Project for Economic Education

INDIAN LIBERAL GROUP

National Seminar on the Administration of Justice

Taj Manjuran, Mangalore, August 6 & 7, 2004, Inaugural Session

Welcome Address and Opening Remarks

Mr Giridhar Prabhu:

We have promised ourselves justice, justice to be governed by ourselves and created the institutions through which individual members of our community can resolve differences and disputes in an orderly manner. John Ruskin in his Essay "The Roots of Honour" described five great intellectual professions relating to daily necessities of life, these exist necessarily in every civilized nation. The soldier's profession is to defend it, the pastors to teach it, the physicians to keep it in health, the lawyers to enforce justice in it, and the merchants to provide for it. And the duty of all these men on due occasion to die for it, on due occasion, namely, the soldier rather than leave his post in battle, the physician rather than leave his post in plague, the pastor rather than teach falsehood, the lawyer rather than countenance injustice. The occasion today is inauguration of a national seminar on judicial administration. We are all gathered here under the auspices of the Project for Economic Education to discuss over the next two days exhaustively on what should be the liberal position on judicial administration.

The legal profession is the garden of justice. We have a person who has emerged from it to the position of the Honourable Justice of the High Court, a person who is of keen intellect, fairness, deep knowledge and who has developed profound thinking on our judiciary. He is none other than Justice Michael Saldanha who is with us today to inaugurate the seminar and deliver the inaugural address.

Respected Sir, it is a great honour to have you with us today. On behalf of PEE and the Indian Liberal Group, Canara Chapter, I extend to you a very warm welcome to Mangalore and this programme. We are extremely happy that you will be with us during the entire seminar to steer our discussion and contribute from the extensive knowledge that you have in you with your long experience in the profession and on the Bench. We look forward to your enlightening speech, which will assist us greatly in preparing our position paper and resolutions to be framed.

The Liberal Group is bound together by members who believe in values, of freedom, responsibility, tolerance, social justice and equality of opportunity. The value of freedom is nurtured for us to live and grow to find out way to contentment and its essence is not to take away another person's freedom. Responsibility is not doing what one is not supposed to do. Tolerance we all know is to forebear and to give everybody and opportunity to enjoy his rights with obligation that he doesn't take away the rights of others. Social justice, and by extension economic and political justice, is to ensure that all members of the society have conditions for peaceful coexistence and conditions which nurture an inter-dependent community of people. Equality of opportunity is the other great value we cherish most in a democratic society that allows a willing person to grow and advance without let or hindrance in an orderly manner.

The person who binds us all together today is the Indian Liberal Group is none other than our President S.V.Raju. He agreed kindly that the seminar be held in our city and has been the force behind Indian Liberal Group's formation and advancement. He has been associated with the Swatantra party as its Executive Secretary and has vast experience in the political and administrative field, having been directly associated with Shri Rajaji, Shri Minoo Masani and other great stalwarts who were champions for Liberal India.

He edits the Freedom First magazine and is a strong supporter of cultural freedom and liberty and manages the Project for Economic Education. I warmly welcome Shri Raju on behalf of all of you here.

I would welcome and introduce to you Shri Subbaiah Shetty, past President of the Kanara Chamber of Commerce and Industry who is the Chairman of our welcoming committee of the forthcoming ILG National Convention at Mangalore in the first week of December.

A seminar of this nature will produce results when our participants will contribute drawing upon their experience and wisdom. This is a national seminar and we have 20 participants. I would like to extend a warm welcome to Justice Jahagirdar and Justice Puttuswamy, who is the President of the Indian Liberal Group, Bangalore Chapter, and to all the participants in this particular programme I extend a very warm welcome. I extend a welcome to Prof. Rajendra Shetty, former Principal of SDM Law College and the faculty from the law colleges of our district. A national seminar has also given ILG, Mangalore Chapter and occasion for the citizens of Mangalore. I welcome the participants who have decided to be with us for the seminar and also the members of ILG, National and Kanara Chapter. I also welcome Mrs. Kashmira Rao, Executive Secretary, ILG and PEE who has coordinated this programme from headquarters. I warmly welcome all National Executive Members of ILG. I also welcome all the invitees to this inaugural programme who have responded to our invitation and are with us today. I also welcome all members of the media and press who are present here with us.

