we felt as the members, some of us who were part time members and some full time members as well, because we felt that justice system was not responding to the needs of the country. as to this I would like to state certain things, that we thought at that time that what is the limit of law commission, or what is the purview of the law commission's function, of course we have professor Sharma here, who is the full time member of the law commission, who is also an academic and a great Participant in the justice system. I saw one limitation, the limitation was a kind of, self-fulfilling prophecy of judges, seeing the larger stretched kind of definition to justice and the role of justice and its constitutional function was viewed in a very law centric way. the law not in the living law, but the law in the latter kind of way, for better want of words I am putting it that way because when I told our then chairperson and likeminded people like Mrs. Sharma, we also embarked on the journey of visiting various high courts and trying to see, so first we began with Delhi high court because of convenience lot of my students parents are Delhi high court judges and I always held Delhi high court as highest in may be the judges were motivated by professors like professor Baxi, professor madhav Menon, professor Pandey, so, such people must have written their conscience when they were students, so we saw a very unique kind of innovative approach from the Delhi court judges. my long dialogues with the whether it was justice nandrajog or justice ravindra Bhatt, I started seeing as an academic or as a researcher very different kind of way of approaching law way of approaching, justice way of using law in the real sense, jurisprudential sense of serving the function of justice, now, this kind of potential, enthusiasm and innovativeness we did not see so much, they had their own innovation, they had limitations as well because of the geographical and political matrix in which they were operating, but we did not see that. The innovation was not just in terms of the cases which came before them, but also in terms of administration of the high court. we made a wish list of these best practices and we tried to compared it in other two regions of India, western India with

Mumbai, and then we tried to do it in Chennai and because I am from Karnataka, I had liberty to go to Bangalore and checking this in Bangalore as well, but to my utter dismay as far as the structuring of alternative dispute resolution mechanism was concerned Bangalore has certain best practices, no other area, not as comprehensive as the Delhi court's best practices. now, I might not have had the opportunity in those two years of law commission participation to visit other high courts, our chairman visited many other high courts within the same framework. I was very hearten to see that the next law commission, the 20th law commission came with a very, very detailed report where some of the points of this survey were incorporated. Some of the questions were incorporated, but the report limited itself only to man power planning of the high courts or courts as such. I expected much more. Why did I expect much more? because I thought that court administration is not only about human resources, it is not just about numbers, it is also about the quality, so what is that quality of judges, quality of judging, quality of court administration. So these were the lingering questions in my mind, so I set out on embarked on another set of investigation and here you would see the sprinklings of both sets of investigation in this presentation. I have slightly tilt from the promise I made to dr. oberoï on best practices. I have tried to now tightly, use of best practices or next practices, I would say some of the Delhi high court practices are next practices. Practices which should be there in next generation of courts for judicious review of judicial performance. I am not looking it as judicial review in the limited sense, I mean, which is elaborately discussed in last one day and today, some more papers are going to come on sentencing guidelines etc. so there are other scholars and experienced people who are doing a great job of it. I thought I will look at something little more critically, little more functionally, and that is the judicious review of judicial performance and I argue that there should be development of a metric measurement yardstick for better judicial performance, so my presentation is not judicial review, it is review of judicial review or it is the judicious review of the functioning of the judiciary. Pardon me if I have gone ultra vires, the mandate have given, but I thought that somebody has to speak this, thank you

**Participant:** no, no, we are here to learn

**Professor Shashikala Gurpur:** oh! Then great than as a teacher I can, I will come to that, but before that I have to justify why I am talking about measurement. Why I should be looking at outcome or performance matrix. We all know that the reasoning and judicial process, both are at

the core of judicial review in order to achieve the purpose of law. The purpose of law is as an originator of peace, justice equilibrium, which means that it is protection of rights and preventing inroads into rights. it's a triggering socio economic changes as well and it is aligning legislatures I should say the legislature and the legislations to the pulse of the constitution, now, we know that even in the ancient ethos of India the Vedic and other ancient systems king or the queen had to be subordinate to law and they had to be considered as a trustees of public interest, now, if you look at judicial review and if I can capture it in its constitutional context it is there to limit the tyranny of the legislature. It is there to assure the constitution's supremacy, which makes the court as an audit agency. It's more of an auditing process, which contributes to audit the working of the constitution, audit the working of the law and also to develop the constitution and develop the law. There is also on one side that enormous trust in the judiciary, enormous power in the judiciary. There is responsibility, as the custodian, as the auditor, but there is also a question, to exercise restraint, now, in the Indian context, the constitution does not limit the courts but, it has completely left it to the dignity and rational thinking of the courts. Our emphasis is on this rational thinking of the courts and dignity. it deals with the legislative power, it deals with the violation of fundamental rights, it deals with the constitutional restrictions to be balanced with the constitutional guarantees and implicit powers responsibilities and guarantees, now in the recent avatar of scientific analysis of law which is called as jury matrix, I mean jury matrix once upon a time was very, very confined until about 70s it was a popular method of predicting judicial decisions looking investigating into the mind of the judging judge, but later on it fell into a kind of disuse, now, it has reincarnated itself. The reincarnation is in the broad definition of scientific methodology applied to law, so jury metric is not essentially court's functioning or judgement analysis or judgement measurement. It is broad scientific parameter which is brought into the science or learning of law, now, I want to look at it in terms of judicial administration and its pertinence to judicial performance. Now, what is the judicial administration pertinence to judicial performance? Therefore its constitutional function as the audit, auditors, and the judiciary role as the custodian auditor is not just substantive law engagement, which you have laid out in your big schedule. Substantive law, of infrastructure, about criminal law, you have already discussed it, the theoretical conceptual strands have been stretched it further with the eminent professors, I would say it's not just about substance, it's also about the process. The process of democratizing justice. The process of guaranteeing access to justice, which is an implicit duty cast on judiciary.

Judiciary's own review of its process should be at the core of such a perspective, in terms of judiciary's governance, its response and its innovation, so governance, response and innovation. Let's look at it. When we view it in terms of some of the latest developments, for example the whole plethora of research which is coming up, capital punishment related judgements. one judge himself justice Lokur said that it has been judge centric, therefore indirectly he is trying to say that there is a kind of personal bias, personal preferences choices coming into that, so, judge centricity is a concern rather than justice centricity, rather than the idea of justice which keeps evolving or constitutionalism in the center. Therefore the vantage point of this investigation my perspective comes from the recent statement of chief justice of India who said that credibility of judiciary crises. There are other questions where is this credibility drawn from? What kind of credibility is being referred to by the learned chief justice of India, is it the canishing trust? Or doubt? In the authority or is it in the performance. Second, my as I already narrated to you my various trips to the high courts and later consolidation of some of these inputs and with the additional rich inputs by the new law commission team in its 245th report in 2014 about additional man power. Three is the recent media scan, I have done a bit of media scan of last six months. The latest is December 2015 by business standards on backlog burden in lower courts depicting the efficiency extremes in lower courts of Gujarat and Karnataka. For example Gujarat's rate of disposal is 19 cases a month, Karnataka rate of disposal is 113 cases a month. If we were governed by the same constitution, if we were governed by the same type of judicial ethos, why is this discrepancies? Justice Santosh have been this business standards report, went to the extent of commenting that what are the high courts in Gujarat, what is the high court of Gujarat doing about? So, indirectly business standards made one retired judge to speak about it, so efficiency extremes in different lower courts and responses and mechanisms putting action by various high courts, raises the basic question of the access to justice and constitutional guarantee as a process review in terms of judicial review. number of reports comments and responses or reactions to various court news or budget discussions or ministerial discussions, drive home one conclusion that Indian judiciary needs its own review or soul searching. There after I am coming to the performance one of the esteemed judges asked about it. a performance in economics is reviewed as an outcome, you put certain ingredients or certain processes, certain investments and you look forward to certain outcome and this is made with the certain out coming view, so that is how the economics refers to it. Human resource management views it as job description and assignments of tasks, resulting in job

satisfaction for the employee and all the stake holders' satisfaction for the organization that is the management perspective. in governance if you look at governance as public service and governance itself being under scanner at various levels in this country under free thinking, and judiciary often acting as a reminder or watch dog or critique of such governance, is it not the time for judiciary to review its own performance, can we approach these kinds of judging role, without our hands being clean, without us being spot less, so own standards of satisfaction of stakeholders, what are they? is not the time for creating a charter of citizen or client duties, despite the highest trust, therefore self-regulatory framework expected or believed off the system because there is so much trust in judiciary, so much of dignity is expected off, nobody dictates code of conduct to judges or nobody expects the judges to have a supreme authority dictating them now, that is not the position of non-scrutiny, thats the position of highest belief and trust, so what is expected is the self-regulatory mechanism, however non transparent or hidden from the public eye, it might be, but there is a duty inherent in that, is it being fulfilled? What is expected or what is belief of the system, now in the background at the drop of this two, approaches the main argument here is with the debate we have had in the beginning I gave you that debate of constitutional framework of judicial review as a concept in substantial terms across high courts. It requires isomorphic or uniform standards. I mean if Gujarat has to take 289 years to clear the current backlog, Karnataka will take 3 years, west Bengal will take 3 years, but Maharashtra and west Bengal both have more rate of filing of cases compared to the disposal rate, so there are these feud equations between high courts. Shouldn't there be some kind of a basic uniform standards, if one applies jury matrix, and latest decisional science methods and analyses some samples, one could certainly see a need and scope for creating a model of decision science and precession. What is that decision science? one would conclude that there is no such thing as infallibility in any human institution or office, isn't it wrong to assume that, justice institutions are infallible, is it only natural to subject every institution or agent scrutiny in the touch stone of constitutionality and the role of law, so thats the main argument, for that I did a literature survey and little bit of survey of lawyers and judges, it shows that there are interesting trends and approaches across the high courts, across different islands of excellence in India. if law is unclear shouldn't the outcome also be irrespective of where you are located, irrespective of who the people who are personing the institutions, but we see variation, many reasons are obvious such as lack of exposure, narrow knowledge, rigid emphasis on the past, we all lawyers, law teachers, judges, look to the past, are precedent based, common

wealth, common law tradition might be a limitation. Risk aversion leading to innovation aversion. We do not want to take risk, if you over perform also you might be noticed, so better to be drifting, so innovation aversion by means of that. One interesting dimension was backlogs and cumbersome long drawn appeal revision petition, admission process in Karnataka. In Karnataka even to admit appeal or revision petition, it takes a long time, almost a year, what about the rights of the accused in the mean time? a senior lawyer pointed to the speedy disposal of jaya lalitha case as a contrast to that, where out of the 50% vacancy in tact in the high court, one judge spent so many days enquiring one case, when 100s of cases, because rate of disposal, rate in Karnataka high court is about 100 cases a day, so imagine how many months, one judge's performance or outcome was focused on one case. there are other literature and media scan reports also which show, I mean there are some angry reports coming from west Asia's human rights organizations, which talks about how certain frivolous cases are wasting the precious time of judiciary. The other contrast this lawyer brought out was long pending cases of corruption in other instances, years together which is effecting the service records and other things of so many people. is it the use of judicial discussion or judicial restraint or as nani palkiwala once lamented handmade situation of the judiciary, now, imagine the impact in such cases, so that is what I told you about Karnataka, so the practice of admission and delays in criminal appeal or revision petition is what is required to be rethought in Karnataka context among many other problems. Now, the other is the remedies for tackling backlogs, I mean when you a look at the graph in the law commission report also the graph is showing the co-relation between current filing and current disposal. the pendency graph is somewhere up there as if it is an independent phenomena in suspended animation nothing, it is an area which is so difficult to be touched, it's like braking up hornet nest, so remedy for tackling backlogs indeed to be sort out to elevate the credibility of the courts. a broad survey of measures in Delhi etc. as I told you, showed prioritization of long pending cases, for example Delhi high court resolves in a particular day in a week for such long pending cases, then fast track courts in Karnataka for example, there is a very interesting Cambridge university scholars study which talks about the myths of speedy justice, because in children's cases there is only 7% conviction rate and the delay was very much there despite being fast track and if you look at the legal aid, legal aid how it is working, how efficiently it is working, alternative dispute resolution mechanism, how frequently these are resorted to, is it because you want to have lok adalat with thousands of cases at a time, that you

want to create an impression that courts are working well, what about the quality of justice, I was talking to one of the eminent judges, he was telling me about, how Maharashtra's evening court later became a stressful factor to the judges and they could not give the proper time. It resulted in dissatisfaction, stress, and illnesses. They could not take holidays. They were getting extra money but it was at what cost, so what was the quality of justice in such enthusiasm to dispose, and create a higher rate of disposal. Then use of legal and judicial training in creating efficiency. And creating efficiency how is the judicial training content in these various state judicial academies are? How far they are engaging in the law schools and bringing the law school force into going hand in hand with the courts. This was also very different in degrees and styles in different high courts. In contrast to this I should also draw the attention of this group to the substantive judicial review instances, which I had investigated a couple of times. One is high courts have played a very crucial role once again I give it to Delhi high court, two judges in critical engagement with market modernity and traditions. particularly exceptional rejectary in gender equality cases, one was Andhra Pradesh, of course subsequently supreme court reversed that decision, because there was a very obvious conflict between the institution of family and or at least the perception of conflict between the fundamental right to trade and profession, therefore the freedom of wife and the restitution of conjugal rights provision in Sarita case, but Andhra Pradesh high court was quite pervasive in bringing out such a decision, Sabrimala case, for example, how the Kerala high court is exercising the kind of safe playing and how not public opinion is superseding and for years the appeal is pending. Peniockle case which came from Chennai, where the omman temple management had to be entrusted to a woman and there was a village panchayat ruling against it, and the judge to courage and made a statement that how ironical in the modern age it is to deny a woman to right to worship a woman form of god. the hiromani case which was decided by the justice Ravindra Bhatt, he is the another system of barring system where the lack of a male heir, brought the temple Pooja rights in favor of the woman, but because the woman was in the menstruating age, there was objection from the cousin, but the judge took a lenient view and the judge said that for those seven days, she could appoint her attorney or somebody who is representing her, so this how the modernity and tradition clarity has been balanced by the judges is a very interesting development in substantive justice in terms of gender and culture interfaces. recent radicalism of one of the Kerala high court judges on polygamy, I don't know how many of you have read those reports, now, these are the instances of judicial mind in responding to substantive areas is going in terms

of meeting the interest of justice and therefore so many other considerations, other than strict provision of law, border consideration is being taken. In the intellectual property and pharmaceutical cases larger constitutional goal of right to health has been by the Delhi high court. employment and service cases I have contested with the Karnataka high court has decided such cases and the way the Delhi high court has decided such cases, especially in case of public employment, how malfidely they transfer cases. I have dealt with the Delhi high court judges and the Karnataka high court judges. there is a grave difference, so again my question is if rule is the same, if judging as the process is the same, if it is so scientific in framework, why such differences? so, we have had another tribunal coming up with a very revolutionary decision in terms of fundamental right to water, and conservation of water in the sri sri case recently, and the host of water rights pronouncements by various high courts which evolved human rights dimension to water, so days are not far, that we may have to come out with the constitutional guarantee of right to water. I am just making this cherry picking, just to show but, all these cases are cases where judges have set a standard of judicial review of legislation or legal provisions and setting triggering positive social change for the evolution of the constitution, for the development of the constitution. based on all these I would like to drive the idea of performance or outcome of it, I suggest that national judicial academy could in addition to its academic engagement with the substance could look at creating standards, good research in order to create certain standards, it will create a committee for developing a performance or outcome for the judiciary as an in-house exercise and self-regulation. It could be purely in house exercise. It need not involve other organs of the government or it need not be a matter of a public debate. It may incorporate both qualitative and quantitative indicators, supported by a customized software. in the university where I am teaching I developed such a metric for the university and laid developed in association with a software expert, or a software which could quantify these things and the quality aspects also where summarized as observations, now training and education could align with judicial training and judicial education could align with this outcome metric analysis with the multi-disciplinary input, which should involve neuro science and decision science approaches. How to stand above your beliefs? How to stand above your rigid notions, how to because brain is a malleable organ of the body. You can always expand the limits of the brain. Neuro science approaches are being, there are neuro science labs in strand ford university, Singapore University, which are looking at various ways of enhancing human capability, can we enhance the human capability? Can we understand

how the judicial minds works? Because reasoning in arriving at decisions in judicial process, arriving at decision in operational decisions, or in research decisions that we academics do not much work variations. it's about selection of data and it's about alignment of the data and it is about arriving at a solution or answer to a question to or a problem, so, it should not be a big rocket science, so, whether decision science approach could be deeply applied to the context of judicial reasoning and there could be a better quality of judging, there could be an uniform standard of judging. such a team could lead long terms reforms in proper synergy with the government then the current ad hoc, not that there are no initiatives, there are out of the world like initiatives by various organs but, various judiciary examples I have given already, but these are happening only in islands of excellence, so they need to be cascaded. second, leadership for collecting such best methods, who should collates such best practices, of course NJA could take this because judges don't have any time spared for this or they could not spare much time because there is a larger outcry of democratic system of their being address by them, so it may be drawn from among judges on advisory with the track record of commitment to the paramount ethics of human rights. Once again it needs lot of academic research from the NJA team on who are the judges whose judgement, like we have very interesting study of Krishna Ayer judgement or justice Bhagwat's judgements. There may be one odd judge might have given such judgement but suddenly there is an insight flash of insight, don't neglect these areas. So their courage, their conviction, who often challenge the given limitation of law, who stretch the boundaries of law. Who gave first principles judgements in various areas of law? Who gave intacting judgements, because of one particular judgement the whole landscape of the society or governance is changing reported judgements, those who gave reported judgements, so make a wish list of such judges. Somebody has to observe the judges, study the judges, and research the judges. idly the academics are supposed to do, but people who don't have that kind of research interest have entered academics most of the time, or once they enter academics, they may not engage with the courts because such is the bar council regulation, that you cannot be in full time employment, if you want to continue practice unlike the doctors, so there also the limitation which makes the academics to be court shine, academics to be system shine, so we need to have full time researchers who are trained. Such leaders or thinkers derive to be identified as mentors and contributors to the team, which could work in with the NJA. Third point is in order to tackle in judge centric variation. I think you are convinced that there is judge centric variation in administration, there is judge centric variation in decisions,

seldom there might be a co- relation and commonality between judges who at a time deciding similar type of cases in different parts of the country. There is need for innovation in governance and management of judiciary. What is that governance and maintenance of judiciary innovation? In terms of human resource allocation, which judge should be assigned, which kinds of tasks? management and utilization of expertise of judges studying their CVs, studying their track record, orientation and training, some of the judges might be long term lawyers, they might have not come from the judicial track, so, how do you switch your mind from being argumentative and one sided to become the arbiters of competing claims, so that the kind of orientation, that the kind of training, that where neuro science decision science comes. Mentoring, some of the judges acting as mentors and then realizing them into full time decision making. Engagement in legal education and training, this varies on the leadership style of the judge. Some judges believe in potential of education and training in bringing in human transmission, some do not, so that leadership style has to be studied and it has to be oriented to become comprehensive. Academy engagement in the training academy how many judges involve as Participants, as research persons, this needs to be seen. The vision, the grand dream, vision is a dream with planty said in management sciences, so how many of them have a grand dream of flawless, high performing judiciary. I don't think all judges share these kinds of dreams, some may have a very realistic dream, and some may have grand dreams, so that one, and their administrative caliber may be doing a kind of satisfaction survey, during one year tenure of an administrative judge. Identifying and encouraging specializations, expertise and specializations, for example in Mumbai, Maharashtra, and justice bhatkar would agree with me, that there was a whole cadre of judges who were appointed as family court judges. What happens to these judges after they attain the seniority which is ultimately possible? How do they get rewarded for their performance? And over the years they have accumulated great insights, valuable insights, now, on the other hand there are number of family court related cases which are pending in the high court, which have a huge impact on the life, now, those areas are being tackled by the judges who are into many cases as well as family cases. we had a very great occasion created by dr. madhav Menon in pune, he runs these continuing legal education programme for cross sections of legal community with judges, lawyers, law academics, students, now in one of those occasions I had the privilege of listening to a sitting high court judge a lady, that is also an assumption that a lady should handle family court cases etc. so a lady and then the senior family court judge, and then couple of lawyers and some of his academics. I was

very hearten to listen to this senior judge in the family court who had such valuable insights in terms of understanding the custodial battle, in terms of understanding how mediation should come in, how mediation could be more efficacious, those kinds of insights at the high court level with the other judge who are not so sure, because that judge came from a different background of handling different types of cases for a long time, her insights were brilliant in terms of administrative and process related input, so, in the high court why not bring such judges who have such valuable insight to offer, who may reduce the number of cases as well. Faster as others can deal with and who may bring out of courts solutions as well because of the nuance of that they have gathered over the years. competency development in new recruits, this goes hand in hand with the orientation, this whole paragraph I am talking about is coming from the background law, human resource management and management dimension, organizational behavioral dimension, so this needs to be brought into the discussion, now, performance has always been viewed from outcome metric dimension from the point of view of numbers, not the quality, so addition of quality to parameter should be there. What is this qualitative analysis? I already told you, evening courts for example, so many number of cases were disposed, how did the judges feel, how did the client will feel, what was the total outcome on the overall performance of the judge?, that was not done, that's where the qualitative aspect comes. Judicial review analysis into a theoretical model, I once did this with an operational research engineer friend of mine. We studied the coal block allocation case, very interesting analysis. We found what were the variables and factors which affected the outcome of the case. you would not believe the major premise in the decision which was seen was wrongful allocation of resources, so ultimate consideration was the value of people sovereignty over natural resources and the judges were acting as the custodians of that people's right, which is articulated in the constitution in different provisions under different legislations, so, it mirrors the certainty and scientific approach of judicial reasoning, which rightly to apply the, we direct the theoretical model of valued precedents and we try to apply to few other cases. You would not believe that there was a photographic image of quantities outcome in the theoretical model that we built, where value was in the Centre, and around the value the judgement was hinging, so what we studied, in explorer case, or deadly vs. Stevenson case, that the youngest sailor was killed and made the nail out of, doctrine of necessity. when the judges decide there, do the judges decide first and then interpret the law, or do they use the literal interpretation of the law, or is it the semiotic which is playing the role, so we did this analysis when I was using it in my Irish classes, we used

to go into long, long debates, how does the mind work there. invariably we have seen that the judges decide first and then they find the justification, so what is that, which is making them jump into the decision, and that jumping into decision is it immediate experience which is in the background of the mind of the judge or is it some long drawn experience, is it something trivial that may also cloud a very clinically distance well deliberated decision, so this is where the decision science comes in. finally it is, therefore how do we develop these values, as Oliver Wendell Holmes once said that, values are the inarticulate premise so, operational model, operation based model, theoretical model which we were developing clearly showed that, the values has the inarticulate premise behind judicial reasoning or behind the mind of the judge, was a very interesting universal hole in judging, so whether the judge is in America or in India, high court in Bihar or high court in Karnataka it should not make a difference if that is the way in judicial mind is trained and understood. there is a need to mitigate judge centric trend which I have been harping upon, both not only substantive but also procedural, because any at times you say that it happens in educational institutions as well, they say that ex tenure as a vice chancellor of this law school was the golden period. One of the judge has only written this report, about Bangalore national law school. This kind of person centric outcome rather than the process centric outcome whether it is x vice chancellor or y outcome should be the same, if the processes were in control. if processes were put in a very structured, logically coherent manner, so in procedures as well as in the substance, there is a need to go beyond the judge centric trend and it should be process centric, number of analysis on capital punishment as I told you already. Particularly the two decisions which had different outcome, similar set of facts in one case it was a seven year old girl, in the other case it was a three year old child, outcome was drastically different. in fact outcome should have been drastic in case of the three year old child, probably if you are going by the dynamic of motive and malice and design, but why was the outcome so distinguishable when the facts were not so strongly distinguishable, could be the media hype, could be the public outcry, could be the experience or belief in used to bias of judge which remain invisible therefore discounted, so this is the judge centricity of process as well as substantive approach. These all ask for the review of our training model, our approaches in the academy which required cascading and sharing best practices by facilitation and exchange of views at national and regional levels, intra and inter SJA, deliberations, regional deliberations and NJA level deliberations. There is a need for development of compendium of analysis, review and research, on trends and decisions on

important substantive matters. I am not aware of any such compendium that judicial academy has produced, perhaps reviewing judges ways of deciding and developing a training need analysis metric and based on that training manual could be a better approach. Maybe you would have done that, but you have to enlighten us from that. recent law commission report which I mentioned earlier clearly mentions about the improper way the data were provided, inconsistency in the data, it was very clearly mentioned, very honestly mentioned, so data knowledge repository, with both qualitative and quantitative analysis of different approaches are need of the hour. just the judicial academy in state or national level have it, we do not have, we need to have an inter disciplinary understanding being brought into the training of the judges because judges do not operate in vacuum or unit disciplinary context, so we have a very interesting development in the European context from this journal on judicial administration. I do not come across journal of Swiss publication in which one of the European scholar has written about performance metric for judges. He uses the word how to asses, I mean he is debating the conceptual clarity on that, he is talking about while assessing the performance there can be a conflict between guaranteeing justice and protecting judiciary. You have to protect the sanctity of office, I mean that is where I am bringing the most sensitive dimension. What purpose do performance assessment serve? Is it about the case allocation, is it about quality assurance, is it about promotion or career development, is it reappointment, and is it about salaries. it is performance linked incentives etc. in government it is not yet known therefore there is a very moderate performance acquisition, many a times levied against state system, but, if at all performance assessment is introduced internally what will be the consequences, there might be some kind of performance assessment but, it is a guarantee it is not free of bias, we have seen it in the past also, many a times there are criticisms have been there. What is a subject of performance assessment? Is it judicial activity or management? What are the assessment criteria? How is performance recorded in order to form the basis for performance assessment? Is it statistics or is it surveys, is it meetings, is it discussions, what is the subject of the performance assessment do we assist the courts? Do we assist divisions? Do we assist judges? Do we assist clerks of the courts or should be there a differentiation between members of higher and lower courts. I mean even about the salaries there are lot of discussions about earnings there is a discussion. Who conducts is it the judges themselves, is chairpersons of division, and is it court management board? This is in European context they have, now, in India we have introduced court managers as of now, higher courts or supervisor's authorities what are the rights of recourse? I

mean if you have grievances against performance which is the board which should look into it? To whom are the performance assessment results address? Judges, residence, courts management board, Supreme Court, or general public. one of the chief justices of the high court told me, that client friendly courts responsive to both internal and external customers, he was speaking exactly the language of business model and organizational managerial behavioral aspects communication, public relations and cultural aspect player only, he was talking to me about i his court how women lawyers were being talked to them by the judges such a crude fashion and the treatment of women lawyers. He is gender sensitive kind of judge, very well-known so, he was talking about that. Client friendly, gender friendly culture, communication and outcome in terms of client stakeholder satisfaction are the primary requirement, for example how many courts are disabled friendly? How many clients can deal into the courts? So, if this question that is you are disabled friendly, how many, judges, physically challenged judges are there, and how many of them can wheel themselves into the courts? So, this question I would leave it you. these are some of the questions I would leave to the house, mam is asking about the innovation so, I would request the members to deliberate, may be divide into groups or sitting here to deliberate on some of the issues that I have raised. Some of them might be very uncomfortable for you. I mean if it is so, I feel that it is a kind that someone undergoes while rethinking and innovating something, so I suggest that face lift on governance parameters, ease of doing business are keen to be taken up with judiciary, being no exception to good governance. Today we are talking about good governance, why should we spare judiciary from good governance, because it is a custodian and practioner of rule of law, and constitution, so I acknowledge the insights of justice nandrajog, justice ravindra Bhatt and most valuable insights of justice chandrachud, chief justice of Allahabad high court for extensive contribution and comment. Thank you very much

**Justice Gyan Sudha Mishra:** we equally thank you professor Gurpur, and it's really enlightening to see that the concept of judicial review which we understood as a law student, as a lawyer and a judge and is really now knowing no limits and sky is the limit, concept is being attributed to judicial review because anything which has to do with the administration of the justice, would come into the ambit and scope of judicial review. I think it would be a change for better because generally in the good old days, the judicial review was generally attributed to just one concept , that the court has to judge the reasonableness of the law and the statute enacted by the parliament and the

legislature, but gradually with the introduction of the PIL, and of course the versatile thinking of not merely the judges and the lawyers, but, also the public at large, we are giving a wider scope and the meaning to the judicial review and why not, because ultimately we want to arrive to an ideal situation where all aspects of administration of justice, should be looked into and be monitored by the pyre of judicial review and why only the acts under the statute, because after all if we put them into claustrophobic compartment then obviously we would not really be arriving at the ultimate conclusion of an ideal administration of justice. thank you for treat in this subject, in such a wide variety of dimension because the subject also as it says the scope and dimension because all this time we were only confining ourselves and I can see the change in the academic mind can bring into the minds of the judges, that you have to widen the horizon of the subject, which we are here to deliberate, because after all what we already know, is not going to add to our knowledge bank. What we should think, what should be the revision of the judicial review would definitely come in and widen the scope. Of course within the parameters of the constitution under law, thank you very much and I would invite the Hon'ble judges

**Participant:** can I ask the learned professor something? the learned professor tells in a manner when she propagated the idea of the surgery being performed upon or neuro device being council being given to the judges who have to think in a uniform, standardized manner to my mind that would be delivery of robotic justice, would not be standardized arithmetical justice with certitude in its dispensation, may be applicable to some extent to America where there is certain systematic relevance of standardized models of thinking and rationality, but may not be applicable largely to India, where there is such variety of social, ethnic complexities and each of the complexities require dispassionate application of independent mind by the judges and justice has to have the human face. Justice has not got to be delivered in a robotic manner, if robotics certain justice delivered it eliminates the possibility of decedents and decedents is the sigh for the evolution growth of judiciary. so far as professor has said about the audit of performance of judges, the best audit for the performance of the judges, this is a learned bar, but sadly the standards and excellence in the bar is declined steeply so that the audit may not be available and the reliance preceds and the judgement of the our seniors and elders in the system, that reliance it to large extent, guides of you know, and wealth of a wisdom and understanding and skill and experience is the most important tool in the repauter of the judge to deliver balance even handed justice and they cannot

be any replacement to that tool in that repauter in armory of the judge, and robotic justice is no solution to that, it has to be a human face to justice. There cannot be any replacement to skill, or experience and the se standardized manner of justice in the same set of circumstances I think they cannot be any same standardized set of circumstances requiring the similar decision by all judges throughout the country. the difference in the analysis of the material varies from a judge to judge, it depends upon his experience, it depends upon skill, his discernment of his subject, so these are personal assets and qualities evolved by a judge through his experience cannot be ejected into a judge by mere counselling. May be applicable to America but not at all in India.

**Professor Shashikala Gurpur:** that is the way the family businesses and managers spoke, when they spoke about an organization in the beginning as well but, later on came systems whereby there was a degree of rationality objectivity and fact based approach which was taken in management science as well. this was the justification was given when certain groups were excluded from important role for example, for very long women were not considered as fit to be filers, the assumption was that they cannot carry weights, so all the time human mind discovers these assumptions as the justification without putting it through the rationality. my argument is that I don't mean to say that justice should be always blindfolded, they say that justice has to peek as well the in order to distinguish the enhances in the given case but I think both of us have certain commonalities in our approaches, your argument is not oppose to what I am saying but between the two is something that would be more advisable than going to the extreme of leaving it to the individual judges. Justice is too much to be left to individual choices of judges

**Participant:** principles of reasons or knowledge, they also left the certain degree of latitude...not that we have standardized to that process of...

**Professor Shashikala Gurpur:** in one way what you are saying is from the point of view of the rational, the process of the mind. you are right but because the boundaries of rationality we say pushing the boundaries, but isn't it too much to be left at the individual evolution because one individual might be limited by one zone of socio economic and political context, or judges I mean while judging it is supposed to be assumed that divine wisdom governs the judges mind, but the judges also fallible to human so, degree of orientation is very important because you answer my simple question, that exactly similar set of facts how they can render to two different types of

judgement. There have been studies in which they have shown that judges are being trained in a manner that all will be having at least deduction of the decision, they are not saying the outcome, the outcome might be different but, outcome might have different impacts, but the every logical coherence

there are other cases as well for, example, the linearity of sabrimala decision by the Kerala high court or the nuances which are assumed in the subsequent cases, where the minority women judges came before them, I am referring to gender justice cases because I have read more in that area, or the reluctant of the judges to touch the fabric of service law in Karnataka or applying the pure principles of justice in terms of administrative law and giving a different outcome in Delhi high court, similar set of facts, why?

How could you decide whether it is kelsen's applicability or john rawls applicability looking at the case? Every case deserves to be treated from a check list which has brought all the jurisprudential theory synthesized

**Justice Gyan Sudha Mishra:** I think it's now my turn to intervene and complement both of you for articulating and sphering and finding out for each other what exactly we have been conveyed to the rest of the audience. I don't know may be I as confusing as the subject sometimes. Would anyone like to say something? I think ability to articulate is also is the great virtue

**Participant :** what struck me if somebody practices and is involved in justice activism, so to speak is what you were saying about processes as well, you know the differences she said between Gujarat and Karnataka 19 cases and 119 cases something like that, it's also about that how is the impact that's like a one figure when you are talking about 120 people who have not got justice and who have expected to get justice so it's also that impact which is very important on the ground, and that's about robotics, that's about improving your systems so you are delivering justice, that plus also what I talked about yesterday a little bit about when you look at the evaluation that has been done on the domestic violence act, by lawyers collective some states are making interim orders like Gujarat 5% of cases, which is a very crucial remedy under that act, and some states are making 50% interim orders, again you have to look at the impacts, it is not like individual judge making that decision. I believe that they have not understood the domestic violence act in the way

that they should, if they are not making interim orders, at all because that's like a crucial remedy that you basically kill the act if you decide not to grant that remedy to women. The fact that without interim maintenance, residence, they cannot actually carry on the proceedings because they don't have the means to do so. They don't have somewhere to live, they don't have the finances, so if you don't understand that you are killing the purpose of the act and that difference as to be questioned. We have to ask why you are not making interim orders in so many cases.

**Professor Shashikala Gurpur:** should it be so literal in interpretation or shouldn't it look at what we call it the purpose of the statute in advancing the remedying repressing the malady? That is justice isn't

**Participant:** as I said that, if you see the 60s, 70s judgments you will find that, they have one approach, whereas justice subbarao and others have different approach on same set of facts, so it jurisprudence, how you are influenced by the jurisprudence, that is the most important thing

**Professor Shashikala Gurpur:** now, that is where I would want the systematic

**Participant:** it is not possible, otherwise you will be sacrificing your thoughts, if law has to reef, and as to grow, then there has to be a deliberations on this

**Professor Shashikala Gurpur:** but, would you all agree that there is a need to capture such devasity and create a model for Indian justice

**Participant:** suppose there is interpretation of the citizens, so, where the constitution administers the, but court has to involve to advance the socio economic justice, there cannot be uniform parameters because one precedent may be upset by the other precedent

**Participant:** in manner of reading of a statute in interpretation all depends from person to person, that cannot be a, but so far as the domestic violence act is concerned what mam referred to those jurisdiction they exercise in the magisterial level and whenever there is an error committed by the magistrate concerned or the session judge while exercising to vision jurisdiction, proceedings under 482, would be laid up before the high court, we do address to ourselves to the fact whether

there is the orders which have been passed by the courts below are in conformity, so basically those

**Justice Gyan Sudha Mishra:** direction is given by if you arrest, if you don't arrest you have to give reasons

**Participant:** exercise the jurisdiction at the magisterial levels

**Participant:** I am not talking about the individual cases, we are talking about the systemic, the research shows the systemic difference 5% of cases where interim orders are being granted compared to 50% or more, that requires a systemic intervention and it's not like one case will go and will deal with it. It requires systemic interventions.

**Participant:** law where there is, which require enjoin upon the judge to interrupt on the assistance of able lawyers and interpretation of law and that faculty of interpretation and the manner in which the interpretation has to be given and rendered, that depends upon the skill of each individual judge, it cannot be. Justice without passion would totally robotic. when judge delivers a judgement it is not...there is not only his mind which is involved, or which s in the head it is also as a soul as well his heart that cannot be divorced from the process of reasoning and justice, no rationalist would say that heart would never involve in the process of reasoning

**Professor Shashikala Gurpur:** see one example we could give, there is a who lends money for an unreasonable rate of interest and then choose the borrower for nonpayment of debt, now, if it comes before the court how will the judges judge that?

**Participant;** no! judges will not go beyond the scope, that is already separate in terms of law and judgements, so whatever facts is coming, of course the equity is the basis of the....violation of article 14 and 16.

**Participant:** let me just controversially pose a question that, legislations which have been proved to be totally ineffective I would say it because of the bias of the judiciary. They are all doing it in their personal way, we don't have problem with that, trial court judges will put their personal prejudices into their adjudication, that's ok because that are allowed to do that.

**Professor Upendra Baxi:** our brother judge point out in the morning that, the call for test, preamble part III and IV, and the question is one of discipline and creativity, now, discipline can come from managerial science, from behavioral science, from jurisprudence, from the traditional judging. the important, professor of Chicago university used to take the first semester law classes, and American students, then he used to say to law students, you are beginning the career of law and you be there lawyers and judges in future, however, you must never forget one motto that look at not what judges says, but they do with what they said, now, what you do with what you say is very important, not what you say. relation between reasoning and resource in a judicial judgement, he studied about 200 years of common law and he came to the conclusion that what we called discipline consist of a series of starting point, the judges DOs and DON'Ts, the judges have themselves have evolved by tradition, there is inner point of judges, where there is tradition and discipline and the external point of view, expert in behavioral science, or other science and the question how do we carry the conversation among it. the judges don't dispute, for example person planning, you say them bias, the discussion to structural bias against women , the other side the judges must examine themselves, where the points are patriarchal or gender points. What does it mean to you? internally and whether you can take the fundamental rights mean to you or what fundamental duties mean to you, what the preamble mean to you, or oath mean to you or it is individual philosophy of the judge? The question that Shashikala is raising is that judges should not give judgment only based on their personal whims and fancies

**Justice Gyan Sudha Mishra:** I think this perception needs to be tackled, because a judge even he or she wants to decide on the basis of the prejudicial it is not possible, he has to be focused on the evidence that is placed before the judge, but yes, discreetly where there is a situation where a judge has a discretionary situation where he or she can decide this way or that way, then the discrete prejudices might be unconsciously may prevail over the judges concerned, so I think that discrete part has to be tackled, because yes that is why sometimes when an enquiry is done against a woman subordinate judge, they would prefer that I must have a lady judge to enquire into the matter like why do we give our preferences there of course inspite of the evidence and everything discreetly in the sub conscious mind may be the judge that prejudices prevail at times and I think that discrete part has to be taken care of , and that is where you need to think whether the prejudices should be allowed to prevail. the other day I was mentioning that roopal devam

Bajaj, so, I remember the reaction of my male colloquies and reaction of female section, some judges might privilege it and some judges might feel very strongly about it, so, one cannot ignore totally the prejudices but to say that the matter is decided on the basis of the prejudices that perhaps might not be correct and let this perception not gain ground that the judges decides on the prejudices, out it's not the totally without basis.

We will be compelled to wind up, as I said

**Participant:** this feminist syndrome is gripping society and its effect would be that it Bing aside the relation between the men and women,

**Justice gyan Sudha Mishra:** just one or two minutes we can spare not more than that

**Participant:** I think we are very thankful to Dr. Gurpur, very deep insight and the critical of all the judicial workings. this is something very good for us, I mean we also need to really think on all the issues which he has presented, she mentioned about two high court son the same set of facts and she referred to malafide transfer, that how the high courts have treated such a case and I would like to have your opinion on that, what was the kind of study

it is the case of summon being transferred to very difficult place, which by all factual parameters were not at all for either the growth or the expertise or better performance of that person or for the organization. It was transferred just for the sake of malfidely transferred, now Delhi high court decision was taken as a persuasive precedent and based on that an argument was made for new case which was in Karnataka high court, but the judges were simply reluctant to...

**Participant:** it is depending on the perception of the facts of the cases, no but these kinds of cases I feel that there cannot be any sacrosanct.

**Justice Gyan Sudha Mishra:** but, friends and judges now, spare your views and let them for the next session, so please, we will carry forward. So we will rise, for just 15 minutes.

## Session 7

### **Judicial Activism V. Judicial Self- Restraint**

**Justice Gyan Sudha Mishra:** so, a very warm welcome once again to all of you, and a very warm welcome to Mr. P.P Rao who does not need any introduction. we are fortunate to have him as one of the another eminent speaker and Gurpur has kick started a very active and volatile session and I am quite sure this will be equally thought provoking session on judicial review and very much so, because the subject is judicial activism and judicial self-restraint and I think it's like a as we say gagar mai Sagar, so in that pot the entire spirit of the judicial review lies and it is just a missile which will really cover the entire canvas of the subject. so, without wasting any time and without my like it will be, I would invite Mr. Rao to share his thoughts and views and take the subject much forward than it is so, that we can use it and you can use it in your discretion and balance the scale of activism and restraint. Professor please

**P.P Rao:** thank you justice gyan Sudha Mishra for your very kind words, and the welcome. It's a pleasure to be here and sitting next to you to interact with such a distinguish judges who have assembled today. The season process of law, through interact it is always been positive and treat. my regret is that the I have committed time when I missed the presentations of my dear friend and perhaps anyway the former client, professor Upendra Baxi, vice chancellor of the university he sat next to me when I was arguing the case for the university and he was so committed to the cause, I remember that and professor balram gupta, professor Moolchand Sharma. Once I heard that Professor Moolchand Sharma is in pune, the symbiosis law college and I could see that he can move the audience with his words, so, I really regret that, I missed their presentations. when he was the director, and a very able director that late midnight I could resist the temptation of reading his, before going to bed, only when i get up I saw it is contribution was so much there.it has also been great pleasure and delight to be here Dr. Shashikala Gurpur, the amount of studies she has made, amount of thought she has given, collecting data analyzing it and coming to certain conclusions and which are really enlightening. I also enjoyed the comments of the esteemed judges present here and the judge in front of me who raised the topic of justice and which has the point that justice has to vary. So long as human beings there can't be standards fixed and rigid kind of justice, so everybody enjoyed the experience. Now we are into another world of discussion and

discourse. judicial activism, the subject on which many brilliant minds have applied given their thoughts and time, and wrote extensively and I find one here, sitting in the extreme right at this table, and who in his preface to book, on judicial activism, is what he said, activism is one word, but constitutes many worlds, Indian judicial activism has not one but several histories, so that shows the visionary dimension of the theme they have selected for this particular session. let me recapitulate just one more definition or attempt to identify the content of the judicial activism, by one of or many activist judges is J.S. Verma, he said judicial activism is required only when there is inertia in others. If everyone else is working, we do not have to step in, this is what justice verma said. He also said, judicial activism and judicial restraint are the two faces of the same coin, self-discipline is to be practiced strictly by the members of the judiciary and the judges must be framed on commenting on policy matters. he said many other things, there are many other views which have been expressed, so I take it from this as starting point, when other limbs of the state suffer from inertia and they do not discharge their function, that is the opportunity for the judges to step in and tackle to whatever they can. This raises very several larger questions, first in assessment whether other organs of the state are functioning, discharging their duties properly or not, that is done by the judiciary itself. Then to what extent their omissions could be remediate, within the parameters of the justice system. The second aspect to be assessed, third is how to remediate? There are three different aspects. Now, I will come to it little later, let too start beginning with this, activism has many dimensions. One kind of activism is revising the earlier attitude towards certain provisions of the constitution, certain features of the constitution, from time to time. It was way back in 1955, in Bengali case of Supreme Court, lord before the House of Lords decided, to reconsider the earlier decisions. the supreme court decided that they have power to overrule in earlier decision, which is wrong and since, now I would like to briefly point out the few occasions how have been the fundamental changes have been brought about by revising interpretations on same provisions of the constitution. starting with A.K. Gopala, article 21 was laterally interpreted, because justice frankfurter, don't have this due process clause in your constitution so, they made it procedure established by the law, no person's life and liberty can be taken away, except according to procedure established by law. That has been interpreted, but later the Supreme Court realized that this interpretation will not lead the reasonable just and fair decision making and upholding of the basic human right, of all the human rights, right to life and liberty is the most basic one. If you have that other rights you can enjoy, if you don't have that, nothing can

be enjoyed, so, for this reasons, they revised it. The revision came after how many years? Finally it was in Maneka Gandhi's case interpreted article 21, revised 21, 14 and 19 was revised, revised for the good. That was one instance of judicial activism. This is not only the case the court exercised its mind from the beginning on the question whether article 368, the power to amend the constitution as limitations or not? Is it unlimited power? This engage the report sent in Shankri Prasad case in 1951. initially they decided, bring by the language of the, again the textual interpretation of the article 368, there will be limitation for again the parliament, so parliament can amend any provision of the constitution, but when we come to Sajjan Singh's case, but then they are disturbed, supreme court decided in zamindari abolition cases, to strike zamindari abolition on the envelope of article 14, and 31 and parliament was because all through the freedom struggle this was one of the assurances that lot of people of India, will abolish the zamindari system, we will confer rights, and this was the effect theory which they propagated through the movement and successfully and when then the courts strike it down to my mind because it was a thoughtless on the part of courts. Courts were not prepared, was not familiar with the new constitution, they were only familiar with government act of 1935, and which was meant for the dominion and not for the independent country at all. The new concept or directive state policy and their impact on the fundamental rights, they could not comprehend, they don't appreciate. if I don't blame them that was the situation which were faced but, subsequently it was realized that no something serious is not happening, as soon as the zamindari abolition act was set down parliament was taken a back. It was shocked and did not know what to do, they were advised to amend the constitution in such a way that 31 A, 31 B, ninth schedule, were waiting to be attacked on the grounds of violation of fundamental rights, so that was the resorted to, and court had to tackle with them. Subsequently again importance of judiciary. Sajjan Singh's case it came again judges no, doubt they enlarged and retreated the law to Shankri Prasad, but two of them had reservation support, and one of them Mr. Mudholkar, you are the one who raised the question, is it so wide as to permit amendment to the basis features of the constitution, amendment power is so wide, as to changing the character of the constitution, and as the Balram Gupta mentions in his paper, he got the thought form the judgement of the Pakistan the judge, probably and that became the seed sown by the Mudholkar which ultimately sprouted and became rule of law, in between again the Golaknath case again grappled with this. Justice Subbarao said, he was so strongly for fundamental rights, so the bench was divided very sharply, eleven judge bench reconsider earlier decisions. six on one side and five

on one side, in fact it to say it was actually hidaytullah but overall he joined with them that way became the majority, r by they held amendment to the constitution is law, within the meaning of article 13. A law which cannot violate or abridge the fundamental right, therefore the amendment takes the fundamental rights, will be strike down. But then look at the wisdom, practical wisdom of the court. they said we are not striking down any amendment now, but declaring the law for the future and said we invoked the principle for tomorrow only, and prospectively overrule the earlier law but, not now. Even they include act in case of Punjab, that was not set aside, that was not set down. This is how they tried to balance the urge to control that is the judicial review of amending power, and also the other's rights. That how it is difficulties are taken care of, and that's how the prospective ruling was born in India for the first time. Then we came this keshvananda Bharati, as we all know, for the first time the court has declared that basic structure of the constitution cannot be abridged or abrogated. What is basic structure is the next question, the state cannot be exhaustively set out on the basic features, and so when I was asked to deliver a lecture, and I chose this subject, the basic feature to deliberate upon. There I pointed out in this all disclosed content a basic structure of the constitutional lies enormous power of the judiciary. Power which parliament cannot take away, the content is probably that does not know, because you don't remain exhaustively what is the content of the basic structure of the constitution? To state the sovereign republic is aim upon that means you cannot have monarchy. Democracy is another part of the structure. Federalism is another one, broad separation of powers is another one, and fundamental rights and directive principles they all are the part of the structure, so they identified certain features. Then this judicial creativity activism has creativity, as a seat, it went on, and more active stages grant to the Supreme Court, and there has been further interpretation, at a faster pace, after the mid-70s, and during 80s, the law has taken as March forward at a faster pace. so, keshvananda Bharati, once again sharply divided, 13 judges bench, 7 on thi8s side and 6 on that side, 7th judge was justice H.R. Khanna, the first of the judgement appear, that you win the other way, but later it took a turn, and towards joining other people and limited power declared right to property is not the part of the structure because earlier fights were all over right to property so, everybody in fact I was in state of Andhra Pradesh as advocate, led by ram reddy senior advocate at that time, the main actors were palkiwala, and many others so, I had opportunity of closely watching the eliminations and assessing and understanding the implications of this doctrine, and impact it would have shifting for the ultimate power when the parliament and the aim of amending the

constitution and legislations to the supreme court as having the last word even in the amendment. then we many of us criticized it because it is unknown to constitutional law and its basic structure, unheard of I said it is very doctrine, how can you firstly develop, etc. but the wisdom of this realized very soon and Mrs. Gandhi election was set aside, by a courageous judge. I must say courageous judge because it requires courage of conviction to aside the election of a very powerful prime minister and analyze all the prime minister so far we had, one of the most powerful prime minister was Jawaharlal Nehru and Indira Gandhi, in fact somebody said there were only male member in their cabinet, that was one way of I don't appreciate the way they put it, women are known as courageous then this that's why we worship goddess durga so, after set aside the election, she opposed the supreme court for a stay and appeal, and justice Krishna happened to be, see how destiny, plays its role in shaping the future of the country. He happened to be the vacation judge. in any other vacation judge in his place was normally said, this four people are hearty contesting this matter is going to take the unnecessary time of, I have not meant for this business, let the justice be judge who set aside the election himself granted stay for two weeks or three weeks to enable Mrs. Gandhi to move to the supreme court. Justice V.N. Khare who became the chief justice of India, he was the junior council of Mrs. Gandhi at that time as soon as the judge pronounced it occurred to hint that to ask for the stay. they asked for stay and the judge granted it, saying that yes it is very serious and probably the help came to become a judge out of, and then turn about to chief justice of India, sometimes things happen, not by design, but just like that, so, when she came justice Krishna Ayer he was man ready to take on any challenge, normal judge would have said let it come after vacation before the regular bench am continuing the stay granted by the judge of the Allahabad high court close the matter, but he went on hearing the whole day nani palkiwala occurring for help on one side, great constitutional lawyer at the pleasure of hearing him, including keshvananda Bharati, and shanti bhusan on other side also, a very eminent lawyer and who succeed in the Allahabad high court and came here. Upholding all that he produced a reportable judgement, on order in the interim application as one would say, she could do this, and as a member of parliament she could not do this, she can attend the parliament, she cannot draw salary, and she cannot vote but she can participate in debates as prime minister. This way that way, he made the order, and both sides felt that it is not totally one sided and the result was they made agitation. then next day she clapped emergency all the BJP leaders were in Bangalore at that time for a conference so, under the MESA, and all leaders, including jai Prakash narain including

morarji Bhai desai and advani, atalbihari bajpayi everybody. thats how the ultimately they throw the challenge etc. it kept the supreme court and you know what happened in ADM Jabalpur and let me confess I was the junior standing council for central government at that time, and I to oppose the writ petitions challenged detentions and to sustain this the stand of the government, but that was a matter of the lawyer it is his statutory duty to do it. ultimately justice Khanna and his dissent has become relequent input in the judiciary, at judiciary reminds at clash of worms, reminding us the flood, but justice Khanna paid the price for it, he wrote his autobiography, the roses on thorns, he knew that by the judgement his chief justiceship will go you will not get it, but he decided to do it. New York Times editorial his judgement...and his portray thanks in Supreme Court, so that's all things have happened. The wisdom of the judgement came to light when parliament, I say the advice of attorney general, amended the constitution 30th amendment was passed, saying what? The election of the prime minister and the speaker shall not be called in question in any court, shall be deemed to be valid. the validity...separate forum which parliament may create, the effect was to wipe out the regiment of Allahabad high court setting the election, what was set aside as invalid, illegal shall deemed to be valid and beyond the jurisdiction of the courts to go into, this time all the judges five judges who decided the case, they declared this amendment as unconstitutional on the basic structure. If this basic structure theory had not been there they had to uphold it and how shocking to notions of justice and fairplay. even who initially fought against the theory of basic structure and he was the leader on the side and lastly even he felt later on no, no, this basic structure theory leaded the country and the wi9sdom of this one and all, even the critiques turn out, so, therefore that is the part of the history, thats how the judiciary tried to balance things and such before all this what happened in 1973, keshvananda Bharati judgement as soon as justice Grover then hegde wanted to become the chief justice, three of them superseded by the government and the fourth one is picked up A.N. Ray, with the senior most judges among the dissenting judges, he was made the chief justice of India. That was challenged in the Delhi court one lakhnan pal and these three judges have resigned. the Delhi high court said, you said that senior most must be appointed, now these have resigned, so your petition, how can we issue a quo warrnto, if the man does not suffer by his disqualification at statutory bar, and according to your own principles, after those three judges have walked out, so what is to be done? So this chapter was closed. The fact remains. The limit of power of the executive and the judiciary either the legislature, there is no limit at that time and now we have limited powers of the executive, judiciary and the legislature

because of this doctrine of the basic structure. But what is the result? Judiciary has taken into its hands unlimited power while limiting the tripping the wings of the executive and the legislature. judiciary has assumed unlimited powers to itself, not only that what happened in the supreme court in advocate case, how issues came up and that includes the court vary time to time, initially S.P Gupta's case, 1982, the question arose, because the ways some other law ministers being the candidate, foreseeing the candidates of their choice into the system was resented by the entire bar, judiciary felt affected by that, they were helpless, during the Indira Gandhi prime minister initial days, there was no problem. largely recommended chief justice of India were accepted and chief justice of India always tried to recommend good people, reserving people to judiciary, no problem, but when they started on chief justice didn't try to force their way, two things and on the top of it free transfers of high court judges and super promotion to few judges, this is too much to bear for the system and so S.P. Gupta's case, the solid but a majority of the judges held no, no, the consultation is all that required by the constitution with the chief justice of India. consultation has not been concurrence, you all know how it has been taken away, again the question was reagitated and supreme court took on the regards by the supreme court this time said independence of the judiciary is the basic feature of the constitution, part of the basic structure, therefore to maintain the independence of the judiciary this view which is communicated to the chief justice of India, the consented view should prevail. then they tried to be in some safeguards, not chief justice alone but in consultation with the senior collicks which we call collegium, collectively they decide and that will be the view which should prevail ultimately, government only can convey its reservation and objections to the person of reconsideration of supreme court, to take its earlier recommendation, it should prevail, so this is how amendment of procedure was evolved and this decision was taken. The point which I want to convey is this. one is hour of even selecting judges has been taken over by the supreme court, what limit is there of the power of the supreme court judiciary is, the judiciary without any limitation is power absolute power, is it a safe thing for the country I want to think over it, second thing to think over is how did they exercise this power, this question came up very glaringly, in the recent NJAC case, and the supreme court advocates again came to the supreme court and F.S. Nariman, he lead the arguments, the attorney general was, but he went whole heart attacking the collegium system, they need the judges appointed, this so and so, functional judge so and so, by names and almost it was washing dirty linen in the public, this is not good for the system, because institution must maintain the dignity and majesty, which is not