We are all grateful to the Project for Economic Education and Mr. Raju for having a national programme of this stature. We are sure. The atmosphere and traditional hospitality of our city will make your stay pleasant and deliberations fruitful.

The background of the seminar and its objectives will be spelt out by M. Raju. This programme is of great importance to ILG and to people committed to justice. The programme is on Judicial Administration and will therefore be intimately related to the functioning of courts and the administration behind the functioning of courts. I am sure that such an august presence will deliberate and produce a document which will nurture, develop, sustain and perpetuate a system of judicial administration which will ensure justice for individuals in free India. I once again welcome all of you. Thank you.

Address by S.V.Raju

About the PEE / ILG and Objectives of the Seminar

Shri S.V.Raju:

I add my own welcome to the very warm words of Mr. Giridhar Prabhu. I speak to you now about two things. One is what is this Project for Economic Education and what are we in the ILG trying to do? I would also like to tell you what the objective of this programme is. Why are we holding in the middle of monsoon when planes don't land properly, when we get wet, we are coming all the way to Mangalore to discuss the Administration of Justice? Is there any logic in what we are trying to do? The rain is not of our doing but the timing has been of our doing and we hope that the trouble that all of us took and all of you are taking will end up in the realization of our objective.

Now let me tell you about the two organizations. One is yellow and blue and one is blue and yellow. The colour matching itself indicates that they are two very closely connected organizations. They are also two organizations founded by the same person. The ILG, if I may use the word, is a thinking organization. I used to use the word 'thinking tank' and my friend, Mr S.P Modi, said, "Tanks are not human. So,

don’t talk about tank. Think of an organization, which consists of humans. Tank consists of steel, water, petrol or whatever”. So, it is a thinking organization and the ILG or the Indian Liberal Group is more action oriented, at least we made it action oriented.

The Project for Economic Education and ILG were founded by the same man. That man was Mr. Minoo Masani, no stranger to Bangalore. He has come to Bangalore and he has come to Mangalore and I keep repeating this at many meetings that nothing enthused Minoo Masani more than to talk to a South Indian audience. So, I just asked him, “Just because I happen to be a South Indian, you don’t have to praise me”. He said, “No, the South Indians have a very subtle sense of humour and when I make a subtle joke, if I make in the North, there is no expression on anybody’s face, but the moment I cut such a joke in the South, everyone catches it on the dot”. So, he said, “I enjoy talking to the people”. One person who guffawed away when he said this was Mr D.V Gundappa. It was at a Rajaji Memorial meeting that was held in 1964 in Bangalore.

Now the PEE was founded by Mr Minoo Masani to educate the common people of economic issues. He also said, “I am also a common man because I never studied economics.” For that matter, he was Lawyer actually. But he said, “I learnt economics from people who knew what economics was all about”. And he was referring to some people in the Congress who did not know the word from any other science. He said that he wanted to have this economic education project to convey through discussions, seminars and publications and public meetings the basic issued of economy and more pointedly the economic reforms process. You must remember that along with Rajaji and many other people, Mr Masani was campaigning for – the word used was not liberalization in those days – right from 1960 we were campaigning for an open society, for an open economy. And he said, “Ah, at least the economy is being opened”. He became very ill soon

thereafter, but he said, economy has opened and we need to build public opinion not because these gentlemen believe in it but because India has got broke and there is no other way for them to reverse the direction. And he said, reforms being a matter of convenience lacked conviction.

Let the Project for Economic Education teach people what the economic reforms are all about and why it is important for the country to adopt it and make sure that it is genuinely implemented. That was one aspect.

The other was the Indian Liberal Group. Again, it is an old organization, older than the Project. The Project was started; in 1985 but the Indian Liberal Group was founded in 1964, again, to promote a concept of liberalism or open society with individual as the centre of all things when socialism and collectivism dominated and Nehru dominated. There was one person, a good reason for us to be in Mangalore. Masani would have been happy, a good reason was that one of the persons who joined him in forming the Indian Liberal Group was Prof. B.R Shenoy. They were a pair. When Masani made a speech in Parliament you can make sure that either Masani had gone to see Shenoy or Shenoy had come to Bombay for discussion on how to present it. He led from the opposition every budget speech from the opposition point of view in all the budget sessions of the Lok Sabha from 1960 to 1971 – all of them except perhaps in 1962. Otherwise, in all the budget sessions he was the one who led the attack on the budget, the finance minister and the policies. The man who was his inspiration and who guided him was Prof. B.R Shenoy. That is good enough reason for us to come here again and pay homage to Prof. Shenoy and say, very close to your place we are coming and doing things. We did two years ago a seminar on disinvestment. It was in the very same hall. There is a publication, we have just put out there. So, the Liberal Group was formed for this purpose.

I personally did not realize it that a number of people mix up liberalism with liberalization. They are not synonymous. China has liberalized, but it is by no means a liberal society. It continues to be a dictatorship. India is liberalizing its economy but it is not a liberal society in that sense of the term that it should be as we have been seeing that there has been in the last few years an increase in intolerance.

Today what we are seeing is that one party may have gone out and another set of parties may have come in but all of it is dominated by the politics of opportunism. Alliance and united fronts have been formed not as policies but merely as a means to acquire power and it is the game of arithmetic that goes on all the time. It is in such circumstances that the Indian Liberal Group seeks to promote not only the right kind of economic policies but also to strengthen civil society, campaigning against corruption and seeking a clean polity based on tolerance and respect for the rule of law, the basic ingredients of a liberal society. No rule of law, no liberal society, it is very very clear. We need the rule of law, we need the judiciary, an impartial, strong judiciary to be able to even economically develop. That again indicated why the Project for Economic Education is involved in this business of administration of justice. Hence today's seminar.

We have always admired the enthusiasm of Mr. Giridhar Prabhu. He is the secretary of the ILG at the national level. He invited the ILG to hold this seminar and also said, "Why don't you come here and talk to us. Let us have an organization of administration of justice". We are very grateful to him and glad to be here. The economy will thrive only when there is a rule of law and an independent judiciary. No one disputes the sad state of our judicial system. This year, the Indian Liberal Group has been focussing on three issues. The economy – we have just produced after a year's labour what is called a 'liberal budget'. We have produced a document of 40 pages, with four pages of regular *hisab-kitab*, as

they call it, of what India needs. What India needs is a liberal budget for a liberalizing economy. And what should be a liberal budget? Not the kind of budget where they keep on tinkering, tightening a nut and loosening a screw. What they need to do is a wholesale change in the attitudes. So, we produced a liberal budget, not merely criticising what was happening because we said that the days of criticism are over.

What we now say is what we need. We have a few copies with us. I am afraid, we won't be able to distribute many of these, we are keeping a few copies there but whoever wants a copy, please hand over your card to either Kashmira or Clariot and we will be able to send you a copy. Particularly I understand that there are some chartered accountants here and I would love to have them read it and tell us what they think. So, we are on that track. Now we are going to push it all over the country. It is written in simple style, it is written for everybody to understand and I can tell you this that it has received very favourable response and comment from economists, well known to the country. I know of two who have welcomed it. Vivek Oberoi has of course sent us, he is Director, Rajiv Gandhi Institution and then there is Mr Gurcharan Das who has written a personal letter to me saying that it is a wonderful document and he is going to write about is sooner or later.

Ten days ago, we had an excellent seminar. It looked more like a public meeting because we had provided for about 40 people, but that hall was crammed with 70 people, because we were discussing Indian agriculture and rural indebtedness – the simple question why our farmers are committing suicides. We wanted to go into that part of it and we had a seminar. Interestingly enough, our vice-president, Dr Sivaji, is a member of the TDP but he never got so much support from his own party as he got from the present Chief Minister who not only had great interest in the programme but sent half a dozen of his highest officers ranging from the Finance Secretary down to the Collector of Guntur district to try and participate

and tell him what should be done. Again, here we have not criticized. We have said what we feel is a policy on agriculture. Our liberal policy has been simple, “You (government) keep your hands off, let agriculture alone to develop”. But what should be done was the theme of that seminar which was attended not by 40 people but by 70 people. So, we are on that. Give or take six months, we will come out with a policy statement which we will try and give us a wide a publicity as possible on Indian agriculture.

The last one is this one – the administration of justice. It is in this spirit of providing the people of India, whoever cares to listen to us or read what we write, alternative solutions of liberal character, which has long been forgotten. If I could digress a little, in 1925, the freedom movement was under the complete control of liberals. Then came one man who hijacked it, perhaps he did the right thing at that time. It was Mahatma Gandhi who took the movement away from the liberals. But what we are now trying to do is to pick up the threads from the late twenties where they were promoting a particular point of view on how we should learn to govern ourselves to be able to run the country.