possible with this kind of attacks, but in any way in his public discharge of judicial participation, no doubt he has done it, but what I want to point out is not what he said, what the judges have said. All of them agreed, all is not well with the current judicial system. here lies the danger, judicial activism will be meaningful, helpful, useful for the country and the people only when the judges or the caliber of the judges like Krishna Ayer, Bhagwati, chinnappa reddy and people of that kind, who committed to the constitution, wanted to push through the aim and objectives of the constitution as far as they could towards realization, which the government towards that, which the parliament towards that, this kind of people you required, are you able to get them? you will get them, you have the power enormous follower required in mighty hands not merely mighty hands, you require a vision how to use it, otherwise this power if not handled properly how will the country be benefited by it. controlling the executive and legislature is one aspect, then what about the rest, therefore we have got serious problems, second thing I would like to point out let us not believe ourselves that everything is fine with the judicial activism, it is not so, it has its own phases, sometimes they are up strings, sometimes they are also downward trends, take for instance two situations, I would like to invite that is the prevailing system, political system, recognized in various nations is not throwing up representatives of quality, and as I say the fact which is media often mentions every time, during the general election of the lok Sabha, they made a study of the representatives who have been elected and they come out with an analysis which shows the number of persons criminal antecedents is increasing every election is a fact, atalbihari bajpayi before became prime minister, he came for the memorial lecture in Delhi, about the present state of faces of democracy, thats reported and in fact I would like you to NJA to circulate this, this is the report of the bar council of India, the Indian bar review journal of 1998 issue, volume 35, issue number 3, in that whether accountability, there he explained in detail, only for personal gearing they are getting into the politics, and these houses have become akharas, for fighting votes, fighting in arenas, no meaningful debate is taking place, this cannot be the system. having said so, he became te prime minister thereafter and in the manifesto of NDA of the 1999 general election, there was positive commitment made, and I won't take you time reading all that, it says when we come to power we will implement after considering recommendations of the law commission and one important step he took, constitution of national commission towards the working of the constitution, which venkatachillah as the chairman, in which soli sorabjee, justice Jeevan reddy, they all members. Very distinguish committee. Journalist was also there and they made very

valuable recommendation they said that the political system is how such the extensive criminal relation of politics, unless urgent reforms are undertaken, there will be not much to salvage thereafter. System is getting into wrong hands, as already got into wrong hands, this is what they have analyzed, and this is what the report has find. There after I don't know what happened he constituted the committee, national commission, but he could not take it forward, that shows the difficulties in the system, interest in system, which will not reform. We need judicial reforms we need administrative reforms, we need political reforms, electoral reforms. Electoral reforms are the first priority according to me. Nobody is interested. The latest manifesto of the NDA, don't find the mention of the electoral reforms. In none of the speech of the prime minister, he has made any commitment about the electoral reforms, not that other commitments that he has made, that's the different thing and I am not going to that. Therefore, the situation is developing where the institutions of governance are not in proper hands, they are seeing it emerging trends are very disturbing, unity is threatened. There is one constitution objective to preamble, to promote fraternity among all sections of the citizens, assure the dignity of the individuals, and unity and integrity towards the nation. this is very important constitutional objective, totally forgotten on the contrary attempts are being made to delete the word secular from the constitution, secularism has come only into the constitution by the 42nd amendment, was the constitution earlier? Because the earlier judgements, right from the beginning the Supreme Court have been saying the caste less, classless society, this is the aim of the constitution. If you do not promote unity among the different sections of the people, how can the country progress? Naturally take the advantage of it, if you today look around, is there a single neighbor of yours, who stands for you, think over it. Things and situations are developing in a manner which is not good for the whole of the country or good in the constitution, now, situation has come where, and you require leadership, of the highest quality in all the three spheres, judiciary, executive and the legislature, now who will bring it up? Legislature not interested, and if not interested, will the judiciary be able to do something. Judiciary has been doing some half of the attempts, that's why the grievances with activism. what have they done in PUCL case, in fact it started, PIL started in the Delhi high court, the voter has arrived to know, the antecedents, background, assets, liabilities, qualifications of the candidate, because the voter has a right to know, therefore the right to know comes from the 19(1)(a), supreme court is like a modification afformdate, after saying that you must state on oath, disclose the assets and liabilities, criminal antecedents, education qualifications, the supreme court did not add one

sentence, which would have made all the difference, it should have said any false statement made, in the affidavit, will render the nomination void, one sentence could have been added, that would have been brought the results, otherwise what is happening, they are disclosing crores and crores of assets. I remember two candidates, contesting for Tamil Nadu, chief ministership, disclosed the assets, other thing you cannot and therefore and even that this may not be correct but unless some sanction is attached what is the good of this, we all know that, assets yes, in fact when PUCL case second round it came, when the decision was given all political parties joined together. They closed their ranks, otherwise they fight like fox and bulls in the parliament, on every pity issue. on this issue all of them came together, how can you allow the candidate disclose all this, so dangerous this would be, let us undo this then NDA government at that time, there is no difference between the governments, I find all governments names differ, but style is same thing, result in the same thing, people's problem are the same thing suffering with the same things, during some period is less and the other period suffering is more, but suffering is common. then it was an ordinance that was challenged, this researcher lead the argument for the PUCL, I told justice Shah, I said my lord have one more thing to be insert an item to be insert in that affidavit, he said what is that, let them disclose what were the assets when they joined politics, so that have the comparison, how much self-service, they have rendered to the country, Mr., Rao we are not in the first round, this is second round, now the disclose will limit to the validity of this act, and they upheld, but they did not add this, this sentence. Subsequently NOTA judgement came much later. you all know that negative vote, *none of the above*, Mr. krishnakant was one of all the vice president, there was long discussion about, he was really concern about this, he was the man of politics, he saw the things how they are happening, two reforms he suggested, one is by amending the people act and make it the requirement or a candidate to declare successfully and constituency, he should have polled at least 50% plus one vote, polled in the constituency out of the polled votes, unless the candidate secure 50% plus one, he would not declared elected, if nobody secures, with limited to two leading candidates, that will bring stability, that will take away, the poison of this communal caste, factors in the voting system, criminalization, many things will silently go, because you cannot directly take on this problems. Second thing he said was, that people be given the choice to disapprove all the candidates, none of the above, and the majority of the voters reject all the candidates, then there shall be fresh election and fresh candidates. These two things simple reforms are done, then the system will be much better, Supreme Court took on the issue, and gave direction including the

ballot paper on the voting machine, the provision for people to reject all the candidates, but did not follow it up. One more sentence, the majority of the voters reject the candidates there shall be fresh election, with fresh candidates that sentence is missing, so this halfhearted activism does not bring any positive results. We have to correct the system and realize the dangers of this caste and communal divisions of the country, which have been used regularly by the political parties, it is trying to rethink on Indira Swahney case, caste and reservations. I close on this. Indira Swahney, some through caste with conviction, myself, Venugopal, please don't ever permit caste base reservation. have occupation, then they said earlier Chitralekha said, that could be done without reference to caste, ultimately they said 9 judge bench, backwardness can be identify through caste, or the reverse caste. there is not the further question which is more consistent with the constitutional objective of the classless society, through the class identification, and with result today every government and V.P Singh became prime minister, within central government all caste based reservations, and now the competition is for the more backwardness, see the jatt recitation in Haryana, Andhra Pradesh kapus, is another important community. They want reservation, in Rajasthan Gujjar's already backward, they want upgrading status to schedule tribe. This is state of affairs, therefore the rethinking is required. this shows that people have different views, and all constitutional issues happens like that, so my thesis is this, we need more judicial activism of a positive kind, creative kind, keeping in because judges take the, only judges invoke such sentences, and uphold the constitution in the laws. Not only swear by to protect the integrity of India, the ministers also do, but uphold the constitution laws is only for the judges. if justice verma's thesis, inertia the other ways, makes the judiciary step in, thats correct, there is not only inertia, absence of will to amend to reform the system, will judiciary step in it will not, and last point is this, when you appoint a commission, there is power to appoint the commission, to investigate in the problem and their recommendation is it not the power coupled with a duty. what is the duty, to consider the recommendations and take action and give reasons, why you have not taken the action, excepting for the recommendation, professor Baxi has analyzed all the law commission reports what have happened, how they have been gathering dust and dust in, nobody to remove the dust and become, if judiciary does not step in, then who will step in, now for this responsible task, what kind of judge is required, the collegium system fails then who is there to save the country? Thank you very much.

**Justice Gyan Sudha Mishra:** thank you Mr. Rao, for such a candid, and a very, very frank expression of your views on the subject, it's really and fortunately there is no confusion in what you have said and can very much decide for what you mean to say, I guess we will all the history, which we are already aware, but your foresight and your views and such a balanced views, as to how the judiciary should go about it and quite sure this will act as a guiding light fruit of thought and compel us to shape our thoughts and be a little more courageous in expressing ourselves because what I have in my experience is that many of the views we nurture in private, but when it comes to public platform and even when you know, expressing ourselves in open court we tend to be diplomatic and may be that is a compulsion more for a judge than a lawyer and a public man, you really it was like a not only a breath of fresh air, but reinstalling the oxygen in our minds that be a little more forthright and take up the stand without fear and favor to which we take oath, but I don't know whether, we will have that much of strength and courage and I am quite confident that may be there will be a time when we get judgement of such a revolutionary nature like the creation of the collegium system and the power of judicial review and very optimistic that will see the light of the day, that sometime there will be a balanced view and courageous view will not only will make an impact will, really translate the status quo into change. Thank you so much for your frank views and we all are obliged to what you have said, and if anyone wants to generate a discussion it's most welcome. After this we can re energise ourselves with the subject.

**Participant:** enthroning address of learned senior advocate, as somewhat blunted my creativity and have blunted my response also, but still I would say that the supplantation of judicial dicta by revisiting them through a fresh vision which society demands and expects is itself person factory of the fact that. interpretative activism through an added vision is an acceptable parameter for the growth of the constitution and of the laws, but at the same time if that interpretative vision with the growth of time lens dimension to the constitution and to the laws and it infuses the fresh life in them in consonance with the demand of the society in with the demands of the various people who are affected by the laws, it also presupposes the fact of judicial fallibility. If we accept the factum of judicial fallibility we have to also accept the factum of constitutional fallibility also. there has to be constitutional status, if learned senior advocate has propounded the view that there is no unfoldment in article 368, of the limitations of the powers of the amending powers of the constitution or power of the judiciary to review those amendments to the constitution

de horse the basic structure of the constitution, there has to be an acceptance of the fact that if the legislature does proceed to channelize those powers of the judiciary to review the constitution, to the extent that it is in consonance with the judicial dicta channelizing the powers of the judicial review and afflicting the to some extent obviously the power, the basic structure of the constitution engrained in the separation of powers. would it to some extent make inroads into the basic structure of the constitution of separation of powers or would it given the ramped corruption wailing in the system especially in the executive and amongst the politicians necessity of the time to constitution of its status and permit it to grow.

**P.P. Rao:** I get the impression that you have been elected as the spokesperson of this group, but I welcome, at least you are the admittedly opening batsman, on the ground. And is really though provoking reaction you gave. that's really the objective of this group discussion is only that, now about the separation of powers you are right, that's why advisedly the supreme court said that, there is broad separation of powers in the constitution, not rigid separation in the Monegasquean sense, broad separation means what, it permits inroads, by whom, in whose area, in roads only by the judiciary in the area of legislation and executive, but does not permit executive or the legislative to inroad, it is a one way traffic, that's how you find interim legislation, it started with the supreme court, you have seen that, Vishakha, and also you have seen in that D.K. Basu's case, in Narsimha Rao's case, and there the supreme court was driven to a corner by my argument on one aspect. You know the prevention of corruption-act, 88, completely repealed the old act of 47, the Chidambaram was the minister of the state at that time, we introduced the bill in the parliament. The members asked, because the public servant definition, members were agitated, are we covered by this definition please clarify, they declare it in the full house, no intention to cover the members of the parliament and legislative assemblies and councils. we are completely out of it, I assure you there is something like that, but supreme court got opportunity to interpret that, I pointed out that this is the bill was fashioned whatever it is, we are concerned with the language with the language to interpret, and we are interpreting it. Public servants include, the members of the parliament and assemblies. the issue was a glaring the members of the Jharkhand Mukti Morcha people, they received cash, and being tribal and innocent people, they couldn't get their bank accounts, so no further investigation required, so I said alright if you interpret this way, under section 19 there will be somebody to sanction prosecution, who is there party, for the party who can call the authority,

who can dismiss them or remove them, constitution does not have any power to remove or dismiss them, member of the parliament or the assembly no, no, we will make the provision, we will invest the power in the chairman of the rajya Sabha, speaker of the assembly, only they gave concurrence....what does it mean? it is not a procedural thing, investing power, conferring a constitutional power on the speaker, and the chairman of the rajya Sabha, separation of powers, is taken seriously and it can be done, we have been doing it and they say parliament enact a law, parliament will not enact a law, only in vishakha ultimately enacted the law, but in other cases it does not do it, so judiciary, justification is what Mr. verma said, that base of judicial activism is inertia, this is the problem, so therefore separation of powers is to be taken strictly, it is flexible concept, how much flexible, depends on the supreme court's will. If the Supreme Court, and the judge who sits there and decides. The right to know of the voter, it's not to be undone, very swiftly it is,

**Participant:** why don't you challenge this reservation which is in progress in the country, total conflict in the idea behind the reservation, and also in total transgression of the fact that it was merely meant to be intergenerational remediation and that intergenerational remediation moto has been accomplished?

**P.P. Rao:** I appreciate that question, and let me mention to you that, there is one ashok Kumar Thakur case came up in supreme court, in that case, I was representing a group, NGO, I raised this question and I tried to re-open indra swahney by pointing out that there are two routes to identify the backwardness, one is through the caste and another ne is not through the caste, they gave examples also, slum dwellers, rickshaw pullers, agricultural labours, automatically they qualify to be backward classes, eligible for the reservations, having said that why did they did not tell the further question, which route is consistent with the constitution aim of the class less society? Which promotes fraternity, therefore please, yourself consider this, and the bench was not interested in this. You read submissions reported in the SCC, along with the ashok Kumar Thakur judgement and you will find it, I have not given up the fight, I am getting another opportunity you for SCs and STs Reservations in the parliament in lok Sabha, and state assemblies for a period of ten years. Ten years is gone, several 10 ears have gone, at the end of every ten years, there is extension, again from the ten years, amendment in the constitution. I said these are transitional provisions. reservation is transitional concept, the constitution postulate in article 46, you promote

the welfare of the economic, and education interest of the weaker sections, that is the main thing and it should be the agenda, you allow reservations, with exceptions that main mandate is to promote but they don't do that, so, therefore that is under challenge now,

**Participant:** excellence has to be promoted

**P.P. Rao:** so, really very important question were arose by you, one is when the reservation is based on the caste, what are you doing, you take the population of the entire class, with reservation, at what level you make the reservations, 10 plus 2 of that, admission to colleges, only those children who have done 10 plus 2 they are eligible, but by taking population not confined to those people, entire population of the caste you take it, but the majority of them are so poor, they don't have the means to change it to 10 plus 2

**Justice Gyan Sudha Mishra:** do you think that Indra swahney direction that creamy layer exercise is also not being done in all the states, in some of the states, they have been doing it,

**P.P. Rao:** Kerala said we don't have the creamy layer, then Supreme Court said, what nonsense you are talking, they appoint the commission, a judge, to investigate the report

**Justice Gyan Sudha Mishra:** but, most of the states they are mindful,

**P.P. Rao:** they don't want the creamy layer, they want to come into the exceptions,

**Participant:** benefit is being derived amongst the affluent amongst the so called society

**P.P. Rao:** exactly that's my point, therefore it is meant for the most backward but they are left far behind, and it goes only to the affluent sections of the society, that's the very serious problem. Issues are still coming up, whenever I get a chance, I tried to persuade the court, but then things extend as, persuasion is available, our efforts will continue. Thank you

**Participant:** excellence has to be promoted, except for those who are, in really need of reservation, dire need of reservation

**P.P. Rao:** I mentioned the, Gujarat state, former judge, he identified backward class for the state, former judge of the high court, without reference to the community, if you go to the origin of the caste, and it rests to bhagvad Geeta....

**Participant:** practiced subsequently, and it was never ordained in that manner, mandate in, there was no prescription by Manu also, that so called schedule caste, who have been the lower of the verma's, who have been clubbed as the scheduled class, they would be prohibited from entering the temples, they may be treated as untouchables, this is more or less, I am sorry to say.

P.P. Rao: dr. ambedkar in the constituent assembly, he said, class are anti national, we need to promote fraternity, therefore the system is but let us continue our efforts, to mandate. Thank you

Justice Gyan Sudha Mishra: so, thank you, respected Mr. Rao for your, time and your views, and also taking the question of justice Thakur, I think one session is not enough for both of you, but I am getting the list that I have to wind up, and you know, if were holding court I would have thrown the list, but, you have to catch a flight also, so we are thanking you and the audience. We have to assemble for the group photograph before we proceed for the lunch.

Thank you.

## **Session-8**

### **Proportionality and Judicial Review: A View from the United Kingdom**

**Justice Gyan Sudha Mishra:** so, welcome back, the great audience, my lords you are saturated with that expression so, very warm welcome back, to the other listeners and the Participants, and now, we will have a different flavor on the subject, that is Proportionality and Judicial Review: A View from the United Kingdom, so we have enough of desi flavor, and now, we will have imported flavor and basically in some way we have imported the basic structure of the angle of jurisprudence, so it's very relevant that we also get to know about the view from the united kingdom at least, you would know what is the, air coming from a different continent and places and we have speaker, Dr. Arghya Sengupta, he will introduce himself because my g.k. is not that strong that I would be knowing more about him. I see that there is director in center for legal policy, but the ray of enthusiasm and intelligence that he is reflecting, I am quite sure, will be in person, very good.

**Dr. Arghya Sengupta:** thank you very much, justice Mishra, and thanks to everyone at the NJA, for inviting me as in particularly. I would like to thanks, someone who is not here justice room pal, with whom I worked quite closely and so she as insisted that I come here, and so obviously there is no question of not coming but it's a great opportunity and my privilege to be here, and briefly to touch upon what I am going to talk upon today, as in this is clearly the graveyard shift after lunch and I have the unable task of trying to keep everybody awake, I hope so, as in with your participation more certainly

**Justice Gyan Sudha Mishra:** so, you have to withdraw this graveyard session...

**Dr. Arghya Sengupta:** OK, so the word may be expunged from the record, so what I planned to talk about is to actually carry on something that Mr. Rao, mentioned in the last session and where he raised three points about judicial activism, as in first that judicial activism takes place when there is inertia of other elements of government, the second is that the courts needs to asses us to what the extent of that inertia is and the third is that what do the courts do and how do they act, in order to ensure, that the inertia is to certain extent mitigated, so my talk today is on administrative law review, essentially on proportionality which is a principle that has grown significantly in the

United Kingdom over the course of last 10 years and has been used on and off by the supreme court of India and my talk will essentially focus on how judges can use the tool of proportionality especially under article 14 review, in order to ensure that they are activist while at the same time ensuring considerably the reference to the executive authorities when the need arises, because the fear of activism has, justice Thakur pointed out in the last session, is that there is also this element of judiciary fallibility so, that must be kept in mind. The idea of proportionality review is what I will be speaking on and how it can play a useful role for judges while they are exercising judicial review powers. just the brief history of what is being happening in the united kingdom so it's all structured in three ways, what the existing law in the united kingdom wants, how proportionality has come in and what proportionality means and third what could be its possible relevance for judicial review in India. first, and I have circulated a small handout which I will be referring to as in it was prepared by me and my colleague professor Rebecca Williams, both of us taught administrative law, in the university of Oxford together, it was prepared in 2013. the basic question that arises is what has Wednsebury review which is standard principle of law accepted in India as well, called Wednsebury unreasonableness and I think I don't have to over this point in much detail, but the principle was that a judge who will interfere in the actions of an executive authority, only when the actions are so unreasonable that no reasonable authority could possibly take it so, in the Wednsebury case it was a landmark case in Britain as in where there was a license that was given to Wednsebury, which associated picture company and the license was given that they could operate on Sundays on the condition that no child could come to a theatre on a Sunday, so, whether the child was accompanied or unaccompanied no child could come to a theatre on Sunday, only on that ground were they given permission as a theatre world to operate on the Sundays. the theatre world challenged it saying that it was an unreasonable condition that was being put and lord Greene in his famous dictum said that it is not so unreasonable that no reasonable authority could take it and we are going to differ to the views of taken by the Wednsebury corporation and not interfere in this matter, so as you can well imagine that the tender which was set for the view was very low, as a threshold was high in the sense that the court will not intervene that much. This is seen as the idle of the judicial self-restraint and so Wednsebury as a principle was seen as not empowering the judges substantially. the classic exposition of Wednsebury in the larger context of judicial review was given by lord diplock in the GCHQ case, now this was a very interesting case which involved the power of the authority that workers in GCHQ which is

essentially akin to the ministry of the defense in the united kingdom which was essentially in charge of all national security related issues, could the workers of GCHQ form trade unions, that was the question, and the secretary of the state in the united kingdom has said that they could not form the trade unions, and so had barred the formation of the trade unions for the employees in GCHQ. The question was whether this barring of forming of trade unions in a national security establishment was valid or not. In this lord Diplock has said that there are three grounds for exercising administrative review. one is that the decision, one is illegality which is essentially that there is either an error of law what we call an error on the face of the record or mistake of fact or there is improper purposes or irrelevant considerations which have been taken into account, that's number one illegality. Number two is procedural impropriety which is natural justice, in our case it is read into article 21 has here been given the representation, and the third is irrationality. Irrationality is Wednesbury unreasonableness, which is that, is the decision irrationally taken? in our case this is from Royappa onwards, it has come into article 14 as arbitrariness, and again he said that this decision of the secretary of the state was not irrational given the fact that, it is a national security establishment, you cannot have persons who are forming trade unions which is holding the country to ransom and the merits of the whether this is way to do it not the courts are not best place to go into that issue. the courts are going to defer to the wisdom of the secretary of the state in this matter, now what happened subsequently again is given the fact that the threshold that was set was fairly high, there was an interesting development that took place in the UK, is that the UK as being the signatory to the European convention of human rights as in past the human rights act in 1998, which is seen as basically a version of the constitution for the first time the house of lords now the supreme court as in had the power to declare certain statutory provisions incompatible with the constitution. UK has as we all know the abiding principle of parliamentary sovereignty so the courts are not allowed to strike down legislation as we have in this country but at the same time to the first time the human rights act, allowed them to declare certain legislations incompatible with UK's obligations under the European convention of human rights for short, what would pass under the name of judicial review in this country so, then there was a clear division that took place between cases that were brought under the human right act, and cases which were brought under the common law. broadly the constitutional law administrative law distinction, which is currently in our country obliterated because everything is in article 14, now, as far as human rights cases is concerned the

test that was laid down was proportionality and this came through one case which was called *ex parte Smith*, the case of *ex parte Smith* which was a decision given by Lord Bingham, was a case as to, it was a decision taken by the secretary of state in the United Kingdom not to allow homosexuals in the army, so it was the decision taken that the homosexuals would not be allowed in the army, and if you see the Lord Bingham in the House of Lords in that case, upheld that decision that was taken, and if you see the handout that I have provided, it will be on bottom of the page 2, where he says, the greater the policy content of a decision and more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational, that is good law, and like most good law, common sense. The test itself is sufficiently flexible to cover all situations. If you go over to the next page, the part in bold, the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable, so while he still applies the test of reasonableness, you can see the beginning of the shift. He is saying that if there are rights questions at issue then the courts will be less differential to the executive than it might be if there were questions of mere interest. This decision was however overruled by the European court in the case of *Smith and Grady*, this was challenged again in the European court, by certain persons who wanted to be homosexual and who wanted to be enlisted in the army, and the court in *Smith and Grady* held that on appreciation of the evidence they held using the test of proportionality, that barring homosexuals in the army was a disproportionate measure. They said that the rationale for this barred, which is that you want to maintain discipline, is certainly a valid rationale, however they said that the decision was taken on the appreciation of the facts and not on the basis of any survey, on the basis of any data but rather on the basis of prejudice, and they said that, that is not permitted under the European convention of the human rights. They also said that the *Wednesbury* unreasonableness test, is such a high threshold that it is actually preventing an efficacious remedy as it might be required under the European convention, that brought about a change in the UK law, so we move from *Wednesbury* unreasonableness to proportionality, so the question that really arises to cut a long story short, is what is proportionality? And how is it different from *Wednesbury* unreasonableness? There's a school of thought which believes that, it is basically the same thing, it is just sort of expressed in a different manner, question of form rather than substance. The test of proportionality as a ground on which judicial review will be

exercised was best laid down at least in my view by lord Clyde in the case of deflators, which was the case on the Privy Council. That's there on page 4, and it was a threefold test that was laid down by Clyde, who said that you have to test three things. One, whether the legislative objectives is sufficiently important to justify the limiting the fundamental rights. Second, whether the measure designed to meet the legislative objective are rationally connected to it and third whether the means used to impair the right of freedom are no more than necessary to accomplish the objectives. These three test are looking at three things. first, what is the measure that has been taken, and I will give it and I will contextual this in the case that was being heard in deflators, this was the case of Antigua because it was a privy council case and it was the case from Antigua in west Indies, which is being more famous because brain Lara came from there but, this case also came from there which is the only time that I have heard of Antigua, now, this was a case where we would call a service dispute, a government employee have been dismissed from service because, he was junior level employee, because he had participated in the antigovernment protest, and this was violative of rules of conduct in Antigua. He challenged it. the challenge came up to the way to privy council, and the question before the privy council was that whether this dismissal was proportionate to the particular offence in this case? There were three test that lord Clyde laid down. Is it rationally connected to the object? He said yes it is rationally connected to the object because you want discipline in the government and you cannot have anti disciplinary or antigovernment protest when you are actually getting the salary from the government. the second is that, is the legislative object sufficiently important, yes he said that the legislative object is also important, given the fact that this idea that there will be a government that is cohesive, is an important objective, but on the third test, which is a test of necessity he said that the measure of dismissing somebody for participating and that to a junior level employee, in an antigovernment protest was excessive ad his view there was that this balancing act that was performed is by the executive authority between the right in question, which is the as in to be employee and the legislative objective was not performed correctly. on the necessity test this action by the Antiguan government according to lord Clyde failed and this was the beginning of the proportionality in UK administrative law and the best exposition of this came as in there were many but I skip to a recent one given by the full bench of the UK, supreme court in the case of Bank Mellat, this was the judgement given in 2013, with lord Sumption who spoke for the majority, so it was 9 judges of the supreme court who affirmed, one, the proportionality is the law, but more importantly as to how it should apply to the facts of a case,

now bank Mellat was a case where the UK authorities under the counter terrorism act, had passed a direction saying that there will no financial transactions with bank Mellat, which was an Iranian bank. the reason for that was that it was suspected that the any financial transactions with this bank from Iran was being used to finance Iran's nuclear program and because it was used to finance the Iran's nuclear program there was a valid objective that in ensuring that these financial transactions with bank Mellat to be stopped. The question which was challenged, and the question was as to whether, stopping all financial transactions with the bank was a proportionate measure or not? And this is where the distinction between Wednsebury unreasonableness and proportionality was brought out to use the high threshold of Wednsebury then surely this is not a decision that is so unreasonable that no reasonable authority could take. If it was shown that the secretary of state said that bank Mellat was using finances for financing the Iran's nuclear program, because it is valid objective and court will differ but this is where the UK Supreme Court unanimously said that this was a disproportionate measure. there was one judge who was dissenting but they said that this was disproportionate measure because of the fact of two things, one is what we would call a reasonable classification concerned, why has bank Mellat has been singled out, then some evidence needs to be provided as to why this order has been issued against one bank only and not 8 other Iranian banks which were also operating in the UK. They said that the evidence in this case was not sufficient to justify the conclusion of this being singled out, so that was the first issue. the second issue was the necessity test again which is that is it necessary to stop completely stop all financial transactions of bank Mellat in order to achieve this objectives, because there are other financial safeguards there is greater due diligence that has been imposed on all other banks, greater compliance requirement essentially, so they said that there is no evidence to show that you needed to stop all the activities of the bank in order to accomplish that objective, so the point was very clear that proportionality now gave a higher amount of leverage to the judges to require the executive to produce greater evidence, to show that not only was its measure for as we would call it reasonable but it was also necessary to achieve that objective and it also allows the judges to play a secondary role as it has been constantly said in assessing this balance that has been drawn by the executive on the one hand the interest that you have that all banks can operate on a level playing field, on the other hand that there is this bank which perhaps is doing something that is financing the nuclear program, that is against the Britain's interest. How this balance is to be drawn? Does it require complete stoppage, greater due diligence, and what is the role that judges

are going to play? earlier judges in England were happy to say that OK, this balance is for the executive to draw, we are not going to play any role, but now they are looking for the under proportionality, they are looking for the greater evidence to suggest that this balance has been drawn in a manner, that is both rational as well as necessary. What is the relevance of all this for India and India administrative and constitutional law? I think, so, the first thing I want to point out is the fact that there have been illusions made to the proportionality in many cases in the Indian supreme court. proportionality is itself is a common word, so, most of them have been made in the context of where the punishment has been too severe, so you think punishment for some misconduct or so it has been too severe, the supreme court time and again said that it is disproportionate but when we are talking about proportionality now, we are talking about this threefold structure, which is first is the measure rational, two is the measure necessary and then assessing the balance that has been drawn as to whether this balance is the right one or whether a less onerous balance could even draw, now, I will take one case as one sort of case which we might be familiar with, to try and see as to how the proportionality as in Indian constitutional law has been seen so in Om Kumar V. union of India, this was one of the many cases that came out of the skipper construction scandal and there was commission headed by the justice chinnappa reddy which was set up after that to see, to enquire into misconduct by senior government officers. Om Kumar was one of the government officers for whom there was a censure that was provided. It was a minor punishment, some government officers had lost their job, or their pension gratuity. Om Kumar had a minor censure and the question that arose before the Supreme Court was as to whether this was proportionate or not essentially? And justice jagnath Rao as in, in the Supreme Court, said that the proportionality is an established feature of the Indian constitutional law. There he was using proportionality loosely. he went to the chintaman Rao as to the question of reasonable classification and you all remember the case form 1951 where there was bidi workers in Madhya Pradesh as a part of Madhya Pradesh, the agricultural laborers were stopped from working in the bidi factories because they wanted them to encourage them working in the agricultural fields and there was a complete stoppage of bidi factories for a particular season, and the court in om Kumar said that, that was the beginning of proportionality in the sense where the court held that this is an excessive measure. You don't need to stop the bidi production completely in order to encourage agricultural labour, you can think of less onerous measures in order to achieve the same goal. They said that in article 14, reasonable classification challenges the standard of review should be

proportionality, which is essentially looking at whether it is too severe or discriminatory, however and this is a key point which I think leads to my thesis, which is that in article 14, if the challenges one on arbitrariness then in that case the standard of review the court holds in this case should continue to be Wednsebury unreasonableness. we have two standards that are, that the court is suggesting should be in operation at the same time, so currently and I think in Indian constitutional law, because our administrative law has been constitutionalized in article 14, as in if we look at article 14, there is provision which is dealing with equality, as in prima facie, as in it has little to do with arbitrariness as in it is to do with equality and the standard test that has been laid down, that is the classification reasonable which is based on intelligible differentia and rational excess with the objective that is to be achieved.as far as the reasonable classification is concerned, if it a pure reasonable classification question then the test has to be one of proportionality which is when the court can really hold the government to account and say that has this decision being taken in a manner that is both rational to restrict the right at question, secondly it is necessary to restrict it and has the balance been drawn in a correct manner, its important I think for courts to look at the questions carefully, I know that when we file of course times when we file cases in the supreme court we put in 14, 19, 21 as a matter of course, so you don't think very much as to whether it is actually article 19, 21 case, you say *chalo daal dete hain* and then we will see after that, and so the question that arises it's very important for courts to suggest that which is the standard of review that ought to be used,, so when there is rights question, at issue, so when there fundamental right that is in question and the question arises as to whether a reasonable classification has been drawn, it is important that I think that the courts in India use take perhaps, look at the need that the UK has taken in this regard to hold the executive to account in a far more stringent manner, by saying is your measure rational necessary and is the balance being struck a correct one, however as the questions which are questions of arbitrariness are concerned as in is this decision arbitrary, now I think there the judiciary is really on thin eyes because on what basis will you say that something is arbitrary and a lot of criticisms of judicial activism in this country as in also hinged from that particular fact that the courts in one case say something is arbitrary and in another case say that this is not arbitrary, so it's not really clear, so there my suggestion that justice jagnnath Rao says in om Kumar case that the standard should be a greater degree of difference to the executive authority as to what is to be considered reasonable or not, so Wednsebury unreasonableness which is the law in India today continues to be the law as far as arbitrary challenge under article 14 is

concerned but we need to draw nuance and so for challenges which are based on reasonable classification and which are genuinely raising rights concerns, such as article 19 and 21, then there is a case of proportionality to be a standard of review, and one last point which I would like to leave with is that the great benefit of proportionality is also in trying to balance two fundamental rights, there are often questions that will arise before you that require balancing of two fundamental rights and I think this is somewhere where at least in my limited experience of looking at cases in the supreme court that we tend to privilege one fundamental right, over the other in a slightly binary fashion, so if I were to give an example of a judgement which I have written about and which I think with great respect is incorrect, was a judgement given by the supreme court constitutional bench in the case of Pramati, in 2013, which was a case of balancing the right of minorities to start educational institutions of their choice, vis a vis 25% reservation that is provided in the RTE act, for economically weaker sections of the society. the question that arose before the supreme court was essentially that how do you balance article 21A, which is in the constitution providing right to free and compulsory education for all children between six and fourteen vis a vis the right under article 29 and 30, for minority to establish and administer an educational institutions of their choice, in this judgement justice Patnaik speaking for the majority, says that the right of minority to establish and administer educational institutions of their choice is untrammelled, it does not have any non obstante clause so, this must be given full effect to, so the right of children, economically weaker sections 25% to go to minority schools aided or unaided is not permissible. I think there are couple of distinction there which I think a greater analysis of proportionality would have brought out is that did we have to come to such a binary conclusion, of course unaided minority institutions have right to establish and administer educational institutions of their choice, at the same time the RTE is a socially progressive legislation which wants to integrate and bring economically weaker sections which do not have access to the quality education in to the force, so if you were to use the proportionality type analyses we would have found more known solutions that perhaps it need not apply to unaided minority institutions but certainly to aided minority institutions which is taking money from the state, there is greater argument that this is something that should apply that is a better balance article 21 A and 29. second which is led to great litigation after that in several high courts is also the question as to whether the rest of the RTE act, the basic norms and standards that have been set up applied to minority educational institutions, different high courts have taken different views so, there refer to

basic norms and standards, toilets to be present, does this apply to minority institutions, surely logically it would seem to be yes, as in having toilets does not impinge on the minority character of the institution in any shape or form, but the fact that there is the Pramati judgement which is saying that you cannot touch minority institutions in any shape or form, so what I suggest in the lieu of this thought that is twofold, one is that I think there are two advantages to proportionality one is that I think it allows, judges are very powerful tool to balance two fundamental rights, when it is a writ issue, when fundamental rights are in conflict and to find solutions which are not binary, that is one above another, because I don't think as in our fundamental rights were devised in that manner, right from Gopalan being overruled we know that they are not self-contained courts, in some sense they are package and so there will be conflicts within that package, and proportionality gives that tool. secondly and this I think this is the most I think as the proportionality has it as its device which is that I think it allows judges a valid and legitimate way to hold government to account, the inertia that Mr. Rao spoke about is obviously prevalent, but I think as judges and the judiciary and the member of the larger legal fraternity we must also be careful in that we are not seen as we over stepping our boundaries, and that's often the case. The judges are legislating, judges are taking steps which are not seen as judicially legitimate or competent. I think proportionality, allows a great tool by which holding a judiciary to account, using a firm basis for activism and I think doing a great service by promoting rule of law. I think as far as administrative review and judicial review powers are concerned I would suggest that proportionality is an idea whose time has come. Thank you.

**Justice Gyan Sudha Mishra:** so, thank you Dr. Sengupta, you have lived up to our expectations and you appreciate what you have, your feedback and your input to the subject on what you have spoken but in order to make it more relevant or heat generated or useful can we have some deliberations, discussions on this.

**Participant:** I just want to, as you said that principle of proportionality can be useful I think that in many cases, where there are religious issues, are involved, there this can be a good tool to find out the way. There was one case of Jain sadhavi guru child, as she was something of 5 or 6 years old, child, and she wants to take the Jain religion. she wanted to become the sadhavi, that issue was taken up, writ petition was filed, but then issue was such that, where she wanted to be a

sadhavi, is her right to right of religion but that time there was also one more issue, you have child, I think where two fundamental rights have come, so article 21, there is matter

**Dr. Arghya Sengupta:** this is absolutely valid, because I think that it's a difficult question for judges whenever question of religion comes up, and I know that since shah bano, judges know that, to stay away, there is a recent judgement, I forget the name of the judgement which has been given by the justice gogoi, dealing with a math in Karnataka, I will find out this, it is a recent judgement two months back, where again as a sort of very careful balancing has been done, and i think, the fine example of that where sort of proportionality type analyses was used was going back to justice Mukherjee's judgement in laxmindra tirth swami, with the math, and thats a fine case where court can get into territory of what is an essential aspect of that religion while at the same time ensuring that the constitutional prerogatives or something whatever ids of secular nature like a right to life is at the same time upheld

**Participant:** is it also subject to the principle of rationality...how would you determine that this is rational, as it by way of custom, how would you determine this rationality?

**Dr. Arghya Sengupta:** so I think thats a very valid question when I was a law student in Bangalore, I don't know whether there was judge from Karnataka but there was a practice called madesh nana, in Karnataka which is, and so where sort of your rolling on the left over food that have been left over by Brahmins and in that case, we had filed a case to say that this was something that is not sanctioned by the religion itself, so I think there is no easy answer to your question but I think the answer, what you just mentioned is just the rationality type analyses goes a long way ensuring that the evidence is brought on record to suggest that this is an essential tenet of your religion, because I think judges obviously have a great role to play so as to see whether, the evidence that has been brought on record is of a nature which justifies its claim that is an essential tenet of religion, now I know that we are also heading into shah bano territory here, and other point, I know this may not be diplomatically the most correct, then we have also seen that it is true that in practices that deal with the majority religion judges feel more confident, with the shah bano history, as far as the minority religions are concerned. I think that there is a case for a principle which involves a higher standard of proof on the petitioners part to show that something is an essential tent or not and I think once you show that it is an essential tenet and the judges agree

that this is an essential tenet, then only accord a greater degree of difference to that, otherwise obviously the constitutional prescription that is applicable to all which at least in our case like right to life with dignity in the madesh nana case , in that I think ought to prevail, unless something is in essential tenet of it.

**Participant:** in that scenario....if we reverse the trend of applying rationality

**Dr. Arghya Sengupta:** I make a distinction here and I don't think we are applying rationality here to that tenet or religion because that would never get an answer because most religion is you're rational,

**Participant:** barring the principle of law,

**Dr. Arghya Sengupta:** so, I think ultimately it's a balancing exercise, ultimately what you have to go for and these are cases of particularly difficult balancing exercises and I think, you will just have to see whether, and you will have to see as to whether, its most certainly, so thats exactly the point, is that but you still have to see that there could be as in hypothetically, there could be an essential asset of the religion, which indulge cruelty to animals, there could be because religion it by very nature is irrational and so thats my personal view, as in everyone may not share that, but so the fact is that I don't think we are applying a rationality test to the religious practice, as I think the religious practice is entitled to be irrational, but the fact is that we are seeing whether the irrational practice, one is an essential tenet of that religion, if it is not an essential tenet of that religion, the constitutional prescription is heavier, if it is an essential tenet, then he have to see it more closely in terms of, is it really cruel, is it really effecting the right so thats second order question will come in. I think that's a question as far as hierarchies between the fundamental rights are concerned

**Participant:** that would depend on conflict, the nature of the conflict,

**Professor Upendra Baxi:** I think there must, took little of history, earlier with reasonable classification, and we judges decided in the wisdom, in abundance of wisdom or lack of wisdom, as the case may be, everything according to the reasonable test, then came Maneka and we introduced an idea of arbitrariness entered the discussion on reasonableness in a very

preponderance way, now what is arbitrariness, how is it to be proved, what is constitutional arbitrariness? what is the constitutional reason, then we drew the line, that is the history there is lot of pressure as if where to adopt the proportionality test which I will discuss later in my presentation, but I would say I urge a question on recommendation about balancing. our constitution rejected the doctrine of preferred freedoms, very earlier it is rejected the first US type absolute freedoms, but, in any article of the constitution which is near absolute, it is article 30, and in long line of decision have held, that have not touched the freedom of minority institutions to establish an educational institutions of the choice, now, under this so called balancing proportionality test, they have now been asked to enter the area, at which the courts have decided rightly in my opinion to stay away, give absolute, mere absolute right...but given the present it is absolutely wrong to interfere with minority rights, time is simply not right in fact it is extremely improper to make a political statement quite like this, it is not justifiable under the presence of, to roll back the mere absolute protection you have given rightly I think, in the article 30, this is politically not right, constitutionally it is not right, it is shown by 30 or 50 years of experience

**Participant:** article 30 has been the matter of judicial test right from 74, it was in landmark judgement because before that the in Aligarh Muslim University, is then St. Xavier which is a constitutional bench judgement where they interpreted 30, and the rights were interpreted. then came the St. Stephens, it was the five judge bench, there after came, the kuldeep Singh touched the little aspect on the minority institution, what was interpreted in St. Stevens, thereafter came the 11 judges bench, TMA pai foundation, it was large number of ambiguities which was argued by various educational institutions and therefore it came to be interpreted and very normal thing, it came to be interpreted, 11 judges bench came to be interpreted, justice kripal's judgement, subsequent judgement , because in the case, they said that this is what the 11 judges bench wanted to say, but again there was a problem in that, and then came the P.A. Inamdar, which was pertaining to reservation and then the recent judgement but, before that you forgot one judgement on the justice Kapadia, society for unaided, that is a Rajasthan case, there they again in context of this very act, they interpreted and they said no, we cannot touch it, therefore what is to be seem form all this judgements and so many judges touching the issue on 30, and appeals they said that the rights are fundamental rights, you can't leave it to an ordinary

legislations, purpose of which is something else, we have to take into consideration, the object with the legislation want and that is to be achieved, now here is a category of a protected a fundamental right institution ad their rights have been interpreted in large number of judgements, so as professor Baxi has rightly says whether that should be tinkered, because taking into consideration the ordinary legislation, in you know on completely different subject matter and which is policy of the government to spread education, and article 21 A is the basis for that particular legislation, so I completely subscribe to what the professor Baxi has said, so many judges interpreting 30 and now, something as you said that no, no that should have made it applicable only to aided institutions but not suffice the policy of the law

**Dr. Arghya Sengupta:** just two points as I subscribe entirely to professor Baxi's point that politically this may not be the right time but I think just one another factor that I think, as far as the justice Kapadia's judgement is concerned, justice Kapadia actually makes the distinction between aided and unaided minority, he does not allow its applicability to the minority unaided but , allows it to aided which is a judgement I agree with, thats number one, and number two is that I think where I disagree with you is likely with great respect is that I think we are not talking about fundamental right and a statute as we are all the judgements that you have mentioned as in lots of judges have gone into it

**Participant:** several judges have held and even the state aid is not going to take away the minority character and minority rights of the minorities,

**Dr. Arghya Sengupta:** absolutely, as in I am entirely in agreement with that but here we actually the question in this case is now a question of balancing between the article 21 A which is in the constitution,

**Participant:** that would become the condition of an aid, and there is very fine distinction, if you want aid, you have to accept the conditions aid does not mean that accepting the conditions would be abriditation of the fundamental rights in the article 30

**Dr. Arghya Sengupta:** so I don't think it's being obliterating, as in that's the other thing, and that's the final point

**Participant:** partial giving up or abriditation

**Dr., Arghya Sengupta:** as in you can agree to disagree on that point, but I think it's an important policy, for example in the state of Maharashtra, actually the number of applications for minority institutions have short up manifold, after the judgement has come up, it's a very major concern because on the other hand, one we must remember that minority are just not religions minorities but linguistic minority also, so for example I was shocked to found that dhirubhai ambani school in Mumbai is a minority institution because it is by Gujarati,

**Participant:** it is clarified by the Supreme Court, minority institution can have the secular education and that issue is already, and what percentage that community is being.

**Dr. Arghya Sengupta:** dr. I was reminating over the philosophical over tones and over tones underlined the Wednsebury principle, you had spouse the fact that there is no, of the principles of reasonable test for adjudging the reasonableness of the classification under articles 14 and 16 to other articles with the constitution, is it necessary for us to seek credibility to well established principles of arbitrariness, non-arbitrariness discrimination and there being migrated to other constitution principles enshrined in other articles of the constitution of India,

**Justice Gyan Sudha Mishra:** the requirement to study more and let you on this,

**Dr. Arghya Sengupta:** I appreciate justice Mishra's concern but as in I fundamentally believe that as far as the basis of our constitutional law is concerned arbitrariness nondiscrimination, the basis is sound and we don't need to borrow from any other country or jurisdiction as far as the basis is concerned, the only point that I think is useful, is that the way in which our constitution and our legal principles have derived from another system to see as to how that system itself is progressing, it would be useful to try and see and consider as to whether this might give a greater tool for the judges to ensure that they hold the executive account, because at the end of the day, the principle is the same, the rule of laws.

**Justice Gyan Sudha Mishra:** so, shall we rise for 15 minutes in order to continue,

**Participant:** all my brother judges would be, one of the aspect rationality and, but the court is concerned with the legality and constitutionality to initiate action

**Justice Gyan Sudha Mishra;** so we have another session at 3:30, so we will rise for 15 minutes. And of course the thanks is always implied.

Thank you

## Session-9

### **Judicial Review V. Constitutional Review**

**Justice Gyan Sudha Mishra:** so, straight away we can invite professor Baxi to the subject because we now even otherwise, by know we know him much more than we did, so without any formal introduction but of course again a warm welcome,

**Professor Upendra Baxi:** thank you so much, I am not able to find my notes so, I will have to do without it, he said many wise things on natural resources and indirectly, it called justice Bhagwati, balco and indirectly questioned or probably my notes says, against governmentalisation of judicial process

**Justice Gyan Sudha Mishra:** because rational mind makes you feel that what the distinction is when you read from a paper and you read from a laptop

**Professor Upendra Baxi:** impact as I said to professor kelson once when in was in Berkeley, and I said sometimes that it is distinction kelson was short person he got up, said Baxi what do you mean by distinction without difference, so I said what I ultimately don't want to say but I said it myself by

**Justice Gyan Sudha Mishra:** definitely one looks quite up to date,

**Professor Upendra Baxi:** everything has been worth saying has been said, somebody ruchi or Geeta both together assigned me this difficult subject apart which I have not taught about much, but the first question is what is distinction between something called judicial review and animal called constitutional review. there is distinction between these, I am a zoologist, a burning student of law, and I have always believed but I think people do make a distinction between judicial review it is somewhat different from that of constitutional review, so I think what is meant by perhaps I am subject to local action, which ever take, but I think judicial review is a common law process where there is no constitution so some principle that animate the constitutions, or principles without constitutions that has happened for 300 years, in English speaking words, any written constitution and it happened before the proportionality test was invented or when the principles

were invented, if you back to law all that and my lord justice, it is simply because I forget the names of the cases, justice Savarwal I think chief justice Savarwal, gave a very interesting judgement in a case called Nagaraj, and the beginning was, and the judgement you must read, I don't think any judgement has explained in bomai, basic structure so well and the Nagaraj is marked by saying that a constitution is not a document, it is not effervescent document, that what Kapadia said, Ya, I am sorry, justice Kapadia judgement, and he lays down the my opinion and now that I am educated by the academy on different review, judiciary review and constitutional review, I think he says a constitution is not an effervescent document, it must be always interpreted in the light of changing circumstances, and empowering though it does not co shaped in Roscoe pound who said long time ago, in the last century, pound said and I still get on the heart, am sure it is in your heart too, it says look, he said law must be stable but, it should never stands still, and I think it's a marvelous statement, basic structure in Nagaraj, must be stable, must provide the identity to the constitutional identity, but basic structure must adapt to self to changing circumstances and why and justice Kapadia says in Nagaraj, it should adopt because people have faith in judicial ability to interpret that ever changing constitution , it's a marvelous words, these are of great importance. Judges are, I say somewhere else of constituting and reconstituting the people of India, that's what the demossprudence says. demos prudence says, demos, reshaping the demos, as executive and legislature doing and so as our judges doing, so kindly read that carefully the judgement in Nagaraj is very important, what he says, about the basic structure. I wish I could spend all the time, reading it or not reading it to you, I am sure you will read it, but read it from this point of view. now, constitutional review is a term of art, judicial review is a term of art, both aim at justice I think, broadly, whether it is judicial review or constitutional review, they aim at justice, you also regard efficiency as an important part of justice, I think this this dichotomy in justice, that was heard in our discussion, is a misleading dichotomy I wonder why efficiency should not be a part of justice, whole of Shashikala discussion for example based on the contrast between the efficiency and the justice, that is the whole of the Indian administrative law is based on efficiency must serve justice, but I think efficiency is a part of justice, and it is not the enemy of the justice, not adversary to the justice, in order to justice you have to be efficient, and you also to be excellence article 51 A, I forget which part but, last part we all as citizens of India have a duty to develop scientific temper, spirit of critical enquiry and reform and develop excellence in all spheres of life individual and collective, now you tell me what is the an another I tell my

students never to think in single terms, think in two or three hunt in pair, what is the other question you ask for excellence, excellence is mediocre, mediocre is never be a part of justice, he has to be excellent, he has got to be efficient, and that is a constitutional duty and also oath in your case, because you are the justices of the high courts and supreme court, so I think efficiency is integral to justice and is not opposed to justice. We opposed in days of globalization, regulation, re-nationalization, disinvestment we opposed it, markets are more efficient than adjudication. I think that is wrong. justice appreciation is indispensable to justice and so is excellence and justice indispensable to market their can't be any pre market which are not just, there cannot be pre investment which is not just investment, so we have to consider globalization as globalism which marries the efficiency as justice, that is not oppose one to the other, so I think we know the difference between the judicial review and constitutional judicial review, both the common law and the constitution seek to restrict the sovereignty claimed by the parliament and by the executive, supremacy claimed by the executive, they say no, there are certain constitutional limits to your promise. You are free to make policies but not as you like. We will tell you that remedies never, spoke for proportional, so please look at my lecture on the demosprudence to relate this, my note, I don't know if ruchi has included but, there is note on democracy and difference. justices that ethers to difference and not merely to equality, it attends to identity and difference in identity, I often say if unity in diversity is the moto of constitutionalism, I ask is unity in perversity an ideal of pre market, what is the difference between unity in diversity and unity in perversity? and I think we have to find our own answers to this question and judicial review or constitutional judicial review forbids unity in perversity, it allows you to have unity inn diversity, this also the impossibility to the constitution justice, notes of the Indian constitutionalism, now public reason embersed is a very important category so, constitutional judicial review everywhere ought to and does specialize in something good reason, now there is a common mistake, also by the feminist, there reason and passion are to opposite things or sentiments, but that is wrong, it has been proven wrong by.. and by Roberto Maria , writer on law...book also called law and modern society, and knowledge and vision and he ends his book by saying the prayer of Jesus Christ and father because father why as though abundant me? Reason is one side passion or commitment, zeal, enthusiasm, loyalty, too a cause, so... coined the term, he is a great legal philosopher, she has coined a term called sentimental reason. Union of sentiments and preamble summons the best the idea of excellence, so it is not sentiments vs. something, it's a very male concept, the male concept of hard

and strong and soft and messy is sentiments that are of women, they are strong, and we must avoid the patriarchy, in justice. It is injustice to women, so, in a sense, judges ought to have a theory of reason before they come to the idea of reasonableness. And what is this theory of reasons? The great philosopher in 20th century, legal philosopher also, John Rawls, and I have got my notes here, on Rawls, I have not read it but written it, notes covers identity and reasonable pluralism. John Rawls and I say this, he says that there is something called public reason and there is something called non public or private reason, by public reasons he means the judicial reasoning which is held in public, arguments are heard in public, the courts are open to public, judgements are published, everything is public which is not the case with executive and legislature when you fall in love, you don't worry about the opinion, you just invest in stock market, you try to draw a memo of reasons. It's a very special thing, is the only in judging that you exercise your reasons, in any time that the parliament legislative lose the first words of the parliamentary, where it is expedient in such and such of republic. It is never where it required by the constitution, only in judging...in political liberalism book, here the chapter called American supreme court as an exemplar of public reason, judges are exemplars of public reason, courts are engaged in public reasons. What is private reason? he says private reason is that which belongs to certain non-state, they are also the reasons, like rotary club, lions club, they have their own reasons, for doing what they ought to do, church has its own private reasons, Ramakrishna math has its own reasons, and so on, family private reasons, state free spaces, now what is happening, if public reason in India, it changes gradually the domain of private reason under article 25, if you are Hindu, Muslim, or Sikh or Jain, and article 17, the untouchability, by treating it as offence, on ground of article 23 and 24, rights against exploitation, so there is encroachment of the public, and article 15, where personal is the political, kind of saying special reference to women, reservation everywhere the constitution results in impinges, on what the Rawls calls it the private reason and there is a big difficulty from time to time in justifying the extension of the reason of this state, of the constitution to private activities, but they have to do it, and that is what you call public interest litigation, or social action litigation, thus, it tries to bring a continuing malamous against the so called khap panchayats, or uniform civil code, or whatever you have, even against the corporations, corporate reasons and private reasons according to Rawls, and the supreme court in submitting to private reason failed to exercise constitutional reason in Bhopal tragedy, for which victims are still, and there is also an article by me on that, in other words what is public reason? What is public sentimental reason?