So, this seminar, we hope, will lead to Indian Liberal Group suggesting what needs to be done. We realize that the problems are big. We realize that every one of the subjects that have been listed in the agenda, there has been tons written on it, expert opinions given on it, but what we are trying to do is not to go to academics, not to go to a high level, we have only two targets. One target is the people, you, and the other target is the government. We want to tell you what to do, and we are telling them, this is, if you agree, you push them to do what needs to be done. But we want to do at one step at a time. We take very much to heart Gandhiji’s advice, “One step at a time is enough for me”. And what better to begin with that to get a bold judge to set the ball rolling. So, when we decided on Justice Michael Saldanha, I said, very good, you have the right man to give the right kind of push.

So, we invited him and we are grateful that he has come. Mangaloreans need no introduction. When Giridhar Prabhu was introducing him, I suppose he was introducing him to the non-Mangaloreans here. Most Mangaloreans know about him, most Bangaloreans know about it.

My son is in Bangalore, he knows about you. So, I am very glad that you came, Sir. To add to what Giridhar has said, I just want to read two small paragraphs from the editor's note to a publication "Contempt of Court and justification of Truth" by Justice Saldanha. This is what Mr Venkatesh Kulkarni of Jagran Bharat of Dharwar writes:

"Perhaps no High Court Judge in this country since independence has contributed more significantly to the advancement and growth of the law than the Hon'ble Justice Michael Saldanha, senior judge of the Karnataka High Court ever since his elevation as Judge of the Bombay High Court on 31st July 1990. He has produced with almost clockwork precision judgements that have been marked for their vision, for their being relevant and contemporary to the times and above all providing the type of relief that is real and meaningful.

A computer analysis indicated that of the 3750 reported judgements on 20th December 2003, the judge had proved his versatility in as many as 22 field of Law.

In his long career as a High Court Judge, Justice Saldanha has been responsible for clean-ups at all levels. He has earned the admiration, respect and gratitude of citizens from all strata of society, being regarded as an outstanding human being who has enhanced the status of the judiciary through his erudition and unimpeachable integrity".

Now you know why we asked Justice Saldanha to come and give us the push so that, perhaps, with his help, not only at this meeting but over the next months will

be able to at least bring out some of our proposals on what we should be doing to clean up the judiciary just as he cleaned up the Bangalore environment.

Justice Saldanha, may I request you to deliver your speech.

Inaugural Address by Justice Michael Saldanha (Retd.)

Justice Saldanha:

At a seminar that was held at Bangalore last week, what I pointed out was that I think the Honourable CJI had got his figures wrong. It is not 20% who suffer from lack of integrity, it is 20% who we can categorize as persons of integrity. And it is the other 80% who are virtually destroying the system.

We did a little exercise, my friends. This was a private exercise because on issues like this, you don't get official statistics. I understood a little exercise. I go to the National Law School of India University quite often. I requested the students to do a little private assessment. I asked them to come to the High Court over a period of month or a month and a half. This was as late as December, '03 – January of this year and I requested them to contact a cross section of litigants and to ask them only one question. Having regard to the experience that you have had with the system (the system includes the lawyers, the judges and everything that it stands for), if you had a recurrence of the problem which required you to come back to the system, would you do so or would you not do so? Do you know what the results were? Fourteen percent of the litigants said that if we have no other option, we would come back to the system but they qualified it by saying, "We do so with the utmost of reluctance". The remaining 86% of the litigants said, "We will put up with the ignominy, we will put up with any levels of injustice but we will not come back to this system, come what may".

Now this is not a good certificate. But this, my friends, is almost a barometer of where we stand.

What was a little worse was, when I decided to do another little exercise, which was done in January of this year, I asked the student of University Law College in Bangalore, to contact a cross-section of the litigants from the trial courts, i.e., right the Magistrate Court, the District Court, up to the High Court, the three tiers of courts in the city of Bangalore, and to ask them to do an assessment of the confidence levels that the litigants have in the system. They were asked to tell each of the person they talked to that if there were a graded scale starting from 0 to 100, what is the percentage level of confidence that you would repose in the system. Now it shattered me and really pained me because I know that the system has to a very large extent not lived up to its expectations, I know that there is a lot of unhappiness, but it really disturbed me, my friends, because they told me that they had interviewed 1578 litigants of different shades of economic status etc., in the different courts. Do you know that the results of the survey were unanimously, every one of these 1578 litigants said that if we were asked to do a percentage assessment, we would give the system 'Zero'. I know some of us – I for one – mischievous students when we unfortunately drifted into the science subjects, we did land up with zeros because either you are right or wrong as far as those areas are concerned, but when it came to an assessment, it was very disturbing to me personally to come face to face with this situation. Very briefly, my friends, we have got some very, very thought-provoking areas of discussion earmarked for this seminar. One of the very important areas and one of the most difficult ones is going to be handled by my legal and professional guru from the Bombay High Court, Justice Jahagirdar. I don't think there could be a better person than him to speak on the subject of 'Judging the Judges'.

Now what I want to start by pointing out is that the principal reason why this state of affairs exists is because of a total and complete...

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....And if you are not allowed to question even administrative actions of judges and particularly of the Chief Justices of the High Courts or the judges of the Supreme Court or the Chief Justice of the Supreme Court where they are genuinely wrong, in my humble opinion, it would be virtually an aberration and a total illegality to turn round and say, “I will threaten you with contempt proceedings”. Now, what has happened over the last few years, my friend, is that the undue use of the Contempt of Courts Act, or I should say the gross abuse of the provisions of the Contempt of Courts Act, has resulted in a situation whereby you cannot write an article, you cannot speak out, you cannot criticise and you cannot do this, then what are the checks and balances? How are you going to bring about reforms, how are you going to bring about controls?

I am reminded of the time when I was a young lawyer in the Bombay High Court. A very sad incident took place. We had one of the promote district judges who was very harsh, very ill tempered. His competency level was zero. He had been promoted from the district courts as far as many of the fields of the law were concerned and his competency level left much to be desired. One day, unfortunately, in his court a senior citizen, an elderly gentleman, was appearing in person and he ran into hot waters and there was an altercation between the two of them and the Judge lost his temper. He passed some harsh order, he dismissed

his petition. When the litigant filed an appeal, again he got carried away. What he did was, he used an expression in the appeal memo wherein he instead of describing the learned judge as ‘the learned judge’ in one of the grounds he said that the learned judge is a black sheep or something to that effect.

When the appeal came up for hearing, the Hon. Chief Justice brought it to the notice of this litigant and he said, “We will not tolerate expressions of this type in judicial proceedings and that too in relation to a sitting judge of the High Court. I give you the option of withdrawing this and tendering an apology, or else you face contempt proceedings”. The elderly gentleman sought to justify the grounds on which he had used this expression. Contempt notice was issued to him. I was in the court room when the contempt proceedings were being heard and despite a suggestion from the Bench that he should tend an apology and conclude the matter, he refused to do it. And then he kept justifying because he said that he wanted to point out what exactly happened, he wanted to point out that the expression used was justified in relation to this person. He had the highest respect for the profession and the others who manned it. The bench warned him that in the course of justifying a contempt, you commit further contempt and that is again actionable. And it was very funny, my friends, and this incident is still very strongly embedded in my mind. This old man told the judges, for how long My Lords is this system going to continue to clothe itself, defend itself with this strong shield of immunity which is called the Contempt of Courts Act? “May I make one very humble suggestion?”

“What is it”?

He said, “Will the judiciary agree to suspend the operation of the Contempt of Courts Act for a period of six months so that the public of this country are free to

express their opinion with regard to all the many wrongs that are taking place?" This I think was a very, very valid suggestion.

The first point I am trying to make is that we will have to bring about a situation where the whole object of our having met here is not only to pass resolutions but in order to ensure that after tomorrow a change is going to take place. Therefore, we want to have a mental agenda, we want to have a definite plan of action, which is going to become effective from next week or from this very week.

The second thing that I wasn't to point out is that the principal reason why we have this very unhappy and unfortunate state of affairs is whether it is law's delays or corruption, or lack of integrity, or lack of professionalism and so on and so forth, is because there has been a tremendous slide in standards. Many of you belong to the profession, most of you do, if you just look backwards, I was just telling somebody this afternoon that as I look backwards over the last 20 or 30 or 40 years, the quality of judges and the quality of lawyers who manned this profession has changed so very radically, my friends, and it has changed for the worse. Expressions are used that the profession has now turned into a trade and so on and so forth.