There is patriarchal view of reason, control of levels if necessary by some pill, because you have to learn to be a feminist, the command of the constitution. Justice Krishna Ayer, on judicial activism and he classified Indian judges into two, those who are activist, he says and judges who can bestly describe as shopkeepers, of justice, and his article is worth reading and I have written a long article on that also, and a book dedicated to Krishna Ayer, edited by Rajkumar, but that's the different thing, if there judicial duty to be independent, of politics and the market, and the common law says yes! you have to take decisions against the state as well as the market, under the common law and equity and you have a duty likewise to act against state and market, obviously against state but the market or economy, if the constitution so constraints it and very often because constitutional judicial review is a mixed of public and private reason, you have got to do it and that's what the doctrine of reasonable means, so kindly look at the book that I have circulated, by Philip Hamburger on judicial duty, there is a book that was written in 1999 or something, Philip Hamburger as I said on some other occasion has written another book on 2050, which I discussed here I think called, is administrative law, unlawful? and you kindly look at that also because there is very sustained attack on the Muslim law, now, kindly read that then you would appreciate the difference between the common law of judicial review and constitutional judicial review, so that about the question one, in Nagaraj, Justice Kapadia also that's point number two, said principles are more important than the provisions of the constitution, and my friend professor who have been very great to have this judgement but he is no more, because Dawkins...is all lie, in talking about the principles, he spent all his life explaining the principles, to summarize, reasonable consist of loophole and because there are rules the reasonableness consist...opposing the legality because it is legality, or does reasonable consist on principles and whole life Dawkins spent his whole life defending the idea of law, as resting on certain principles, the question is where do these principles come from? now, this should not be a great surprise question before us because Islam, and Hinduism are not state made laws, in one case the parse law, and the Jewish law, and the Roman law, my favorite subject in Bombay university, they are all judge or jury's made law, there are legal systems which are not made by the state that the great thing about these laws, legal systems. these principles come are mixed now, of judicial law making and basic structure says Justice Kapadia in Nagaraj judgement consisting the art and science of discovering those principles, underlay any made constitution or law, second thing, is a matter of constitutional identity and architecture, constitutional review one, goes one step far, and striking this down, one ask what is

that we are interpreting/ law or the constitution, does the public reason operate the same wavelength as law or constitution, in constitution question arises always of social architecture of the constitution, and that is the demosprudence, again that I have discussed, so principles and the provisions. The third point is what in the name, everything you hold dear to the judgement, both common law principles and constitutional principles, define and describe what's in the judgement. A judgement is reasoning, judicial reasoning plus judicial result, now, our supreme court and our high courts very often forget this element effect. I wrote about it and I still write about it, I said that we are still waiting for a judgement, but in Olga tellis, which justice chandrachud, he went to extent of writing about the right to housing, he wrote 20 pages on right to housing, what was the result, the last paragraph, the supreme court paraphrase its judgement, says simply that throw them into the Arabian sea, if you like I am not bothered about pavement dwellers, thats what he wrote in the last paragraph, so, there is no judgement, the reasoning does not match the result. The yellowish between the reasoning and the result is what makes it a legal judgement. in Olga tellis there is no judgement, because the court gave the result this way and the reasoning this way, I have right to stay, and throw, them, but for our protest, but for sabana, fasting under the Gandhi...the commissioner would have thrown them into the sea, thats were the NGO responsibility is coming to say the judgement is wrong, there is no judgement in Olga tellis, so chandrachud always said I don't agree with you, he had mastered in one word, which had a bullet sound, correct, and always say correct, and thats what the way correct Baxi correct, chandrachud was very upset with mechanism of his judgement, I said you don't deserve a pension. The pension is given for the services rendered, when you have not rendered a judgement how can you, but I am glad that his grandson has written an article which we are reading on proportionality, so, there is a question of when there is a judgement? And there is an associated question is there a duty to give good reasons for judgement? Or any good reason, how do we find good reason? there is a philosophy known as the ontological question, but reasons are and should be connected somehow with the constitution, that is what makes the constitutional judiciary with different from judicial review, take Bhopal settlement, I am sorry I am in Bhopal, so I have to talk about it , settlement orders by raghunandana swarop Pathak, and a good friend of mine, I went in the evening to his court, and I said chief I am signing off the Indian law institute, I said now I am in business against the judgement, and I can't be the director of the Indian law institute, and he tried to explain me, and I said do not explain to me privately by the fact is that you settled at the back of the

victims, where a party before the in a suit between union carbide, and attorney general of India and you heard them in the chamber and excluded us , though I have irretrievably enters the soul of supreme jurisprudence and therefore I have to fight, and fought it, I did, what the settlement say, the settlement of 2009,I was looking at till even today, when we talk of FDI and all that, settlement said 470 million, against the union of India amount contemplated at \$ 3 billion, union of India was sovereign plaintiff in the court, in New York, it estimated the damages of 3 billion, then they said union of India was by Bhopal like the parent of the victims, parents patria, the lord ship said they should, union of India instead of being parents patria, of victims shall hence for the parents patria of union carbide corporation, and shall defend union carbide corporation worldwide, for its action in Bhopal gas, related to it. then they said criminal immunity, shall attach to union carbide and its officials in Hong Kong and India, and so on, we filed a review, I did not file it, which was signed by 100 people who were from literature, finance, so many people who were in rocket science, signed it, scientist everybody signed it, the great novelist in Bangalore sri ram Karan signed it, people of all, and no lawyers or no judges, retired judges, Krishna Ayer I think signed it but very few and venkatachillah, said to me that Dr. Baxi I argued the case, and I said I shall give a post decisional hearing, how is this post decisional hearing, publicly good, you have settled and you have passed the settlement order, he said that I have looked into everything else, and he looked, and he struck down the criminal of union carbide, but union carbide was no longer in the jurisdiction of India, it was a very long chapter in Indian public reason, Indian constitutional review, as long as shivkant Shukla in emergency, is as dark as the company dark movement as the company, court decision in raja nandkishore trial in 18 century, if you remember, it is as dark movement as the capital punishment to Gail Singh and another people, who had not committed the crime according to the lord ship who gave three different accounts of the facts and then judgement, in the supreme court, they summarized the high court decision and they found each, coins the different set of facts in the, how can you on the basis of three different versions of what happened. justice venkatachillah quoted he said, to do a great right and he wrote ion the judgement, sometimes a little wrong is permitted, a little wrong to whom and a great right to whom? great right was done to the union carbide, little wrong to victims, two hundred thousand victims, of Bhopal, as Lordship went on and on and on, I don't want to go into that so, public reason has many dark moments, I am concentrating on the dark moments, there was no urgency for the settlement because in the high court had passed turning orders, awarding 250 million interim compensation, interim

compensation, there was no urgency as such settlement, how the Lordship has settled it it's a mystery, they settled it because early wastage of years, that a small causes court in new hope will decide that the supreme court of India has given due course to union carbide or not, and tiny court, small court, miscellaneous jurisdiction, strike down supreme court's order, comparing reason of institution integrity, is it public reason, I leave it you, you will face the situation of decision, I don't decide anything. another dark moment for public reason of constitutional judicial review, is the naz case which I spoke about yesterday, there the petition was filed in the supreme court, and the supreme court directed to the Delhi high court to listen to the matter comprehensively, as examine all size of matter, that is what justice shah, justice murlidhar did, and yet the supreme court interfered, the other dark moment is given by the lily Thomas there might be other views on it, lily Thomas is judgement which says, a convicted legislature who is convicted by the district court cannot contest the election, cannot continue to be the member of the parliament, now, I have no views on lal Prasad Yadav, but I am no politics at all, I am just saying that either there is rule of presumption of innocence or there is not, you cannot say that I am guilty unless proved reasonably so beyond doubt, yet the court said in lily Thomas that when the district court convicts you and then jaya lalitha case is coming up, district court has convicted her, and somehow there has been appeal, the other cases coming up and is it public reason? to give this kind of decision, finally the Haryana, the state has power to regulate who shall contest the panchayati election, justice chemleshwar, said that the state has the power, but and he said it reasonable classification, if you don't build a toilet, you cannot contest the election, and state is giving 12,000 rupees, now, you must have some idea of how states function to reside in the fairy tale or a horror story, that I won't go into. How the poor people get 12,000, I know, from Bhopal, I don't comment on it. Then they said that if you are non-matriculate you cannot contest the election, so we passed an ordinance on the eve of elections and disqualified women, who did not meet this conditions, so will the other state. what happened to Maneka, reasonableness arbitrariness of the legislation, why do we revive reasonable classification test, justice chemleshwar revised the reasonable, how can you revise the test when the test is gone, the test is reasonable, substantive to due process, and mostly the power to... that's what the question, that is why the people went to the supreme court, so I therefore say finally on this that there have been many dark moments, why has the dark moments, because public reason is not sufficiently public, there is something wrong with what the judges offer as reason before the orders, it is not constitutional judicial review, in this case they have gone a straight and

the record must speak, with errors tell apparent on the face of the record. the record must be in feud of the dark moments but there are major dark moments, and why do they occur in respect to the public reason, then the question is chandrachud and junior have, you don't like it Chaitanya chandrachud, in his article here, the let article in your book, has talked about the proportionality, but I think proportionality test on page 261 of you book and you got them again very well explained by the last speaker, so I won't go into it. what the great thing about the proportionality test as apply in the forum, three phases, is not the phases themselves, but the important think about proportionality is that it shows how constitutional reasons can be exercised as public reasons, and there are certain traditions, certain discipline, that judges have to follow, in order to give a decision, and I think that is A very good way of the culture of justification, that the quotation from chandrachud junior, Chaitanya chandrachud, I know abhinav but I don't know, they are very good article, in fact public reasons consistent of art and science of justification, public justification, as a judge , as scholar, as a politician, as the executive, finally, positively, and there is a very small story and some of you may not like it, and in fact may find quite disrespectful, in which case my apologies, but this is how I saved to my students in Delhi university. Some of them are in high courts and the Supreme Court judges, but now, I believe that judging the judges, is a very complex task, I believe in social responsible citizen to points of mine writing long articles on that. I have divided Indian judges into 5 types, and I would like to comment on that. One pair is judicial fixed types, judicial activism and judicial recentivism, that is very familiar...MIC to Bhopal, you know about the activism and restraint, when you give judgements, are you activist, or you are Krishna Ayer, or shopkeepers of justice, its half word, but that what he uses and explains, so judicial activism and judicial and you are familiar with it, but Indian, as I said in 1976, in an introduction, long introduction to a book which I edited for justice K.K. Mathew, for liberty, equality and freedom, is a book published but nobody reads, either by introduction or justice Mathews, Indian judges invented two new types, of judges, that is juridical activism and juridical self-restraint, not judicial, juridical activism I said Mr. .Mathew, he writes in papia and all this decisions...administrative law of delegation, and legislation is unrelenting spectacle for judges to find some reason for delegation, judicial activism is an activism where do you write essays, educate the public, but decision like chandrachud decision is, judicial activism is high art of speaking to the future, not now, even the nibandhkar of Hindu , so sometimes the judges write address multiple constituencies and become juristically, and the actual decisions , otherwise there is very high

purpose, and their juristic passivist who do not believe in the functions of the judge, they write essays, so exercise restraint and a very good example after the 80s was R.S Pathak, he did not like me...but he was a great judge, so he was very, so you can be also a judicial activist, then the fourth classification is judges who are elected, and you remember Mohd. Rafi's gaana, *ek dil ke tukde hazzaro huye koi yaha gira koi waha gira* you know Hindi, and I went to Trimbhakeshwar yesterday, where one piece of Parvathi her elbow, I supposed was fallen, or piece of Parvathi has fallen there, in Mussorie, Naina Devi, her eyes were, so one heart has many pieces, some pieces were electing judge is one and that's for Chandrachud is a very good example, there are many others, who decides not by any, he dissented in Keshvananda, and he was the first who in Keshvanda like fish to water, I mean forgive me I said to the fishes, not to him, eclecticism is when you don't take responsibility for consequences but you decide according to the context, hence it a Nobel art, pragmatic justicity. We do not worry too much about consistency of your positions that is the fifth type, judicial activist, judicial passivism, juristic activism, juristic passivism, eclecticism, then last type is, last two types are also very Indian, forgive me, one that is lazy, that is if my birthday is that is his opinion I just sign it, I know the importance of the case but let it, India has produced the great charge for justice Gadka, who never dissented, who did not want to dissent, on the majority, he himself post the judgement, I am not accusing of lazy bondism but there are judges, brother A.P. Sen retired, he was a very nice man, he was single, he was staying next to Chinnappa, and Motilal Nehru, and once asked the Chinnappa, I asked him that who is next who explain very nice symphonic western classical music, and I am very fond of classical music, western and Indian. He said that there is A.P. Sen, I said can I go, and he said he is very unapproachable, so go at your own risk, so I knocked his door, he said what do you want? he did not know me, and I did not know him, I said that I just come to say that it is very beautiful music that you are playing and he said come inside, who are you? I said Baxi, A.P. Sen wrote an article in the newspaper, saying I decided Hussainhara Khatoon, Have decided this and that, this was Justice Bhagwati's judgement, so I went to A.P. and I said that A.P. *Galati kardi article likhne mai*, he said no I decided all these judgements, supreme court you do not, without my signature Bhagwati would not be Bhagwati, that essentially what, so, I discussed this from conversation that some judges are late blade mechanism, not lazy bondism, but he said brother *thik hai*, the last category is judicial. You can extend it to judges who does not understand the legal significance of the case, nor she understands the... now, I do not give the instances, but Indian judiciary is not wanting in the last category, it

has produced a few of them, and you have your own nominations of the job, so there are six categories, of Indian justices, up to the last category, we might have some reservations but the early categories are clear, so constitutional judicial review has to pass through this categories, to understand the public reason and operation you have to have we have to decide as students of judges, we have to decide which category the judge chooses to exercise the public reason in juristic activism, and once you do that you are able to understand there adjudicated reason better, there was some discussion in the earlier part, with which I might add to it. or artificial intelligence in group discussion, now, I believe judges exercise artificial intelligence always, why do I say this, at the common law judicial review, is based on artificial reason of law, these are words of lord cook to king James I, said my lord your wishes and commands are binding on us all, on your loyal subjects but lord cook said at one thing, however we assure loyal judges, are bound and this important part, by the artificial reason of the law, which you have laid down, so interpreting law commands, we often take a position quite from your wish, but we cannot do any other, because we are judges, so artificial reasonable, how far is next to do artificial intelligence, not biological intelligence is a very important question, all this I have to say and all of you thank you very much.

**Justice Gyan Sudha Mishra:** thanks and compliments to you professor Baxi, for more than one reason, first is that you did not make the audience dose, despite of the post lunch session, because of your not only the content but making it so interesting that improving our insight and also you gave me the idea that tomorrow I also have a reason to say that so and so would not be so and so, if I were not put my signature. And another reason which you know, just struck me, yesterday you have mentioned that why the chief justice should alone should have the power to assign matters before a particular bench, I think when I deliberated I think there is much substance in what you said, and I think its high time that there should be deliberation on this aspect also because many a times I don't know we might say, we might not say but there is a similibim discontent even at the apex court that oh my, I am the judge who will keep on deciding the civil criminal matters of the so called common man. I will never get a chance to be in the history, so where it's not that you don't get a chance to lay down the law, not because you cannot do it but you never get a chance because of work you have never been assigned, and I have understood that it may not be prevalent everywhere but quite a few places I have seen specially when the judges from the I

won't say the subordinate judiciary but the formative judiciary I would say the spinal cord of the matter, even then they get elevated, most of the time they get to decide only criminal appeals, and they are not meant to sit on the constitution bench because of the perception of the particular judge or in the minds of the chief justice. so, I think that was a very interesting and very relevant and important thing that you raised yesterday and today of course you said something not only which was interesting and hilarious but it was with much substance and you kept us on guard and alert your deliberations which was so much will compel us to how to improve the system and specially the power of judicial review and it is so different when a judge and a lawyer speaks and when an academician speaks because you carve it out as if you are painting an modern art, so that it can think out of the box, so that was one of the out of the box yesterday your idea, I think in our informal chats session of course we can always say that at least there should be one little change in the system where a judge do not suffer the simiron discontent that I will always remain a judge who decide as if I am still the judge a the bottom level so thank you very much and we still look forward to listening to you tomorrow and we have a session tomorrow also Participant: complete concurrence with professor Baxi's views on all, I would just add that so far as the corruption cases of politician are concerned they have a very fine amalgam blade of institutional integrity, judicial activism as well as public reasoning, the element of judicial activism in corruption matters is so high that even if professor Baxi has said that the public reasoning element in corruption cases may fade because it may be anti theoretical to the principle of criminal jurisprudence of no man being held to be guilty, is to be presumed to be guilty unless convicted by the court and if at the stage of the pronouncement of the verdict of guilty by the district judge, disqualification entails upon a politician that would be anti theoretical but still the element of judicial activism institutionally integrity and expectation of the public from the judiciary that corrupt politician should be barred from contesting the elections is so high that if any element or trait of any infirmative in public reasoning, fades and it fades all the more because it is well known during investigation of a case against the politician that he is so deeply involved in the corruption that it may not be necessity that principle of criminal jurisprudence, that he has to be held guilty by the highest court of the land should come into play,

**Participant;** there is law of land, that is in the case of Mena vs.

**Justice Gyan Sudha Mishra:** but she can always delegate to group of judges, they always do arbitration. Is the chief justice but he delegates it if he wants to?

**Participant:** he is the master of

**Justice Gyan Sudha Mishra:** we are not challenging it, of course there is no question of challenge, we are not questioning that it is there, but we are looking forward that if they can, pose, we have to break the glass ceiling and the stereotype that is the idea

**Participant:** that is something which is to be discussed in the conference of the chief justice

**Justice Gyan Sudha Mishra:** yes! I think he is correct

**Professor Upendra Baxi:** if you have collegium for judicial appointment and transfer, same collegium may take the benches, I mean the senior judges and then why to include some others

**Participant:** something which is interesting has come up, in the new procedure, which the government has forwarded to the supreme court, it says in appointment of higher judiciary, in the high court and supreme court, the opinion of every sitting judge is required to be taken with each candidate, this is something new which they have come up with, and whatever opinion

**Justice Gyan Sudha Mishra:** but that is already there in the judgement also,

**Participant:** every sitting judge, those judges were outside the collegium, also the participation, participation from the members of the bar, whatever opinion they give, it should be made transparent anybody who give such opinion should have access to that

**Professor Upendra Baxi:** not consistent with the NJAC judgement

**Justice Gyan Sudha Mishra:** I would just like to share something on this, one of the chief justice when I was in Rajasthan, he had adopted the same procedure, he had invited the suggestions or rather names from all the judges that according to you who are the ones who should be elevated and suddenly we were told at 1 o'clock that you give your names at 2 o'clock and we got so

walked out that when I wrote 4 -5 name s i forgot the names who was to be put at number 1, so , it was just in a lighter way, there is always things doing in a proper way

**Participant:** now, you would agree that, that it is a part of the memorandum or procedure but informally I told, that it would ask the embers of the bar, it is their opinion, and what your opinion is...it was

**Justice Gyan Sudha Mishra:** there are certain outrageous things also, that I read in the, I don't know whether they have incorporated or not, that the names would be routed through the attorney general and attorney general's view would be, and that would be Mary go round

**Professor Upendra Baxi:** we can't undo but memorandum the NJAC judgement, thats the game I think now, they are trying to redo the NJAC judgement, through the memorandum, and it depends on the good chance of, they want to pass the judgement, after registrar not to take certain, whatever is the procedure laid down in the NJAC should be followed and they should say and we never know I never know, and I was citizen and never know, what happened, so I cannot say anything about it

**Justice Gyan Sudha Mishra:** that would be the executive judicial review of the judges

**Professor Upendra Baxi:** you say the judicial review and I say judging the judges, same thing but I like it, so there must judicious review on this particular order

**Justice Gyan Sudha Mishra:** so, unfortunately we cannot have a judgement despite of the discussion, so thank you so much

## Session-10

### **Reflection on Progressive Strategies for PIL in India**

**Justice Gyan Sudha Mishra:** Finally we have reached to keep something up session today. After discussing all the Almost all the dimensions manifestations of the subject of course if you know the more research the more you get insight and feedback from your experience but we have to obviously. That reflect on what should be the strategy or rather the progress of strategy For PIL in India Again Very tumultuous subject But of course The balance in the scale of Justice is always there in all of us But. Then let us discuss and. Have the use of. Professor Baxi on this and that is vast, varied versatile experience leave your mark. I'm quite sure he would be. Make us all. You know. To work and add to our Inputs and we will listen to him now.

**Professor Upendra Baxi:** thank you very much I think there was a very little bit by. I had to kind of human beings. I've been watching you even other I think that there was, you know you're right I mean you know I did that got it on the for bureau very guy. I think there are two kinds of you'll be those who are god the courage of conviction your people like me who got the courage of the confusion, so it is very difficult for me to except all this my first. Thank you very much. I absolutely of what we discussed it and he said. Talk of PIL. I called it SAL but you know sure action case, so I said because you have basically more comparative oriented then I am I took it Again Or not I don't know how the prime minister says that the presence of 1.25 billion people Even though I had a billion eyes. I had a very nice chair Rakesh pant I guess Delhi law faculty, at that time even the other then you believe that. And I had big day, the guest was a woman member of parliament called Tarkeshwari Sinha and Tarkeshwari ji and she was a great reciter. Well they gave us a little to recite them. When get so angry with the Supreme Court of India I do watch a low grade Bollywood movie. And Kangana Ranawat, and it was like julfe of the professor baxi and I was very embarraed and as the ma'am. If you don't mind. Youngest dean of the law faculty, my students are here, why you talked about something else. Than my hairstyle and doing so that I swear it is. What do you want to talk about? I said you MP. You talk about. India. And she told me. At that time population was 8 million and since then many of you were born and she said. How can you talk with? Six hundred million people inside your mouth. How can you talk about India? If you can talk with Six hundred fifty million people inside your mouth. So that's what I learnt from Tarkeshwari Sinha, I am a learning organisation, and I love everybody, and that's my life

I'm in lending all of them is my love. That's my life. Is there any necessary social inclusion. I have never represented anybody in my life. And I don't have it representation is a fiction and in Keshvananda. There's a big discussion by Justice S.M. Diwedi and Justice Mathew. And ..... On the word mandate and representation and invited to look at does this course. It is very learned, where do you write discourse. So I don't know how to progress SAL I shared with you some dark moments. As I said yesterday. I now want to now concentrate 3 or 4 remarks I wish to make and then I give to you. I will make four remarks may be, previous remark was in my mind, what I called as a dark moments of adjudication. But also of SAL. I don't know that Ruchi and Geeta remind when the work progress you. And I would invite them to participate in the discussion. And tell us what they meant by the progressive. SAL. But. You first. The thing I want to share with you SAL reminds me of uncle Marx, scientific uncle Marx, not ideological uncle Marx and he said, he studied three levels of capital and read them... I can't understand it. But the first and third I read the two volumes on surplus value of. Das capital. And one of the things he said was it is a common mistake. To treat Capitalism. As merely production of goods and services. Did real harm of capitalism to the manufacture of goods and services. But real heart of capitalism lies in production of desire of goods and services the actual goods and services market produces desires. And these desires are then drilled into a subliminal conscious as socially necessary, the great economists'. Spoke about creative Destruction as the spirit of capitalism. Creative destruction or planned absolutism's when you think a lot of...SAL is the search for the due, is the production of desire, in my opinion, it's a production to desire to different kind, in the market and that's the difference, when you talk of progressive or regressive SAL, that is the constitutional wonder, high courts and Supreme Courts performing or social action litigation, and what this all do they produce is an important question and themselves as judges as the lordships and in the social action human rights groups that has come, bring the petition before them...And I think they desire for Justice, SAL can be seen a production of desire of Justice, remote kind of Justice and in the social section human right group has come bring the petition before them, what design they demos at large the population at large, I think it is desire for Justice. The SAL can be seen as a production of desire of Justice. Now, what kind of Justice? Both Justice according to law, desire for justice according to law, and Justice beyond the law, they manufacture this desire, I think you cannot carve SAL litigation, unless you go with the statutory of manufacture of desires. the justices, the lordships ask up the desire for a just law, a Justice to come in future, but a Justice also here, and I think its

fantastic thing by itself that is how, what kind of desires in citizens the judges, insists when they perform, and SAL, I can speak the whole day about this, particular subject, the theory of desire by want. it was a great French psychologist, many things he said, what is a desire, he built a theory of desire and lacan said desire is always a leg, and we in India , we know something of Hindu philosophy, Indian philosophy, classical, know the concept called Maya, mrugtrishna, the moment desire perishes in the, and a new desire is born, so desire according to lacan who had never read Indian classical philosophy, desire lack of a lack, desire, so I don't know how to apply to SAL, I will not do it, but it is a theory and notion of desires, what is the desiring subject, a subject must always desire it capitalist, neo, it might be neo, poor, a new term has been introduced, since 2014, neo poor, not just middle classes, not poor, but neo poor, I don't know, or probably I am that, I don't know. so but desire for Justice for there now and Justice to come, is the desire that lordships in high court and Supreme Court, so it is wrong to ask, about the impact of social desire , what is the effect, I will come to that, if you have noticed what is desire in earlier times before independence, in 1950, 1960, 1970, 1980, I take judges talk only with the lawyers, and there the matter ended, now the judges talk as I said in Mathew's book, in 75, nobody, has read it, but in 75 it said, judges address multiple communication constituencies, they do not address only lawyers, they address fully, they address executive, they address legislatures, now address the media, they address social activists, judges have multiple communication constituencies, translate this into impact constituencies, diverse impact of constituencies, so I think I do not talk more about, that someday we must understand what SAL, namely but understand what is constitutional desire? and how to spread them across, what the market would desire and how our judges as a assess in high courts and Supreme Court, this desire, for Justice, and desire for rights, and desire for just, and there is moment happening, I think in my mind, there is essence and, we don't draft many things but, this is surplus, second point, I don't have so much time, desire has many contradictions, and I will, of course theory of contradiction, ambedkar said at the time be assured in the constitution, this is most quoted passage from ambedkar, 26, January, so and so, invented to life of contradiction, we have social, equality but political equality, it is brilliant passage, how about the society, judge and the lordship, plural society, but the theory of contradiction, and briefly one minute only, you can have contradiction of many thing, there are no contradictions that are material, there are class contradiction, between labour and capital, that is what uncle Marx said, you can have institutional contradictions, legislature, executive, legislature, and courts,