Now the lack of competency, according to me, is attributable as far as the judiciary is concerned to the wrong process of selection and appointments and promotions and elevations. We talk about law's delays. Today officially, and it is admitted in Parliament, that we have an average of 25 to 26% of vacancies as far as the high courts are concerned. As far as the appointment of judiciary is concerned, the percentage is a little higher, it is 29%. The system is overloaded as it is. There is absolutely no ground, no justification according to me for there being even a single vacancy. We have no dearth of human beings and professional and talented professional in this country. But there is something seriously and chronically wrong

with the working of the system. The argument is that the system is overloaded. Yes, if it is overloaded, what you have got to do is to reduce the load and not contribute further to the load so that it reaches a level of collapse. Even an electrical system can't take an overload. Now, if you look at simple averages and you say that 600 is the average number of cases of disposal per year of High Court judges and if in the Karnataka High Court, you have got 12 vacancies, in the Bombay High Court you have 20 vacancies, in the Allahabad High Court you have got 39 vacancies, you just multiply these numbers and you will see how you are adding to the problem instead of improving on it.

Now I was told by my seniors and I don't think that I am wrong that , take the higher judiciary, the date of retirement is known well in advance because on the attainment of the age of 62, a high court judge retires and the rule is interpreted so well that we are asked to retire one day before we attain the age of 62, but I think that is bit of a relief. The date of retirement of the high court judges (the higher judiciary) is known and I am told that in the British times, the appointment was made in such a way that the judge who came in as a replacement took office on the same day when the previous one retired. This is as far as appointments are concerned and I see no ground on which we can blame the government for this, because this is an internal matter, the recommendations have got to come from the judiciary and even the selection process is done by the judiciary as far as subordinate judges are concerned. So in my humble opinion, my friends, the retention of this level of vacancies is totally and completely unpardonable and we must insist that there will have to be a full stop to this state of affairs.

Now the second aspect that I want to talk about is, I know these are delicate issues. But I talked about the fall in standards and what I need to illustrate is that

the problem which the judiciary faces today is virtually a problem of mediocrity. Again, I want to emphasize that in this sub-continent, there is absolutely no dearth of top level brains, top level competency as far as legal profession is concerned. But there is something very seriously wrong in the process of appointment and we will go into it if necessary. This again, according to me, is unpardonable, because if instead of picking and appointing the most competent, you choose a person who belongs to the other category, then you are going to have absolute and total disaster. I will just give you an example of standards, however hilarious it may be. There was a gang rape case where three persons were accused. They were aged 19, 20 and 21 and they had been convicted. The judicial officer, despite the amendment to section 376 IPC had awarded them a sentence of one year RI only.

And he proceeded to give various glorious reasons in support of his decision. The State of Karnataka had come in appeal to the High Court. Many grounds had been given. One was more hilarious than the other. The last of them I must reproduce purely in order to give you an illustration of the type of standards that prevail, the last ground set out in judgement read something like this. One of the problems that arise in our country is also that where the judges are given the option to write judgements in vernacular or in English, many of them think in one language and write in the other, and the end result is that it is neither of the two. Now this last paragraph read something like this. “Finally the learned defence lawyer is making extremely passionate mercy plea for leniency. What he is pointing out to me, and I am in total agreement with this principle, is that from the Vedic time to the Shakespeare time, it has been prescribed that the quality of mercy requires that the milk of human kindness must flow very strongly from the judge’s breast. In India, that is Bharat, we are using the expression *‘karuna’* for compassion, and the learned defence lawyer is right when he points out to me that the accused person

before me should be shown *'karuna'* or compassion , and the learned defence lawyer is right when he points out to me that the accused person before me should be shown '*karuna'* or compassion and I am upholding this well settled principle of jurisprudence. I am also upholding his last submission which is to the effect that the three accused persons who have been accused of gang rape must give one more chance". Those of you who are from Karnataka must be familiar witht he expression that whenever anything happens, (in Kannada...)...in a gang rape case, the judicial officer says, give him one more chance.

I may also point out, my friends, that we are dealing with the system as a whole. The problem of mediocrity and the fall in standards has travelled to both sides because I have had serious problem. In fact the other day, in January, I asked one of the senior lawyers – of course, we have some of the representatives here from one of our very good law colleges, one of the best in the country – have they abolished the subject called 'professional ethics' from the legal syllabus or what?