institutional contradictions, our constitution embodies contradiction, and we will live within this contradiction. Similarly there can be cultural contradiction, or secularism contradiction, means different thing to different thing, normative contradiction. one judgement today, another judgement tomorrow, you will never know, what is going on, so, contradiction and interpretation of law, and a great thinker, later on he turned Nazi, man called martin Heidegger, and he explained this flirtation with Nazism, I will not go there, Heidegger said once that it was speaking about how. Contradiction, he said you cannot ever make a viscous circle into a virtuous, because by nature a viscous circle, so what harmonists, interpretation devise you to do, when you have faced that, stay closure to the heart of that viscous circle, and if possible stay there, you cannot convert it to virtuous circle, and that's what I learnt from Hidaytullah, yesterday, we all talked about, a decision of Bombay high court, in the fiscal case, they did not follow Shivkant Shukla, I have got that decision, now read it, and I take this more than right but the judgement says Vinod Kumar, says, as I said I always learn more than I can give you, so there is a way of staying close to the heart of viscous contradiction and then destroying it from within, you can never make virtuous, you can destroy it within, and the Bombay high court, performance in that case Vinod rai, in thick of emergency, destroys the emergency from within by saying you have such rights to reason decisions, by the executive, even in the emergency. Supreme Court closed the doors Bombay high court open, it in 1976, that was a remarkable decision, so, I won't go there, I would go very quickly about three contradiction. the first contradiction, SAL, I think is if the courts are, becoming new social movements themselves, if you look at SAL, it's in partnership or bhagiidari, between the human rights and social activist and the judicial officer, Vedanta had partnership, SAL is always a judge induced, latest example, is transgender, by the NALSA come before the Supreme Court, I took the back side, and I know it is presided by the lord ship of the Supreme Court, nothing wrong in, the judges should be, the whole NALSA was a genius petition, because Justice Sikri, who is now a Supreme Court, Arjun was in the high court, and he told me, that was a part of matter, we say to it in the high court, while they slated for the NAZ petition, if would have love to reside das, he had to go to the other bench, it could not break the bench, and he would have held, and he said in favour of, the petitioner. He comes to0 the Supreme Court and NAZ filed the petition for the transgender, he is the presiding judge and he said. Transgender have all the rights, and it was a good judgement so SAL is a part of new social movement, from the Bhagwati era, encourage social activist to come before the court, now Mr Justice Thakur, many judges don't want that to happen,

that judges have no business to be in social movement. so, the first contradiction is court is emerging as the new social movement in his own right against state preparation or state law business, and yet it is the part of the state, there are times when they give the capital punishment , there are times when closes down their shutters, there are times when it gives bail to all those who are supposed, and shouting against the nation, courts have shed their character, they have become a new social women and yet they are the old part of the state and as a contradiction, persist, and they have to study against to the close to the heart of the contradiction, it is not a bad thing, that there is contradiction. contradiction 2, and so, is normatively SAL is exuberant, normatively the new rights, new remedies, new jurisdiction, everything new, but empirically, where few decisions translate into grassroots actually, partly because the state lies on the, but there is no progress, progress is Justice Tulzapurkar, was very angry with me one day, he said professor why do you come to the court, and waste the judges time, if you have not read the state appeal, I said my lord this, not had submitted the petition, he said alright you leave it now, I said give me one day, I will supply the and case of Jabalpur, juvenile once being tortured it came in the Sunday, the magazine, and we filed in the Supreme Court, I found the state affidavit of 150, pages, on a issue of gate lies, and one of the issue in India who knows how to rates the state affidavits, it is *daye hath ka khel* with me, the state of Madhya Pradesh said, there are no juveniles as, in the Madhya Pradesh jail, after 15 paragraphs it says, if there juveniles is alleged, they were in Jabalpur jail, they are not tortured, the enquiry committee report, now how can it has alleged, they were tortured it by like British slaves tortured. in Hussainhara Khatoon, Kapila Hingorani came to me running and said I have got so much sense of that Hazaribagh Jail, and I don't have time and said Kapila don't worry we do this work, we will do it and I looked at it first 20 pages, every sixth man, Ramakrishna Paramhansa, and every 12th person in Hazaribagh prison was swami Vivekananda. they had cooked, they had no time the Supreme Court has set the issue, they coked the data, and I told Justice Bhagwati, I said the article 21, requires sentences to be, I may not under trial for an offence I have not committed, though it is three years, spent 12 years under trial, so I have 9 years times to commit, to certify that I commit 9 years centric, only in 2014, the Supreme Court has said if you served half the time, you would be set free. So, it's vast in exuberance and slow in enforcement. that's the contradiction 2, contradiction 3, high on symbolic aspect, and low on instrumental aspect, and you see the distinction between the symbolic and instrumental, the paper that, Ruchi kindly circulated to you in your book, or you may say high on future and low on here

now, I have talked about Olga Tellis, it has become a right, judgement, but this is , you should know, its high on creating social space to activist, although low on giving them actual relief, Narmada movement, would not have gone national if Supreme Court had not grant stay order on the dam, Gujarat 2002, there not been induced so much, if the Gujarat activist did not crowd the Supreme Court and Supreme Court did not put it them, and very interesting, Talwar's case, and how it is been transferred and recusal by Anil Dave is recusing judge by the way, but, I must stop him some day, if he allows me to talk to him, so any way, the point is there is a contradiction here between creating social pace, I think we should give importance intangible importance to SAL is creating social space for activist, to come as actors for the SAL, the space is now been taken away, by the courts, that is by the Supreme Court, whether it is progressive or regressive , I leave to judge. I have my opinions, I don't in a very high on systematic, governance, corruption, is high and Justice Thakur here also who said, Lily Thomas is a very great decision because, it stops corruption from drawing of, there is a very high kala dhan, government is not doing anything and it is kind of saying, SIT sand all that, and finally jurisprudence of clean chits, high courts and Supreme Court is now specialised in giving clean chits to such political class, vs. high rate of conviction of business and industrial and political actor, until 1980 it was impossible for minister to go to a jail, of minister being denied a bail, now it is not routine, but it is still happening, after 85, it is staying and it is very good in my opinion, we took a long time to get there, now ministers are convicted in states and the centre, they have industrial actors, so there is a contradiction, I have talked third contradiction of demos prudence and the notes of before you I will not go into this, thereby I would say the space for judicial action in SAL, is crowded, it create social space, the court behaves both as the organ of the state and social movement. it chooses its roles accordingly , in such matters it behaves as the organ of the state, matters of security, matters of cross border, terror, in matters of unity, integrity of nation, and in such other matters, in the independence social movement, independence of market rules, now this is called juris, taught us by our friend in Canada, he said he don't know, we are performer, courts are performing constitution word, a comparative constitutional studies, have its rare exceptions, now, finally I would like to say SAL, that one cannot study SAL, in general, it has like everything, history and I tell my students and I tell you now, you are far more exhausted than my class I know that, but I say that there are 5 or 6 phases of movements of SAL, and we should be kept some together, and we must attend to this movement, first is the charismatic, phase, Justice Bhagwati and Justice Desai, Justice Bhagwati,

Justice Krishna Ayer, Justice Desai, and Justice Chinnappa Reddy, probably Justice Thakkar, the sensory that Gujarat, phenomenon of the Supreme Court, essentially barring Krishna Ayer, toning for the emergency and jurisprudence, granting standing radically democratising standing, not self-regarding but standing as other regarding, so, other regarding standing and I give before the lordship that Justice Chandrachud and Justice somebody was there, and they, they said why you come to court...anyway, I said, other regarding standing is where do you get it from? it is not the common law, I said I get it from the preamble, socialist republic, so you cannot rely on doctrine alone, you must go to the socialist jurisprudence and social citizen judge and socialist precedence, citizen, so everybody is citizen, however may be called as a judge, he is not higher than the citizen. all the points, judges as citizens, judges are comrade citizens, and I said you can be a judge only if you are citizen, all the other requirements like of being sound mind, etc., would to take it, because you look to the west of something and you look east for some other thing, and Indian is healthy only in as far as if he or she is aspheric, you cannot be good Indian, and not be esopheric...so, there is charismatic movement which I was healthy in more in finding the SAL, my students, so many people, then the second phase is jurisdictional, where PIL, cells were introduced in the high courts, some kind of, and when SAL was nationalised in some case, and my friend Sheila case, Sheila came. For juvenile Justice cases, and every time they met with journalist...all the states were invited, as she told certain nasty things to the court and the court was very upset, the court said, after the legal aid board, will examine the matter, and you will not come to the bar, so that nationalisation of that SAL, I filed the SAL, but you give to the, cell is outsourcing of SAL, give to the NHRI, national human right institutions, like the commission, like women's commission, like the children's commission, high courts and district courts, that was outsourced to the Delhi high court for judgement, now there are difficulties how can you outsource a case, that has been properly being you admitted as properly being brought before you , but I will not go there, that's a big theoretical question, but Supreme Court outsources, SAL many times, then comes the present stage, question of limits to SAL, before I come to the present, my friend Justice Venkataramiyya, very learned judge, but he in one of the case, said and this is worth remembering, he said, if executive fails people go to, if parliament fails, or state legislature fails, they go to Supreme Court, or high courts. If they fails what charge you will put into? that was the exact quotation, I think in Ramakrishna vs. mills case, where he said this, not merely he said this, as a judge of the Supreme Court, he and then later he became the chief Justice, he raised 10 questions about the so called PIL,

and said that special bench should be, questions are extremely to the PIL, as you called it, you cannot do PIL if you answers them sincerely, and under the old constitution, but the new constitution, that SAL has created, does not regard this old constitution, there are so many constitutions, there is baccha constitutions, there are seven in my opinion, there is Indian constitutionalism, Indira Gandhi constitutionalism, then sanjay Gandhi constitutionalism, the second Indira Gandhi constitutionalism, and in between when the state became the finance capital, state financial constitution, you contextualise it, so they is lot of farming, there is lot of question of limits to SAL, following limits as you know, you establish yourself that it should be public interest not private interest litigation, but you are fostering private, you are not allowed to visit around the court, and so on, but now the chief Justice Thakur, in a recent case of centre for public interest litigation, he asked who when it was registered? who are on the board, how are the case, it is Only the PIL enterprise, centre for public interest litigation, there is only for filing litigation, ex cabinet secretary is former, people, lawyers, and nariman resigned from the board because one of the contention before the judge was that every PIL before the court, and no less the person, and nariman did it art times, and nariman said I did not ever, the centre never asked to withdraw from the centre, so now comes in many other cases, the court is saying, in constitutional, is it constitutional to have an NGO which specialises only in filing public interest litigation, the court built environment jurisprudence in still initiated by the MC.Mehta, one man, MC Mehta vs. union of India, and so on, he decided not to use the personal names, so, the court has begun asking the Supreme Court actually, begun asking questions about the membership, how was the nature, about which matters are considered by the, how it is conducted, now, there is a new phase, where the judiciary, is imposing new discipline ion the bringing of SAL before the court, but the good thing or the bad thing, I will leave it to you, but, it is difficulty with the court, whereas SAL, because people come to court, the contradiction, where discipline, and the market of SAL, you cannot have both way, if you exercise this, you have to go back to select PIL, and you select them as judges, but we do not know, which one you will select, we don't come to you, we do other things and this is a phase that we demands eventual demise of the public interest litigation, as we called it a SAL, or it would be there be only few matters of SAL, before the court, then again it is difficult matter, what will be near future as not with the distant future of SAL, is a matter wide open in the present and with that I will end, there are many contradictions, and you have to handle them as best as you can, sorry I have taken much of your time

**Justice Gyan Sudha Mishra:** it was a pleasure listening and I was not wrong when I introduced you that versatile and very because today I myself have been able to get the new definition of capitalism, which production of desire, and when you really analyse it, you see that the expression, packed with the substance, so interesting to have your views and of course the contradictions in the SAL, also has been very rightly pointed out that, if the courts insist on too much of discipline and too much of discipline in so far as the procedure is concerned, it would be a discouragement, for the society to approach and take the assistance of the courts in order to have an impact on social desire, so we all have to ponder and wider more the functioning of the bench, and quite sure the inputs will be an added experience, in you exercise the judicial, so we have now another speaker,

**participant:** yesterday the professor baxi, had said that, there is a four category of judges, from and unless I recalled my dissent, I would be falling in that category, which I don't want to fall in, I would begin by referring to great economist as well as the political thinker we had, he said that political liberty without economic freedom is mere, therein lies the entire problem, India opted for a democratic system of governance, but the ground for its thriving did not exist because of illiteracy, and political economic surfdome, of the poor to the richer and that has led to the entire problem of coupled with the fact of indolence of the bureaucracy, of the politician, the corruption, to the people expecting from the judiciary its fulfilling their constitution desires and aspirations, if there is political, economic empowerment to the rural masses, starment of literacy upon them by good governance, by incorrupt governments that desire of the people to look upon judiciary to deliver constitutional aspirations and desires would become benumbed, probably it's a very transient phase, there has got to be a lot of evaluation in the democratic way of functioning of the Indian system, Indian polity, as and when there is evaluation in the positive direction which we may hope, this phase will end and sooner or later, good sense and wisdom will prevail upon the political leadership as well as the bureaucracy and thrill that time the expectations of the people from the judiciary have to be given due difference and so far as professor baxi has referred to those definitions of capitalism and the Marxian theory, Marxian theory may not be relevant and may not be, related to the expectations of the Justice, in its absolute application, because as a matter of fact, Marxian philosophy is on the way and no longer in existence, and the psychological leanings of desire a more embedded and rooted rather than upon pure desire, they are rather rooted in liberal desire which I will discuss with professor baxi after thank you.

**Justice Gyan Sudha Mishra:** thank you Justice Thakur, now, as I said we have another speaker Mr .Sudheer Krishnaswamy and I for one would have thought that when he is here from Azim Premji university, he would be saying something on information technology, and software developments, or at least cyber law, but fortunately he is here on this session on the progressive strategies for PIL in India and if he can enlighten us how, the cyber laws can be used for the progressive litigation, I think it would be a pleasure listening to you.

**Sudheer krishnaswamy:** so, good morning and thank you to the chair for the introduction, unfortunately I am not going to oblige, Azim Premji when he set up his foundation, he made a very decisive choice that he would not do anything in the field of engineering or information technology, he thought that, that was a waste of resources to invest in that field, he thought that the public education was the primary and secondary education in the first instance was where we must focus, and the university has grown, if you take a chance to look at their website, it says nothing about the engineering or IT, yet, we have no intention of offering anything beyond may be a high computation in mathematics major in the under graduate programme, and in our law programme, we similarly focused. We are interested deeply in law and social change, and we don't think that technology has much to offer, to that. unfortunately would say hereafter has anything to do with the technology, it is going to be a lot more to do with the, and thank you to the director for having me here and Ruchi for making sure that I turned up, it was a tough fortnight and I am glad I am here after all. Let me just introduce myself before I start. I'm currently at the Azim Premji University where I lead the school of policy and governance. We have a law program master's program in law and development. I'm also the chair professor. Dr. Ambedkar chair professor in Indian constitutional law at the Columbia law school where I spend the fall term. My many years of work a constitution administrative law. And legal philosophy. I do a lot of social scientific work in political science and law as well. Today's conversation is about public interest litigation and. I'm going to take. I'm going to engage some of the issues that professor baxi spoke about but. I'm going to take a very different tack. In the way I address then. I want to begin with our common shibboleth. That many judges and vast range of the Indian media space. Seems to indulge in. And engage with. Which is the idea that we have too much public interest litigation. Any serious. And critical analysis of the Supreme Court's docket. Suggests that not. Not more than three percent. Of filings. In any year at least for the last decade. Could be classed as public interest litigation it. Any form. Our work on the Karnataka high court. Across the last five years. Suggested in the Karnataka

the high court that percentage is less than two percent. As clearly as a matter of volume. There is not a serious challenge. That. But that might be the wrong way of counting. Judicial engagement. Maybe we should think in terms of court time. And that might be an argument that. Certain kinds of cases take up more court. Time than others. But unfortunately our court systems are such that we have no meaningful we have counting called time at all. Not for not for public interest litigation. Or for that matter. Any other matter. We don't know how. How long a civil suit. A civil Injunction suit. Takes in court and how a judge spends his or her time. It would be a very welcome. Move. To start logging in court time. Very meticulously. I think it will do. Very good things to the Indian Judiciary. But unfortunately at this point we can't do that and be kind make an assessment. So I want to set aside. This relatively significant complaint. In the Indian media space that is somehow a source of. Of congestion. Whatever it is it's not that. So the two issues that want to address that we might want to think about as a group. Out are two ideas of public interest litigation. And the first that it is merely an innovation. On the procedural route. Standing. And second that it's an innovation. On the nature of substantive adjudication. Or judicial review. So it's either. Just of innovation of standing rules. Or it's an innovation. Of the entire model of adjudication. I'm going to take these two streams. And I'm going to discuss what I think is happening in the courts. How we should think about it and what crises and. Issues we might. Confront on both of these streams I'm going to close to that with professor baxi. Pressed for a demo's prudence. Unlike him. I'm not as enthusiastic. And I'm going to suggest reasons why we should be cautious about. Even suggesting that our courts. And I judges are even equipped to engage in this task of you know. Realising constitutional vision in this grand skate so let me begin with the procedural innovation idea. So when we think of public interest litigation this procedural innovation. We simply mean that the rules of procedural standing. And constitutional. Injury modified so that. Groups that may not be able to show. Injury to themselves that they have a grievance. In the law. All that they are aggrieved. That's the normal rule of public law standing or. That they are directly affected by the matter. Should now be allowed to have standing in the courts. To be clear that doctrine. It may not have a common law vintage if professor Baxi means. Was it available in the sixteen hundreds but it certainly has a common law a legal system vintage. In that it was at least available in the United States. From the 1920s So. Group standing in public law is not. It's not an Indian creation. This was this existed. Way beyond the before the court. Got to it. It was well adapted though by the Indian courts. And used to liberalize the rules of standing. To allow groups into the court even on

the access parameter. In the United Kingdom for example big groups have standing as well in public law adjudication there's been a very serious concern that allow. Groups. Into the. Into what is the standard? You know. At best serial binary. Just one individual vs. one individual. Is going to cause problems for courts. In that it will change the nature of Justice in the courts. To a form of popular Justice. This work the best. Exemplar of this work is probably Professor Carroll hard row at the London school of economics in a very influential article titled popular Justice. Argues why the moment you introduce. Groups. Into adjudication. Can we maintain a distinction between decisions made in the political process? And decisions made in the judicial process. And if we erase that distinction. Then very serious concerns off. Legitimacy arises for the court system. Let me explain this, groups can be group standing can be thought of in two important analytical ways. One we look at groups as being associate two groups. In these kinds of groups. The questions of standing are not very serious. Because an associate of standing. Group is one that simply brings together people who already have a common injury an example might be. If the effects of the Bhopal gas tragedy. Were felt in a community. If. Two thousand of them stand together in a common litigation. It's. Associative, they are all members who are affected by the same injury the other kind of group standing. Is called representative standing. Representative standing. Is where someone who has not suffered the injury he stands for someone else? It's in the area of representative standing not just that Indian public interest litigation. Associate of standing. Has had very little traction. That a very few cases of large public law class actions. What we have a lot off. Is representative standing. When we had a representative standing with the person before the court has not suffered the constitutional injury. It is relevant to ask. What is the relationship between the people before the court? And the constitutional injury. So you might ask. What is the nature of the person? And showed that the person is not a busybody. And so on and so forth. That kind of inquiry. Professor Baxi counsels that we might think even further. We need not. Even get into the virus. You know divide is. Of a representative standing position he said just that we should just have citizenship standing. That anybody can stand in a public law matter. You don't need to even sure that you have a special representative capacity Vis a Vis constitution injury suffered. That pushes the line. Much further down. And would raise even more concerns about. Who really has? Relevant standing before the court. I'm going to suggest that. Even the at the position that we are in today we have three problems and problems that we must think about carefully. In this muddled. Domain of rules of standing. We have to keep. We have three issues. We have some

parties that seem to have perpetual standing. And I'll explain this. I'll just give you three examples MC. Mehta in the eighties. Subramanian Swami and the Centre for Public Interest Litigation, apparently these parties have standing. No matter what the issue. They don't want to show. Any special capacity to represent this matter at all. They don't need to show Expertise. Nor do they need to show any Empathetic or affective. Relationship with those who have suffered the injury. In fact did need to show injury at all. They have perpetual standing. And no question seemed to be asked. Except for the minor. You must remember that the CPIL case that Professor Baxi mentioned. The Chief Justice Thakur. Asked sharp questions. Was allowed in the end and so. It's not that CPIL was denied standing in that case. The other category that we seem to have. Is recent to have. For example of. Groups that can ensure that presented to the interests of cancer patients, that *Narmada Bachao Andolan* in the 1990s there a suspect standing to those groups. Mask body shop questions about deformable in competition. About the nature of death funding in this report. About the nature of the political motivation. We see. The courts seem to have a wide range of questions to ask of these groups. And they were placed in a perpetual. Suspect standing get it right. So the mountain. Thinking that the Indian courts have developed on the question of standing. Has led to this. Divergence in the case law. You have. Public Interest Litigation. By some actors who have perpetual standing. Which is unquestioned in the courts? And we have another group of actors. That have Prof. Sudheer Krishnaswamy: cancer patients groups, groups that the *Narmada Bachao Andolan* in the 1990s, to those groups we ask very sharp questions about form of incorporation, nature of funding and support, political motivation, the court seems to have a very sharp range of questions to these groups and they are placed in a perceptual category so the muddle thinking that the Indian courts have developed on the question of standing has led to the divergence of case law you have PIL by some actors who have perpetual standing which is unquestionable in the courts and we have other group of actors that are constantly placed under suspect standing any case they bring before the court they need to show some special characteristic they have to get pass the gate as to why they have to be allowed in the court system, it seems to me that the court even if we take a limited view of PIL, that it is just an innovation in the standing rules you know who can bring a matter to court and nature of constitutional injury, we have to pay careful attention to our rules of standing, all courts need to get clear about the nature of the parties they want to allow to participate in public law adjudication process and the real battle in the Indian court system has to be to shift more into PIL from representative cases to be associated standing

cases the more cases we get by groups of those injured themselves stands in court is when we are going to bring both clarity in litigation and you will see why in 2nd part of my argument I am going to suggest we have to change the form of adjudication, when we have associated standing those people have been interested to prosecute the case and secure a meaningful solution and I think that sorting the standing rule is an essential 1st step in this sphere let me move to the 2nd strand of what I want to present today, the 2nd strand is to think about PIL or social action litigation as prof. baxi calls it as not just about a modification of rules of standing but a completely new model of adjudication itself that is not just about standing it is about how you decide cases so let me trace the history of idea briefly and then talk about some contemporary concerns with the view... who is at the Yale law school in 1976 wrote a very influential piece called public law adjudication where he argued in the Yale law journal that public law adjudication should not be like private law adjudication if we take model of private law it embodies the idea of adversarial legalism which is that there are 2 parties they have contested questions of fact and interpretation of law, the truth emerges out of the binary contest between the parties the judge is a neutral arbiter this is the private law model, Abram suggested way back in 70s that public law adjudication is not like that because in public law cases judges have constitutional and administrative law values that they must pursue irrespective of the nature of the [parties so judge cannot be a neutral arbiter as in the case of private law, also it was argued that the judge must recognise that there is a significant power differential between state and the non-state parties and the idea that a neutral arbiter can somehow ensure that the truth wins out doesn't apply, when the state is party so a baxi argued way back that public law adjudication, all of the constitutional and administrative law adjudication cannot be modelled on a private law adversarial legal note prof. baxi picks up that strand in a slightly different way in the social action litigation argument, where in this in the late seventies and early eighties it was argued that social action litigation is not just public interest litigation. It's not just a standing question it's about having courts who are committed to pursuing constitutional values to the adjudication process. They must secure Constitutional outcomes constitutional social outcomes in the world Judges should not just sit back and be neutral arbiters. Moreover they should not view the courtroom. As a battleground between parties, in fact they should own up to the state and the other parties and pick on amicus interveners to assist the resolution of Public problems. So we should not see this as being adversary legal. We should see this as the courts constituting a

Forum for resolving. Key questions. Key. Public and constitutional problems. Right. This is a. This is a very aggressive and vicious view of what a court is able to do. It was. If you look at evidence that the court actually understood this view. In the early cases just as Bhagwati in PUDR and in *bandhua mukti morcha* Kind of equivocates he seems to say that he certainly takes them. Standing view you know that. Public interest litigation. Is a modification of old standing rule. This he says very clearly. Does he also see that? That public interest litigation is social action litigation. In the way that professor baxi urges. He sometimes seems to say that. He says judges have a duty to achieve the goals of the constitution. But he doesn't. He doesn't follow through on that. To say that the judge cannot be a neutral arbiter on. The judge should not look to. You know decide the case in an adversarial fashion. He doesn't quite going that direction. So what is the result of this idea that. Social action litigation calls for a different model of adjudication. And I'm going to suggest. We find two or three pieces of evidence that suggest ascertain. Picture of what is happening in the Indian legal system. First that courts. Adopt an abbreviated process requirement. In a lot of public interest litigation cases. The entire fact finding. Bulk of the fact finding is affidavit to driven. We have used court commissioners and you know some forms of evidence of fact finding. But considering that the court is looking to resolve some of the most contentious issues of public policy for example whether we should have. You know. The ultimate car rule in Delhi. It's a very complicated question of scientific evidence. Even before we turn to the law. Is should see that kind of. Adjudication proceed. On the basis of. Affidavit based evidence. Of parties. Is a very serious question. And that has happened so we find. Abbreviated process. The second thing we find is a fair bit of creativity in remedies. Courts have tended to. You know. Allow for. Remedies to take different Forms. And what is striking and. Professor Baxi try to trace. Thesis of public interest litigation. And what is most striking in the recent phases and I'd say about in the last ten to twelve years. Is that the entire public interest litigations space is a space. Of compromise the courts no court is willing to make a hard decision

What courts are looking to do? In this space is to somehow get the state. On affidavit. To undertake to do something. And then once that affidavit is put before the court. To achieve a sort of. Mediated order. Which is put out. As a resolution of. Of the topic. No decisions. Very few decisions think this law is unconstitutional. Or. This order is unconstitutional or illegal or that you can do this. And you can't do that. This very little so you get a PIL adjudicative process. Which is all about the small. Orders and. Just the kind of things singing. Now you do you do this little bit ok you've done

this. Now. You will say you do this other bit. You will produce. You will allow for eggs to be given. So that's fine. The state has undertaken that eggs shall be given with the mid-day meal. Hen's eggs shall be given. It's this form of. Adjudication. And it's a complete. Adjudication of informality. And compromise. There is no articulation of what is the constitutional basis. Or requirement in these cases. And what we get. If this kind of iterative decision making which can have some social utility. I'm not suggesting that it's all socially. Useless. But it is very far from a model of adjudication where a court. Dispersed. Pursuing a constitutional vision of Justice. So that's what I have to say about the two strands. I think on both strands with would be view it as simply a modified standing rule or whether we viewed as a different model of adjudication. The Indian PIL. System. Is in trouble. In serious trouble. So Upendra Baxi in his recent Basu memorial lecture argues that indeed courts should move to what he called the demos prudence one where the courts must in some ways. Anticipate. And empathize with. Popular ideas of Justice. And translate this into their court decisions. And I'm going to suggest. Two reasons. To my mind. But we should be sceptical of this bush. The first is the idea of expertise. In what we could we have a demo's prudence. Maybe. Courts and judges. Have some special expertise. They have some. Epistemological abilities. That other people don't have the executive doesn't have the legislature doesn't have the people don't have social groups don't have courts have some special epistemological expertise ability. Even if this were true. We must see evidence of it in the decisions of the courts. The decisions of the courts. Must be examples of. Public reasoning. That. Persuade us all. Not us all. That's too high a standard. Persuade. Most of us who would participate in that process as good faith public reasoners. To the conclusion that the court arrived at the right decision. You know, we could have an expertise based justification. And. This must be manifest in the public reasoning of the court. And it is with all due respect. Like modest. Evidence of that kind of public reasoning. In court decisions. Second. It might be because the courts. Enjoy some superior legitimacy. You know. The court's legitimacy is so high that. All issues. Could somehow be ultimately decided by the courts. This could be a good reason. But for the court's legitimacy to sustain. Two things must happen. They must represent the people. And when I say represent the people. I don't mean that they must be elected. But they must at least represent the people in their social diversity. And the Indian high court and Supreme Court system is so far from representing people in so should. In that social diversity that. Even some sort of. Representation illegitimacy. Is impossible for the courts to claim the second kind of legitimacy. Might not be a legitimacy of

representation. It might be some legitimacy. Based on the accountability of the courts and the institution is so accountable. And so responsive to the people that the people think that this is the most legitimate institution. Is this true. Can we say this about our court system? We know that in the last five years. We have struggled on. Issues on access to information as well as on complaints and grievance redressal. Even on issues as fundamental as personal ethical corruption in those contexts. I don't want to go to institutional legitimacy. Because I think that's an open and shut case. The Indian court systems capacity to process its caseload. Is legendarily weak. And anyone who turns to the empirical evidence on that would. Would be. Would take that. Quickly you know. The institutional legitimacy of the court as somehow being the most efficient institution. State institution. No one would. Would go it. But me. Maybe we could at least think about the accountability based legitimacy. Or some sort of representative legitimacy. And I'm going to suggest to you that. On both those counts, the Indian court system doesn't come out shining. So if the courts do not enjoy the legitimacy advantage. And if they do not enjoy. An epistemological advantage. To the other branches of government. The grounds or the. The basis for demos prudence Are weak. So let me conclude if you persuade about anything I see you might ask me what. Than what do I suggest must happen? So I'm. I would suggest that approach that the. The most significant thing that can happen in the field. Of public interest litigation. Is a very strong push for? Careful recalibration. Of the rules of standing and. A return to the basic form of adversarial legalism. And by that I mean not an adversarial legalism of the private law variety But adversarial legalism. Of the public law variety of the sort that. Abram's describes courts. Institutions to resolve disputes. And make Orders. The legitimacy. Arises from that primary function. They have no special advantage over the rest of the population. In the way the. Arrive at these decisions. It is the format. And structure of the legal dispute. That gives them the unique legitimacy and role in their social function. They must return to that role. And that is their best chance of indicating constitutional vitals. Thank you

**Justice Gyan Sudha Mishra:** thank you professor krishnaswamy I think most of the time. We have a lot of sugar and sweet in our plates

Especially in the discussions like this. But I can notice this streak Rebel in you. In so far the functioning of the courts are concerned. Because you have tried to draw a line between a representative. Representative standing. And associated standing cases which I quite appreciate

that there are cases where a representative standing is taken that the courts may decide such cases but where there that is associated standing cases. The courts have to be a little. Little rigid about the provisions of the procedural. Part of the court proceedings. I could also notice that you could gather that. In your views. The courts. Are not always equipped should not indulge in the probated area of deciding. Matters in public by way of public interest litigation. But I would like to say that. And then you say that the courts have not really decided. They are only short orders that you do this you do that. I guess I still feel that you have a lot of potential. Yet. You need to do a lot of research. Right. From 1950 Right from bank nationalization gives right from zamindari abolition land revenue cases, the Indra Swahney reservation cases a whole host of. Even I'm forgetting the list. Thought. I for one would like to be sent from what you have said that the. I'm not really equipped. Or rather you know. And I must really compliment you for the terminology that is used by their kind of. Academicians. And by the judge and be judged. Judge and generally we use the terminology of. Which are prevalent in the judgments. And the. And the. And the law books. But your expressions are much more. You know. Backed with. In what you think you know very enough even though you are not doing any engineering course in your institute. But I think you have crystalline of the formula. And very aptly put across what you want to say. But I for myself would. Would do you know. Try to impress upon you that you need to do a little more research. About the Indian. Diffidence. And the Indian. Indian courts and specially the Supreme Court, perhaps to do the contribution of the court. In reforming the society. And the great leaps and bounds that the courts have contributed towards. Tackling the entire horizon. Of the problems that we are confronted with from time to time. If it were not so. I think the screed breakers that the courts are putting that. Would that would you know there may be aberrations and. You might be right in saying that the corpse. Should take assistance from the interveners we know. And by impleading the party of the cause and. If the feedback is coming before the court. In a month. Much more. You know. From different sections than. From different groups. I think that will be added to the input. But I would also say that the courts have never felt shy. In allowing the intervention applications and. If you see the court functioning. Many a times not always been you know tide. You know the courts have given a notice. General notice that. Anyone who wants to argue before the court. On this subject. Actually. Than it does not really adversity in litigation. Then generally the courts have been very generous. So please don't misunderstand me that I'm being defensive about the court proceedings. But I would say that you have. You would require a

little more study. In order to have a dispassionate. And an objective view of the subject. But we have. I really felt delighted that you know. There should be a real debate. Because many times what we do is most of the time. The sweet talk of the time. Even I am at times you know that maybe I'm too much of you're too much of this reaction has saw too much of sweet. Makes us diabetic. And so Letter the a little sugar free And be forthright in expressing our I am really compliment you that you are representing a young generation you have been in the in front of the galaxy of judges you have been so forthright in expressing yourself. I really like I would do what should I say that. I should provoke you we should do more of it. Because that. That provocation compelled us to develop the law. And that is how this value of defending judgments all through your dissenting view on PIL strategy is a really. Welcome. And a breath of fresh air and especially in front of the judges where generally want to you say that even we have to disagree and you want to contradict. So and put a question you think you don't think. I'm asking you have to say I asked my friend. So it's really welcome. And. I really thank you for expressing your views and. And more of it was absolutely no confusion. We truly understood what you have to say your candid forthright and. Just making no bones of what we have to say. That's really welcome and that is the value for debate. Thank you so much. And anyone who wants

**Participant :** now, doctrine of local standi was first discussed...now, the chief Justice of Allahabad high court, quoted in the judgement of S.P. Gupta, very enlightening article on the locus standi, from 1982, S.P. Gupta till today locus standi has called in such a manner such a manner that is just mind boggling. now, in today's era we have PIL's of fifty kind of issues, your subjects of affidavits, and several aspects of it, you have PILs on education, you have PILs on sports, on medicines, then the environment of course, that is the advantage of the right to information act, because earlier, it was not available, now they have information available, and ultimately it is the duty of the court, to see that whatever is been brought to the notice of the court which is in the nature of a violation of any constitutional principles or any legislative laws, in that case, the rule of law is required to be maintained, in relation to the social impact, the cause which is brought before the court is for example disability, the large number f petitions which are filed on the disability of the all the citizens, led unfortunately, that the best example I can give you is the railway matter, the local trains, now, citizens have come up in large number of matters, it is uncontrollable today to handle the PIL, where they are coming up with the different issues of overcrowding in trains, increasing the height of the platforms so that the accidents are reduced, other things, medical supplies in

government hospitals, and if these are the causes which possibly urgent causes which are coming before the courts, definitely in that situation the court is also, expected to rise that situation and occasion and immediately pass some orders and of PILs, if this is a thing in that case only and only recourse which the court is likely to do

**Justice Gyan Sudha Mishra:** he has expressed what he has to say, we are supposed to adopt his view or reject his views,

**Participant:** I am just making, therefore in that case you have to counters, affidavits, all the state governments has brought to our notice, the learned judge of our court wrote a letter some days back, to the chief Justice, in that, there was baby who turned away from a municipal hospital because there was incubator, in Mumbai mirror, times of India publication, article on the front page, everybody those who have means they can definitely approach, brought to the notice, letter was treated as PIL and immediate directions and the life of the baby was saved. these are the different intricacies I mean PIL today locus standi concept is absolutely diverse and is considered in the manner in which you have focused on it, it has large number of social repercutation, large number of constitutional rights of the citizens which are involved, therefore it is a very major role in development of society,

**Justice Gyan Sudha Mishra:** I just wanted to add that I could notice your concern, that the courts don't decide the issues, and there are only small directions that you do this you do that, don't you think that if the courts were to just bang upon a decision without really having the reactions day to day reactions as to how unbeaten path or unbeaten track is to be handled by a judge then don't you think it will not only be judicial activism, but hyper judicial activism, which might collide with the established set of situations, so I finished, so, that he can answer collectively, not answer rather express his view

what I have been able to gather from what you said is, he said just the opposite, he has expressed just the opposite, that courts are interfering too much, so it's a, was it not earlier, because I am not sure, that after this terrorist activity, this was implemented much before, may he has retreated, but it has been implemented much before, I remember it very clearly because I was travelling and even I had a problem, I was travelling by road, most of the time from Jaipur-Delhi, Jaipur -Delhi, and at that time it was already implemented that you don't have to have a thick film, anyway thats a, yes of course the court has be cautious where to interfere and where to not, and I quite appreciate

his concern, that there may be, and very intelligently he has classified, that wherever there is representative standing, and the other there is associate standing, where bluntly put, when you have to settle your scores, that has to be distinguished, so would you like to say something?

**Sudhir Krishnaswamy:** I mean I won't, saturate things, one is that despite all the compliments about clarity thing, first three responses

You know. I'm not making press for less PILs I don't know that thing to, or I started with that, I said very clearly that PIL, in India is very small, in the slight docket or, if anything that court needs to do more if, it as a constitutional court, so I will not make an argument for less PIL, second, I making an argument for restraint, but it's a restraint of a different sort, it's a restraint on the kinds of cases, that get admitted and who brings those cases to courts and once those cases are admitted what kind of adjudication takes place, for example, the justice mentioned that you get a disability case about access to trains in Mumbai, I certainly think that you should ask that was the case before you, and if the law makes it clear that access to public transport must be disability friendly as it does, the law is clear on that question, the court must be forthright and pass orders,

**Participant:** there is no issue with that question. my argument for a sort, not only the orders are passed but the case is monitored for years to, they are asking the courts to, and I forgot to mention one category, animal activist, now we had large number of cases on animal reservation and prevention of cruelty to animals act, and one trust in Kolhapur, had got an elephant, so animal activist visited the temple and they saw that the elephant is chained badly with the chains, that was brought to the high court, that order was upheld by the supreme court,

**Participant:** with reference too implementation of the, the number of PILs entertained, with reference to the guidelines laid down by the constitution

**Sudhir Krishnaswamy:** just to be clear that I did not say anything about any of those cases, so,

**Participant:** no, no, we are just talking about the dimensions, on the dimensions and the utility of the PILs

**Justice Gyan Sudha Mishra:** I think you exhaust your time very fast, so that is why again in the, it reminds me of a story, if the boy is in the queue, for a Mary go round, he already does it , and then I use the queue,

**Participant:** for justice Thakur I can remember a dialogue of one movie of Amitabh Bacchan, Jha main *khada hota hu wha line chalu hoti hai...*

**Participant:** lordship and compliments to young professor, Krishnaswamy, the only grey area which has aroused my thought is , the proposition which has been expatiated by him regarding the, consented attempts of the judiciary to clip the thriving of public interest litigation constituted by the fact of certain social activist litigation being protest, activist being put in the suspect list, the concerns of the judiciary in that regard for treating certain social activists, to be in the suspect list, are bonafide and extremely genuine, certain social activists do in the garb of social activist litigation, become ransom takers, therefore when there is some credible evidentiary material. Before the court. Off theirs masquerading that public interest litigation social activist litigation as ransom takers, it is very much open to the courts to dissuade such attempts, therefore if in certain areas where the court suspects that certain litigations especially in land acquisition matters Where compensation has been paid to the landowners. And rehabilitation schemes. Have been now, put on the inbuilt Benefit has a crew to the landowner was thereafter to they continue their protest against land acquisition open to the courts. To when there will see the litigation their part for doing notification of land acquisition that. It is motivated in it's for extra-nets considerations. And basically these aspirations are for the people for true constitutional goals been accomplished through. Public interest litigation as I said earlier is deeply entrenched in the factum that there is a lack of economic empowerment of people of India and lack of literacy. Lack of literacy which has disabled them completely to priorities their values and goals. For electing representatives. If there is growth in literacy. Is empowerment. Economic as well as political. Then they will elect representatives... of money. Appropriate candidates. With suitable qualifications credentials of high honesty. And which would bring good governance and. More or less will absolve. Absolve the judiciary. To take on the role of the governance which otherwise constitution is to be performed by? The executive as well as the political leadership. That extent limits professor.

**Justice Gyan Sudha Mishra:** And I think you are in the queue for a long going through. The lady first is becoming the lady last,

**Pritarani Jha:** But I'm thinking two things is what I'm going to talk about next about gender equality. Kind of private law very, problematic. That I'm trying very hard for the judiciary to do with sure that judiciary, to show concern for private law case I have a question about that. The other this. Associated and representative stuff. I feel. What's important and what has come through. Is the substance of the issue before the court? And whether that's backed up by evidence or not, not necessarily you know somebody. And what you mean. Do you mean? Groups who represent this. Interest have suffered because I haven't suffered and I'm. I can go before the court because there's all these requirements now. You have to prove, been working on this issue for so many years that you have to prove your legitimacy. That's already there in the Gujarat the high court. In terms of an affidavit, so I'm not sure. No one person spends his life time. Getting the evidence to bring a, before the representative, you prove that commitment by your work, that not necessarily be, those two things particularly the private- public domain, those are the two issues that I want to

**Sudhir Krishnaswamy:** so on, I will make the Four points, and on first on executive shirkers. The question. And this is been suggested. A lot in legal writing. As well as in court decisions where courts say you know this executive authority is not acting or this legislatures not acting hence we will act. So this. This rational for judicial decision making is a significant one. In in in our understanding of the role of the court and. It's clear to me that. There are times when the judiciary must act. If the other institutions fail And. It might be that the critical question. Is the nature of constitutional values at stake if we see is a decision on. I'll just use an example not because I think it's less important. But it's an issue that may come up before the courts. Let's say the issues about. Organ transplantation policy. So our organ transplantation policy has not been framed by the court by the executive for say, two years and public interest litigation. Petition or comes before you and says. We need organ transplantation policy in the state. What should a court do? I'm going to suggest that an adjudication for me power moment. Is an adjudication that puts that? The matter back to the executive Department. To make the policy in a time bound manner. And to then report, to the court, and adjudication for empowerment is not for the court to make the policy itself. And so this is a point of adjudication. That would be called in legal theory terms a legal process theory. A theory that takes a view about institutional rules in a democracy and about institutional competence. So I think that that courts in India are very happy to take the decision themselves and that is an issue. On some issues on Life and death issues. You mentioned a child not being given..... Clearly those are cases where this facility to go back and forth doesn't exist. And in those cases

the only meaningful order is to intervene. So I'm not suggesting that in all cases. So the executive shirker argument has gone way too far in the Indian adjudication context. And courts even if right minded judges who want to be who want to empower Indian democracy and want to intervene should intervene with respect to institutional process is, is my is, my short response. Now on the suspect category question. I suggested something and I think that this is a going back and forth and justice Mishra also said something and I am not clear that I'm coming across clearly are not the first thing I said is that Associate of standing is the easiest Ground of granting standing if people who are collectively injured come before you as judges instead of litigating five hundred writ petitions with a standing one by one. They come before you as five hundred in an associate to form some association either registered unregistered. That kind of associate of standing is relatively easy. Because they all have the injury. Everyone is going to see an affidavit I have suffered this injury whatever the injury they are claiming it doesn't settle the matter before you. But at least. As a standing issue it's relatively easy. What is striking in India? Is that whenever the court seems to ask. Suspect. Category problems they ask of associate of standing cases. When there is a representative standing. When there are a few people I mean I don't know, I don't want to make a political point, but Dr. Subramanian swami. Who is an affiliated with a Political party and has been for substantial periods of time stands on in every court on different issues. Clearly he's not associative he has not suffered the constitutional injury. His only claim to representation can be a representative one. I stand for the public interest because these are issues of public interest. So it's a representative standing cases that the court is the gate wide open. There are some respectful people or respected people who seem to have an open gate. And the question I'm asking and what I suggested earlier today was that we must shift the balance, shift the balance from representative to associate of standing. We have we need to have a lot more cases adjudicated were associated groups come to the court. And we need to be more careful with the representative standing and. The argument so I come to your last point is this, would this constrain people who work, no I think the first question that the ask the court asks in representative standing and this is legal principles you can look anywhere in the world in the common law world, there are two important questions. First are you what are you as an entity you establish your bona fide as a... As a person or as an entity. And second you show that you have a special capacity to represent this issue. This is the crucial analytical question. What is your capacity to represent this issue? If the party says I have been working on gender issues for fifteen years and hence I represent this issue this is completely

fine, this is precisely the case you should be entertaining because the party has representatives standing. But if the parties in court today on the basis that they are protecting pedestrians on the street and tomorrow on the basis that they are ensuring that foreign exchange is not released in a particular way. You must be suspicious because how it is that this party seems to have expertise and a track record on all questions. So, Representative questions, Representative inquiry is important. But the example that you use is precisely the example that the court must allow right. As opposed to the example that the court should be...

**Justice Gyan Sudha Mishra:** absolutely endorse your view because I myself have faced this you know in the case of euthanasia my co-judge says that you know sister you don't know theory of locus standi has been diluted long ago and Obviously I reacted like you, which I feel absolutely correct that theory of Locus standi have been diluted and can file a litigation for the social cause. But, if somebody said that euthanasia should be allowed by the court but the question is who at whose instance we allowed passive euthanasia then at whose instance that should be done, that cannot come within that locus standi and that has to be addressed by the court at whose instance should be done. So you're absolutely correct that, you know there are situations for gender justice you can take in but who exactly is going to...

**Sudhir Krishnaswamy:** The, the court's interest in a standing rule is to get the best candidate to ventilate the issue. So for example if your issue is tobacco related cancer. Who better than the cancer patients association. They are the sufferers of the consequence. So they're the best placed to ventilate they have they have this, vested interest in the issue and that's precisely who should have standing.

**Justice Gyan Sudha Mishra:** So the timekeepers only is now you know, I have to highlight the time keepers' role.... So we will break for the coffee but really a very thrilling experience....

This PIL is such a happening with subject that we can't even ignore this.... Sorry for summing up abruptly because this timekeeper is feeling in his her duty. Will have a pleasant break, for a coffee break. And then after, If somebody has to get back. But of course that would be another session

## Session-11

### **Use of Continuous Mandamus to Secure Gender Equality**

**Justice Gyan Sudha Mishra:** I think we have all assembled, and brothers please lend me your ears and sisters of course, I was a bit sensitive at times you know, I would justice patil, how would have brothers, so he said by interpretation, brothers include sisters, so we have to, we are in sort of hurried session not so much because I guess prita says that she would make up a power point presentation, now, this is another subject of great importance and of great concern, but I would thank Dr. Geeta that at least she has given me an opportunity to diverse my mind into something other than gender equality, because generally I thought you know why even women judges are typed card that they only have to participate in gender subjects, so I am really thankful that I got an occasion to hear all of you and even to ray of thoughts that I could express on a variety of issues on judicial review because if I were so much gender conscious I might have joined a profession which had an image of gender priority so, with that informal reaction we would first of all invite the chief speaker of this session, mis Pritarani Jha, and I have come to know that she is a professor in the university of nirma and of course a very patient listener to the whole session and even giving up her chance to react when she is not given a chance, but we are hear you and of course the reactions would come later

**Pritarani Jha:** thank you very much. Can you hear me, ya! it's a big privilege for me on the same stage as with Dr. Baxi, whose work I have admired for many years, and it's the first time I am here with the high court judges, I come here and I have been here before, with lower judiciary and trial court judges, and its big privilege coming here and be able to talk to you, because I really and the all of you, because we worked for years to try to make the difference and I feel all of you can make a difference within five minutes by an order, so thats a reason for being here. Lot of issues have been coming up over the last few days so, I just want to kind of deal with some of them. yesterday we were talking little bit about feminism and I really wanted to make a stand, I will make a start with what is feminist jurisprudence, actually this is something that was asked to a group of us who went to visit the bar, president of bar council of India, post Nirbhaya case, to argue that you know this is a kind of subject that should be also taught to the law students and his question was what is feminist jurisprudence and I wasn't prepared that day so I had to respond of the cuff and what I told him I will tell you now, about what is feminist jurisprudence, because

it's not something that may be everybody would have come across. The idea behind feminist jurisprudence and it's been there over the last 20-30 years now, in different stages. my engagement with this issue was to with the case of kiranjeet Ahluwalia who is a survivor of domestic violence, kiranjeet after suffering years of domestic violence one day, put petrol over her husband and lit the fire, she was tried in the court in England, and this is England, she was a bride who had been those NRI marriages, she had been married from a village in Punjab and who was living in London and has suffered years of domestic violence. the court convicted her of murder, though she pleaded man slaughter, she tried to raise the defense of provocation, but not very effectively, but anyway the defense of provocation was very difficult for her to argue because given the very definition, of provocation, provocation is so male centric, it requires you to lose control suddenly, now not many women can suddenly lose control ad over power a man, so one of the question, because now I teach a course called gender and law, and I say that you have to question a law, where if you see your wife with a lover, you can suddenly lose control and you have a defense within the law, but if you have suffered years of domestic violence and you lose your self-control it's to something, there is actually no defense in law, and that led to a very, movement of feminist movement that engagement with the law to change to ask, to ask that this now we have think about, whether in this century this defenses are not too male centric, not too masculine thought, it's not we are thinking about women's experiences when we are even having new definitions or when we are thinking about the law ad so in England there was a whole campaign, the case went to court of appeal, and she in that case pleaded something else that has now become common, called battered woman syndrome, so there is recognition within psychology and reports that if she suffers domestic violence for a long time, you suffer from something called battered woman syndrome, so she pleaded diminish responsibility on basis of this evidence and she was acquitted, charged with man slaughter and she already served the sentence. The issue comes that it has been written about the woman that have to be bad or mad, in that defense, right! Either you are so bad that you kill or you have to be mad, to have a defense, and slowly so the whole defense of provocation has developed in England to limit cases where it's that kind of case of infidelity. There is recognition that this definition is itself is male centric. similarly in Australia the law of self-defense has been changed to recognized, that a reasonable woman, not a reasonable man, a reasonable woman can lose self-control, if she has suffered years of domestic violence, so this is what the feminist jurisprudence is, its talking about experiences of woman being coming into the law making, into

the law implementations, into these practices, and we have had a lot of changes in our law, over the last 3-4 years, we got criminal amendment act, 2013, we have the domestic violence legislation, we have got POCSO act, 2012, we have got the sexual harassment act, we always have the vishakha guidelines, but I don't feel that lot of judges and people genuinely understand where are these changes coming from, what has influenced these changes and a lot of these changes have been, influenced by years of activism by feminist on these issues, why do we say that woman should have counselling because the experiences have shown that women suffer a lot of trauma, as a results of what happens to them, so taking on additional court proceedings after you have suffered trauma given a court proceedings , which actually re victimizes and re traumatizes them is not going to work unless we have all the support during the process to make sure that women don't are not re victimized by the criminal justice system or whatever law we are looking at. it's in this light and I have worked both in England as a domestic violence lawyer for many years and my capacity as a lawyer, as a manager of a refuge, where shelter in our context and in fact when the 1996 act came in England came on training various stakeholders on the domestic violence in England and now I have worked in India for many years on supporting victims of communal violence, domestic violence, sexual violence, so I have a position to make certain comparisons in this experience and what I find I find and this is why I am here is actually laws are pretty much almost on par with the laws with UK, it's not that we have much more to go as far as the substantive law is concerned, we have marital rape exemption being there, there are few things which are there and they are important things not small things but where we fall down, repetitively is the implementation, the law provides for xyz, and this is what the Shashikala mam was also talking about it yesterday, and I want to try to bring this to you and I don't know how best to do it, but just by giving you some examples of cases that I have been involved in for you to understand why we are talking about judicial bias or why it's important to have some kind of normativity in decision making but in England I could fairly predict what the range of responses of court would be, it would not be so different from one to another, here its sometimes different and also what is more different is predicting the time frame and that is very important, people want to know how long this case will take and thats again a very difficult thing to predict, so I want to talk to you about a case that I was involved in, that the organization was involved in. I will give her a name, I don't want to use her real name, Ganga, and so Ganga came to see us when she was about 18 or 19 years old, regarding family breakdown. she had been trying, she has a three

old daughter, she had been trying for two years to affect a compromise with her husband, which is often the case despite a case what everybody says about the feminism, for me feminism is about following and trying to give the choices to women to do what they want, we don't dictate to women what they should do, but we certainly try to ensure that there are the choices so that they can make those choices for themselves as per the law, so she wanted compromise so we got together, try to get together with her husband, the lawyers, the position was very clear, we don't want her, want a divorce, we want to pay a few thousand rupees and we want to end the matter, and this is actually a very not one of case, but there are many cases where this attitude of the husbands family is almost like a market thing, *hume nahi chahiye*, you know something has gone wrong with the goods, we don't want it anymore, and sometimes with discussion and debate you are able to change that positions, but many times you are not. in this case we instituted domestic violence proceedings on behalf of ganga, there were many instances of domestic violence and particularly one of the main issues appeared to the fact that she had not been able to deliver a baby boy, as she had one abortion and then a baby girl and it's the instance of once you know, it was that which was also a factor in a family not wanting her, so as the domestic violence proceedings started, the husband's family and obviously you would find that the husbands family are in a much more advantageous position economically, they have land, money, the women she had already been with her maternal family for two years so, they were feeling this as a burden on them, and brought the reasons for proceedings were also conclude some finality to this matter, so we applied for interim maintenance, residents, the whole domestic violence provisions under the act. as usual the act is supposed to and this is why it is important supposed to be quick, supposed to be kind of over into months, in Gujarat its frequently one to two years sometimes more, how long it takes to finalize the domestic violence proceedings and wraps that varies from state to state, so that is a long time for people not to have any interim remedy of maintenance or residence, which is also the reality in Gujarat, that interim orders are not being made as frequently and this is not my experience from a few cases, thank fully domestic violence act is one of the few acts, which has been evaluated, and we have looked at monitoring and evaluation of the court orders, and this analyses shows that in Gujarat about 5% of cases only the interim orders are made. this woman does not get the interim order despite the application being made, it was just not being heard, in the meantime we get an application to quash the proceedings because its two years since she separated so, there is no case, there should be no case on this basis, of course we fought very

strongly, that it was a case of continuous violence. it takes 3-4 months to decide this new issue that has been thrown by the respondent, meanwhile the interim application is still pending and we literally have to ask the court, give us a decision on our application, we have to write on this, give us the decision on the interim application and they eventually give us a decision, giving a very small amount maintenance, to which our advice was we should appeal this, this is very small. It's at this stage the things that suddenly go out of suddenly our control and we get the biradari of the community stepping in and all of a sudden a compromise solution is arrived at, by the parties. We only get to find out about it actually by a third lawyer, we may not even have found out and the compromise solution is that the three year old girl who is being staying with the mother and grandmother is now to be transferred over to the paternal family on the basis that they will give the divorce so she can get remarried that's the agreement. for me that was a very shocking thing to hear, a child who we are saying is not wanted in that family is suddenly a girl child is to go back and live in that family because of the social thing that she won't be able to get married with a child and this is arrived at by the community, and this is a consequence I feel in part, so you know I sat down with the family trying to understand what has happened, without the biradari being there and the positions of the parents was you give me a guarantee, can you give me a guarantee that this case will finish in two months' time and I will get the maintenance, I obviously couldn't give that guarantee, so if you give that guarantee I would follow a certain course of action that you are advising given that you can't its already gone on for one year we don't have the means to support her, we cannot continue with her then this is and also the, issues about the community, we would be ousted from the community, if we do not follow the community decision the khap panchayat kind of decision that has been breached, totally traumatized by this and I come here to get share my traumas, we go to court, agreement is drawn in terms instructed by the client and I tried to negotiate for some time because this little three year old girl has still not been told that from tomorrow she will be waking up in somebody else's house and her grandparent's house and her mother will not be there at all, so I asked for some time, that give us like at least 2 weeks or 4 weeks to get the child ready for this life turning decision and the response of the *biradari* was *aap bahar se hain kya?* It's like humanity *bahar se hai, earthquake mai toh kitne baccho ke sath aisa hua*, they survived, and even when the parents are dead they will survive. my only hope only was that the judge would do something, because I can't , I have to follow the instruction of the client, Saturday afternoon agreement there was rubber stamped and this is so different I could never ever

that agreement passed, in England, the court would slap it on my face where is the interest of the child? this is what is different, and I tried to negotiate, you don't want to contact, then what about indirect contact, what about phone calls, letters, forget if you don't want to do phone calls, letters, what about just sending us the reports of the school, because in cases in England, that what happens, if you have got a very hostile child, who is saying I don't want to have contact with the absent parent, that's the least minimum you can do, if you see it in interest of the child, in terms of identity that both parents to know who I am, I need to know both my parents, and have some contacts and realize that may care about me, even if they cannot be with me, none of that. They would not agree to anything, court did not ask any question, so, when we say 5% of cases interim orders not made this is the consequence, in himachal it is 10%, most cases the average is about 15% of cases only. The key remedy is interim orders in domestic violence case. In England I could get into court and get an injunction order within the same day, if not within three days, if they had to be on notice hearing. the only difference between the judges was, whether I could get an ex parte order, or on notice hearing which would happen in a week, now understand our system we have a lot of cases, it can't be a week, writ can't be also 6 months. This is the problem that we really need to think about and look at. what Shashikala was talking about just power of judicial review, also the other angle of the judicial review, since you are in the position and I feel that should be a lot more research and thought about what happening at the lower judiciary because as we all know 99.9999% of cases are decided by the lower judiciary, we a lot of research at the orders of the high courts and the supreme court makes, which is very good, but feel a lot more attention needs to be actually on the trial court adjudication, because that's where the problems, and lot of the problems are. that is one issue that II would, and since you are in that position of power to look, and one of the key things that is required on the domestic violence act, is to look at monitoring, it may be a different problem in different states, but till you do that research of looking at what is happening on the domestic violence act, routinely what is the average time being taken to finalize a case, till you at these things are interim orders being granted, I come to the issue that I have dealt within the article a key thing of ,lot of resent social justice legislation is the infrastructure support, required. Requiring that an effective implementation of these acts if we don't have this support, with the dowry act it was dowry prohibition offices, domestic violence its protection offices with POCSO support, workers and various other mechanisms that are there. act is not going to work, nothing is going to change and actually a lot of research shows it is not just

conviction or not conviction, what makes a difference there is a thing called procedural justice, if people feel treated respectfully and they get the support as they are fighting for justice that's also very important, and they get treated humanely as they are going through that process, so protection officers being trained on the law. In Gujarat the firm that you can ask the order for actually does not have a column for interim orders, which is something that has to be looked at, I have pointed this out to relevant stakeholders. routinely the protection orders are not aware of the significance of interim orders, how would they be, I don't think anybody has talked to them about how important an interim order is, so, we need to have training of protection officers so in Gujarat the problem and I expect that this is the problem in many states and we have had a lot of supreme court decisions looking at non implementation of social legislation orders, like the dowry prohibition act, like PCNDT act, and this is what it is going to immediately solve the problem but, I definitely feel that there is a difference and that makes the difference however small when the judiciary get hold of an issue like this and say it is about the matter about enforcement of fundamental rights and that we can ask you that there should be sufficient protection offices, so for example in Ahmedabad there was a situation where when a woman went to seek the help of a protection officer, she was asked to come back in three months, time because they were so busy. There were not enough sufficient protection offices, now act imagines 3 to 5 days, let us that is not possible perhaps, everywhere. it should be but that's not sufficient, three months what are you saying to a woman who is suffering violence go back and suffer it for three months to bad, if you killed at that time and if too mad if you suffer an injury, I am given and this is what I come to now that given that we know in our society that the kind of barriers there are to quoting at the first place, research is showing very clearly the people who have come to you for constitute about one % of people who are actually suffering by 1 to 2%. you will see this I have quoted the most recent research of the survey and also one which was done by an international agency in its a global survey, showing globally its about 7% of women who are breaking the culture of silence or in reporting 2 formal agencies about 40% of women have talked to somebody about it, we are not saying that they do not talk about it at all, but talking to police, talking to doctors talking or reporting to a formal agencies about, 7% globally about 2% in India, so there needs to be recognition when a woman comes before you, she has already done something very big, she has broken the culture of silence and taken that big bold step, to seek a remedy before you. I don't see that sensitivity in the lower courts towards women survivors that they have done this big thing

when they come before the court, let's give them all the law at least says, they should get and as quickly as possible. it is this private public, it is seen as a private, there isn't an understanding that, I get this when I teach a gender and law as well, is that it has to be equal, it will be equal when we come from a position of equality we are not in a society which has its starting from equality, so till we get there, we would need this law. If we were in a position where there was equality already. in this case when the victim approached the newspaper this report was taken note of suo moto cognizes, proceedings by the high court of Gujarat, at that time justice Bhattacharya and there were proceedings which lead to order, about a year after saying that state must appoint sufficient protection officers, it was also found that the protection officers did not have what they should have in terms of their capacity to do the job admin, secretarial support, temporary employment was in issue, all of these things were addressed by the high court, so, you think this matter is sorted, but this is where and that judgement is actually has got a lot of constitutional basis , in the saying that making fun of domestic violence act, if there are 800 applications in Ahmedabad, and you have got one protection officer, do a little analyses, look at all the districts and some districts there are only 25 cases and you know you are giving one, in some there are 800 cases, so do some kind of monitoring and evaluation and actually when I tried to do use RTI what is the position, it was very difficult because you as judges might be in a better position to ask who is actually responsible for implementation of this act, I could not locate a single person, somebody is looking after protection officers, somebody is looking after xyz and these xyz are not talking to each other There's no coordination to see effectively how the act being implemented. Now this is an act that is being used most by women because as you may be aware domestic violence globally one in three women are being affected. In India. It's probably more than that, right. So this is the matter that is coming. Intimate partner violence is coming before the courts. The most in terms of violence against. Gender based violence. So it's something that we all need to prioritize. Prioritize to get our act sorted. So the protection order issue went on the court said within two months you must appoint the protection offices. Nothing happens but after two months after about. To year. The Amicus curie. I haven't quite understood. Why I took a year and what happened. And the matter was brought before the court. Again. To see why it had not happened. Eventually I think end of December 2014, though. The court. Sort of gave a final order on the basis that the public service some. Examinations had been held. And they would now be done. Which at state was then will we be appointing in two months. So I don't like it in months the position was again. It will definitely

be done in two months. I don't know what the present position is that the on the ground. Again. Where women are going to file complaints it's not. It's again. Having us to come back after a month or two months so it's something that needs constant. Evaluation it's a very important role. It's not being given that importance. By the state so that's one issue. Protection officers, as far as the domestic violence act is concerned. The other one is of course shelters. The act says and cause. You know. A big that. Two issues three issues not just about the domestic violence act or at the shelters should be there for anyone noble woman or child and. All of us need to think about the kind of state of. Shelters that are there in our states. I was unaware that. Dr. Baxi was a litigant in our protection home. About 1981 Thirty years ago. And when I looked at the account of that which has been the written by justice murlidhar. Protection home I was really surprised. Because if you walk. Two organizations or one of which. I am involved in have recently filed a PIL on the issue of shelters Gujarat and the affidavits. You would not know that this. These two things are being talked about thirty four years. Separation and I think that's a big failure.

You know. In thirty four years. Very little has changed. Unhygienic conditions. All kinds of you know if you look at what happened in. Agra and what's happening in a central. Protection home. Shelter. In Ahmedabad and I don't pick Gujarat I feel that this is a problem in many states. I happen to be living in Gujarat. So I can only talk about this issue ok, you we filed the petition the court has responded. After initial. Delay I would say. Court has responded by making a very good order. Of a kind which I think is important. Asked a committee. Of judicial officers and NGO Eminent. NGO. Activists to go and have a look at it shelters in Gujarat It wasn't possible for them to look at and every report back. As to what the conditions are. That's in process of happening.

What I want to say is one of the issues that we have to think about which. Which upraised or. Already. It's not just. Shelter based on. You know if you're suffering domestic violence and if you report it to a formal agency. Because as I said that's a very small minute of women who are reporting to formally agencies. We need to think about. Shelters being available for women voluntarily. If a woman has suffered violence she should be good. Be able to gain access to shelters. This was a point put forward in the PIL by senior counsel. And I have to say the response of the. Chief justice and the assistant chief justice at the time was less than serious. They laughed at the suggestion. Of this. Voluntary access to think maybe for a practical reason from their point of view because they said if you did do that they would be overcrowded. *Aadhi aurate Gujarat ki andar*

*chale jayengi* so at least there's an admission that half the women are suffering domestic violence in Gujarat on that basis. And the assistant chief justice to this issue said. And the other women. Other half. Threaten every day. Main shelter *chale jaungi tu dekhte rahio* Ok. And the court would laugh and this happens. And I recounted this instance. In my gender class and all the boys have laughed its funny. So you know we have a long way to go to understand that this. These issues. A serious and. We are not making progress at on certain fronts. We may have the laws. But implementation and. Even in a relatively prosperous state like Gujarat remains a real issue. And I don't know what the. You know. You will know better than me. What the issues are. So really I am talking about using continuing mandamus. In your capacity as high court judge. To make sure that you do monitor. You do ask what data. You do ask as Dr. Baxi what was saying yesterday. What. The budget allocation for this. You know how you are doing this because the law is meaningless without the budget allocation without appointment of the infrastructure without having good quality protection officers. As far as the act is concerned. As far as POCSO is concerned as yet we do not have any support persons. Appointed.in Gujarat. But then it's only 2012 we'll wait. We'll see what's going to happen. But that. This is early days. Ok. I could talk a lot more about some individual experiences I had I'll just talk very quickly about the insignificance of you can see of counseling or. Intervention with reference to two cases involving child survival such child sexual abuse. Soft. I've been involved in two sexual abuse cases of children. In one case. It was a fifteen year old child survivor. In both cases. And this is. You know what you think is exceptional. But. Is happening. More than you would think the. Research in Maharashtra done by. Much less. There's shown that there are about eighty such cases in Maharashtra where the child. The discovery of child sexual abuse happens when they go for a routine examination at a hospital. It's found out that the child is six months pregnant yet. You'd think this was exceptional. Right. So in this case. Obviously. Degrees of vulnerability always very poor in many both the cases that I have knowledge of mother is not there. One is rural one is very poor urban right. So obviously a high degree of variability and neglect will also be there in such cases. Both cases. The in one case. The police actually were not doing the DNA. Testing. Right so if a child. In one case was saying so and so is the father in fact she was only saying she was I think so and so is the father she was saying so and so has abused me. And if she's pregnant and she's only giving one person's name clearly. That person must be the father. So in that case. A lot of work had to be done. To get the DNA testing. And the court did that very easily court was very helpful in saying to the police and

prosecution either you do this either you apply for this or. Make an order which would look very good in your name. But even with the paternity test in both cases risk. Could result in negative. But then a t. test is negative. And that was quite shocker. When a child has been giving you one name and. The paternity test triste. Turns out to be negative. So in one case. We have had to have a very good judge who ordered counselling. This child had not had any counseling. Neither of the children who had proper counseling in these cases. And the counseling that resulted in the child giving many more names. So it was widespread. Sexual abuse and then police picked up. Many people. And there was a paternity test matching. In one case in Ahmedabad so we were very happy at that point because it seemed like you know you got somewhere. And two weeks later that child committed suicide. So canceling. And that's the port. I'm just trying to tell you. You know and I feel responsible and it has changed me. In that before this I did not think about working on awareness of child sexual abuse. And I got into the whole training thing because I realized. The best possible legal interventions failed. You know so the best thing you can do really strike to prevent child sexual abuse. In our society that's something that really needs to be worked on prevention. Right. In the other case that the child is living. And in this case what's interesting is that because of all the psychological report and forensic analysis. There is actually a conviction despite the fact that this girl never gave evidence because she wasn't alive to give evidence. This conviction against the paternity test matching. And. But there was an acquittal against the main person that the girl was always saying had abused her. And that matter has been admitted. As appeal in high court because the issues not about you know put on a test being positive the issue is also about rape. And there is some evidence despite her. Evidence not being there. To suggest that there is enough cogent evidence for us to. And prosecution is supporting that appeal. So that's what makes a difference that the court ordered counselling and an expert. Intervention. At that stage. In the other case we also get a paternity test being negative and nothing happens. We arrived at that post the trial, deposition happening and nothing I mean you know. Advice from counsel was we cannot appeal because. There are no grounds for appeal if you look at the evidence and what. What what's there. In the trial court? But to me. Everybody you know. If you have a child and. There's pregnancy. And the paternity test is negative surely some questions must be asked that there is more here. Can went do something more. How can we just how can prosecution police. Or even I would say the judge. Leave it there. At that stage you know that counseling you have the power that the. POCSO gives you the power to order counselling and ask. You know. To me

that's a. Issue that. Unresolved. And in this case the woman is prepared to be saying that there is somebody else. But nobody ever asked her now it's too late. So I bring these cases before you for you to think the power that you have to make a difference. Not just in individual cases but of course. Also by providing that support by ensuring that interim orders are granted and. The proceedings are concluded. Speedily. And I know it's a big issue. But. In such cases and you can see the degree and degrees of vulnerability indifferent cases. You would get a sense of that. So for these reasons. You know. I think gender equality is a far dream but at least on gender based violation now. You have the power. And you have the tools. You know. And I request you to use it. Your power. Thank you

**Justice Gyan Sudha Mishra:** thank you mis Jha With you for expressing their views on such a sensitive subject with such deep inside. An experience that you know I would like to be. There can be no two opinion to what you have said. Because I don't think it's at all debatable. What you have expressed. But in my experience and. especially the recent experience that I have. You know gathered from some of the. Conferences and the. On the national commission. For women. The area of concern. Which has really given. Jolt. To us and especially the and women at large is that the domestic violence act. Is now being perceived. You see what you have said is that is absolutely correct. Then we proceed under forcing that Yes the. Woman has come up with a case which is genuine. Now there is more concern. In India I have noticed that there is that is misuse of domestic violence and. In in view of that the. Courts also are taking step in. In that and the most alarming decision of the Supreme Court. Where it says that the. Domestic violence act had been diluted by giving liberty to be the officers who want to investigate that give that you can't give provision says that you have to arrest. And if you don't arrest you have to have to assign a reason. Now. The law of the judgment. Has dramatically you know. Has said be off of it that if you. Arrest have to assign. Reasons. The total effect is that the whole provision. Gets diluted. And it is basically you know. To my mind is legislating. On the subject. So the area of concern of the late has been that the domestic violence. Is as more as a weapon. And the instance of some women and it has you know losing its efficacy. So in that context what you have said is that. Appointment of protection of officers. I think that is a very important part. There. I think the. The judge at the high court level. Because family court generally. Would not have that much of scope. To appoint a protection officers. Maybe they can appoint in just all the matter before which comes up before them. But the high court can do much more. By issuing continuous mandamus for. Appointment of protection

officers that it can be highlighted. As a preliminary report that. What you are alleging. Is that it is a false case or a true case. Instead of waiting for the evidence to come up at the final speed. I think if there are very relevant aspects that you all have to look at it very seriously that protection officers. Can come up at the start preliminary feedback on the instant incident which if you cannot and. And the report that is lodged by the in concern. So all. I would like to know impress upon you that in all of your study that not. You should. You will be. Or rather all of us will have to highlight that this perception and this mindset that is gaining ground. That the domestic violence act. Many times has been used to punish the husband and the in-laws. How to go about it and how do you tackle that situation. And that is there no woman get stocks. That you don't know. She. Instead of being. You know all getting justice. She has to be become defensive that. Whether your report is correct or not and especially with the Supreme Court judgement. I guess you know if you have to deliberate on how to go about it and. What would be the. This I think of a very relevant. Remedy that if protection office of appointment or protection officers are taken A little more seriously or are they you know if you insist. Or maybe some provision maybe added to the act itself then I think we might get some you know. We will be able to treat the issue. A little more with. Action. Rather than just dragging the matter. Because dragging but you are very right. That. The concern you that it is delayed. Because once a question mark is whether this this. This is false or concocted or correct or not correct or. The whole thing once you create a gulp in the mind of the judge things are going. Now how to. What to do about it. If anyone want to express what you would like to react to that.

**Pritarani Jha:** Yeah I mean PWDVA is pretty clear on the necessity of protection offices. And in the case you're talking about 498 A the cruel case in which is. You know

**Justice Gyan Sudha Mishra:** I've got a lot of somewhat of overlapping.

**Pritarani Jha:** There's overlap in that most of the time. What. Domestic violence things have. You know the analysis found that. Dowry violence was the main violence that was of the time women that even in the PWDVA women are complaining against. And actually to the point that you may have brought me up to a very important point that. Also I would really like you to address. One of the main points of PWDVA was actually to provide an all solution in one case. So you don't have to go to some court for maintenance you don't have to go to the criminal court for. Remedy under cruelty. You know. The point in this wide definition of violence was that you do a

domestic violence case and. All your remedies residence maintenance compensation. All of them can be in that proceeding. Unfortunately I know certainly in Gujarat this is not happening because lawyers. Can get more money for three cases. So they are advising women to file 498, 125. And domestic violence. Right. And it's a pot you know. You can you imagine you're dealing with this situation and you have three dates. In a month and. You know I have been unable to dissuade you know because obviously it's. It affects the likelihood. I have been trying very hard to say and you know just go in there is why do you need to also go in this but. You know that's against lawyers. Ethics issues are also there. And also creating problems because you know you're asking for maintenance in 125. That's disclosable in the probably proceedings. Proceed parallel proceedings something missions are going on which is which is a problem right yeah we are judgment that. Your ladyship talked about. Section 41 A. I find it interesting actually in teaching. Administration of criminal justice in gender and law and everybody knows about this judgment. And it's actually been implemented a top lawyer saying. *Phele Jo roj roj ka bail milta tha* WO toh ab hai nahi you know there's nobody thinks the people's lawyers is real livelihoods have been affected and it's been implemented. And I said to them because a lot of them are very skeptical about everything. To do with gender and law. Now how come it is that they don't know about the Supreme Court judgment on 304 B which has talked about the poor investigation in? Tree murder cases. 304 B... That police are not sending. Poisons. You know. . Analysis. Forensic analysis. Yeah that's not widely known and of course I don't know how well that's being implemented. We need to ask the question

**Justice Gyan Sudha Mishra:** about evidence act amendment also where the husband has to prove that if the presumption part. That's not a trial court I've hardly come across. Sitting in Supreme Court dealing with such cases. I've hardly come across a case where the trial court is at all aware that the husband has to explain how the wife died within 7 years of marriage. And you're right you know it's the awareness this also is a convenient. Theory of convenience is applied

**Pritarani Jha:** But that's why that's where you come

**Justice Gyan Sudha Mishra:** that does not have to be checked by the high court I mean.

**Pritarani Jha:** And one more we should and so because I don't get a chance to come before you have to crow about issues that you when I do. Section twenty six. Of PWDVA a lot of the lower judiciary were unaware of the fact that you can claim. The remedies. Under domestic violence act in any civil or criminal proceedings. So even if you are in a 125 proceeding you can claim. The

remedies a protection order or residence order there you don't have to do a separate. PWDVA proceedings. There's a lot of hostility to that from family judges like *humara kaam itna zyda hai* already. You know we don't want to believe it exists. But it exists. And it exists to give. Remedy to women so they don't have to go to three different courts or any other code. So that is something very powerful for you and me. In 498. Act is the section is very clear. In any civil or criminal proceedings. You have the remedies available. Under PWDVA. So whether that's 125 or 498 Women don't have to go for a domestic order. But again. Is that being implemented? You can ask yourselves. It's a deadly silence.

**Justice Gyan Sudha Mishra:** you know the silence is there because when there is controversy. There is a reaction where there's no controversy. What you have said in that two nuclear uncontroversial. What you have said is really uncontroversial we are all aware of it. So no one can. No one can really react. I think he wants to

**Pritarani Jha:** we can share that experience, and of course it's different, I think Maharashtra 142 protection officers have been appointed after a PIL by an advocate just recently. So there should be one per district in. Ya Maharashtra is a history on women's movement in work place

**Justice Gyan Sudha Mishra:** I would just request you. That you know. If you could request a concerned judge or the. Chief justice that if there are administrative orders. Y let it be. Let it out. . Maybe I don't know like on the judicial side whenever there was an order of this kind which could be used by a court of law. So there were the direction from the bench to circulate. All over the country. So if. That could be done. I think may be

**Pritarani Jha:** And just one more thing that I would like to add that I was just thinking. When you were speaking. Is also you know interim orders I did ask the lower judiciary when they were here because this is my chance to actually and after.

**Participant:** because they don't tell us why interim orders are

**Pritarani Jha:** Yeah I asked well I asked lower judiciary when I was training them

**Participant:** why interim orders are not been given? Because all this matter under the act, they all matters are very... so I am unable to understand why Gujarat...

**.Pritarani Jha:** in many states. The average the research shows. I can tell you the research shows that it's only being made in fifteen percent of cases which at this one of the worst ones. But even in himachal and other places it's being made in very. So when I asked the judges they said it could be appealed. You know we don't we're not making it because it could be yeah no but I will forward you the report lawyers collective report which shows that you know it. And it doesn't show five percent I've worked that out by a percentage but. Yeah no mean it situation varies in Assam it's fifty percent. So you know us and that's just an interim order but there's many other levels of sensitize nation that are required. On the domestic violence act and you know. The training of. Advocates on a new. Important legislation like this. I've also had a situation in which one advocate was you know. Was not aware that the act applies to cohabitees this is like three years ago. Which was done many years after the fact. So who is responsible? You know this is for all the advocates we're not talking about judges and. There's an issue that about the responsibility to make sure that they are up to date with the relevant legislation because if they don't know. Then again. That's going to be a problem, so you had some.

**Justice Gyan Sudha Mishra:** I would request. The. We have two because all of you have to catch the flights so we have to rise at quarter past one

**Participant:** I totally differ and agree with the by the professor Jha, but the topic it's all wide. That could not have been covered in just one session it requires. Sessions more than one. Basic norms of there. The topic which for discussion is that the judiciary may not be living up to the task of implementing the laws but the. Rendition of orders by all judicial courts. Is in consonance with the material which is placed before it and which is not wanting in the task what is disturbing is that the phrase gender equality which is occurring at the end of the word do you law. The use of continuous. Madame has called gender equality that is not only appropriate or what is more important is that there has to be is gender sensitization on gender equality. That's a very vast topic and I would not deal about it on at length. But what the preventive action which is required to be taken by use in promoting gender sent to sensitization. Is not being taken because the underpinnings of psychological. A feeling psychological underpinnings which doggedly remain in entrenched and etched in the psyche of women has. A historical, socio and until unless we understand the psychological and social milieu we'll not be able to dock preventive techniques. To eradicate this problem of gender sensitization of gender equality. Basically this gender equality

idea is promoted by. Western feminists and, they do not really understand it just as a second. First of all *no no no no no* please let me let you know let me let me Please. We have to listen I believe that you're not a spy of a kind of that kind this kind of area which the world of the country from which may not be applicable so far as India is concerned now what the point which I am trying to make is that freedom of choice which is to be given to women, that has to be within its the arena of the social ethos and the moral ethos, cultural ethos, I which women are living the most important issue which is required to be dealt with, and which is not dealt upon by learned speaker is that the underlying psychological underpinnings. Of the issue. Have not been addressed at all. If you analyze the system matriarchy and patriarchy you will find, that this problem does not erupt in matriarchal society. It erupts only in patriarchal society and be selective test determinations and the options for male child does, so many problem in matrimony is restricted only to patriarchal society. It does not exist in matriarchal society, Kerala very peaceful. North east very peaceful because dominance of Matriarchy there women in it. Women go to the house. Of the husband. Sorry the husband goes to the house of woman and live there as ghar jawai, and inherits the property back home. Maintains the legacy because her husband lives in her house, therefore we have to. Some of the other tackle the problem in this respect because until and unless we understand the psychological underpinnings. We will not be able to have a preventive action and that preventive action is more important than punitive action. Preventive action may able to eradicate the more than the punitive action, so therefore one has to go amongst the people and.

**Pritarani Jha:** And yet just very quickly if you read the article I talk about

**Participant:** and because of chemical distinctions also prisons estrogens and testosterone in male that's also going to be understood in grooming

**Pritarani Jha:** Very quickly. Just to address the two points if you read the article I talked very quickly that it's not possible to address all the dimensions of disconnection is a very difficult. Then that. It's not possible to do that in one article not to how you know you don't run for a typically on gender based of thought of my difference. At the right. Yes

I'll send you the. It's. If you go to the website of lawyers collective. I don't know if but that there was seventeen states involved. They looked back. They collected about twenty two thousand orders. I sent you that report. Which looks at the evaluation of I'll send that to

**Dr. Geeta:** good bye. And thanks. Give gratitude due to our law professors, Professor Upendra Baxi, Professor Moolchand Sharma, professor sudheer Krishna swami, dr. professor balram gupta, prita Jha. .And first and foremost. Of course. Our chair, who has really Taken care of everything. So and. To all of you. Participating so well, thank you so much for your patience listening and. sharing all your viewpoints. So it's a good bye till we meet next time. And yes of course to mam she is so nice without her support that is the gender equality, without her support of course we couldn't do all this and have sir with us, thank you so much mam. And thank you all our law associates and this is ruchi's last program, she is leaving us, she is going to Tamil and national law school so, this is very special for us.

Thank you