Now we are having very serious problems – competency problem and integrity problems even on the other side. One of the first appeals that I dealt with was a simple appeal by a bank when I came to Karnataka where a very prosperous coffee planter had borrowed a huge amount of money from the bank and he had not repaid it. The bank had filed a suit. This was a totally defenceless case because he had taken the money and he had not repaid the principal, nor paid the interest and a decree should have been passed straight away. The record of that case indicated that it had dragged on for 9 years and 11 months in the trial court and in the order, which I passed, I said, I must compliment both the lawyers for their immense ingenuity of being able to drag on a case of this type for this length of time. At the end of it, naturally a decree was passed against the defendant.

Now you would ask me, why did the bank come in appeal if a decree had been passed. The reason was this, thanks to the persuasion of the defence lawyer in the operative part of the judgement – and it was a senior judicial officer – the learned judge says that the defendant's lawyer points out that his client is in financial difficulties and he therefore prays for instalments; hence I grant the following instalments: the defendant is allowed to pay the decretal amount in monthly instalments quantified at Rs.99.75. now where he got this 75 paise from and why he got it, I don't know and where he got this Rs.99 from, I don't know. The bank came in appeal and they said, it has taken ten years in the trial court and look at the type of decree that has been passed. We are only aggrieved by the fact that the defendant is a prosperous man and he has been allowed to pay the decretal amount in instalments. I did a rough calculation in the court room and I am happy to tell you that my calculation indicated that if the defendant was honest enough to pay up the instalment every month without default, it would have taken 297 years to satisfy that decree.

I was the administrative judge of Dakshin Kannada for a few months. I was also hearing some of the revision of petitions that came up from this district. On the eve of one of my visits to this district, I came across a case. It was a suit 59 days old, it was less that 2 months old and 31 interim applications had been filed in that suit. Can you believe it? It should go into Guinness book of world records. When I came here the next day, I called the two lawyers and I said, I am not going into why and wherefore but is this way to conduct a litigation? And as thought this was a tennis match, what they tell me is, "Sir, he keeps filing applications, therefore I have also go to file applications". Now the profession is not an arena for fooling around, my friends, I told you what the image of the profession is and I don't think that the figures that those law students gave to me, or the little exercise that I did

in December-January of this year, are wrong. That is the principal reason why all of you have met.

The last aspect that I want to call attention to, because some of the areas, which I wanted you to think about seriously are slightly extended areas to the subjects that have been set down, is this: there is a very, very serious combination of malpractices that prevail in the profession. The guilt or the fault for what is happening is equally on both sides and if I can give you – I know that this is going to raise eye brows but I think we have got to d a little bit of plain talking – some concrete figures with regard to what I am saying, then yo will understand that and all of us will be of unanimous view that some very, very measures are necessary and they must be adopted. What they are going to be, we will have to decide, but they must be adopted immediately.

I found in the last one year when I was a judge of the Karnataka high Court that very often hotly contested matter would come before me which was not unusual this is what happens to every judge, but what was disturbing, my friends, what's that as the case proceeded when it was substantially part heard it is inevitable that the trend is more or less apparent something very very sad and shocking would take place because the case would get transferred away from my quote. I took the matter up with the chief justice. It was useless. In the court of last one year, 47 such instances have taken place. Why do these things happen? Are you going to allow forums to be chosen? Litigants are the lawyers and the powers that he who manage the courts, going to be allowed to act in collusion and are they going to be allowed to destroy system? These are very serious issues. When I found that, it was impossible to the situation rectified at the Karnataka level I wrote about it to the Chief Justice of India. The letter was not replied, nothing happened. And this

happened six times thereafter until I finally gave up. Now these are again areas I think we have got to seriously think about because it is not some Utopian concept, it is not just in clearly that we talk about the system working badly, what is the rot has friend and if the robot has now reached the level of malignancy, I think some very very serious surgical action is very necessary.

My friends, I have just given us you a few pointers in the course of this inaugural address. At sessions such as this, I would like to keep my eyes and ears open and I am very confident, with experience that intelligence that emerges from the discussions in the course of this seminar, unlike other seminars and workshops which end only in resolutions, that on this particular occasion we will be able to bring about the much needed change. Thank you very much.

Open House

(Questions & Answers)

(There is some disconnect in the tape here. The points to which he is replying, which were made by certain speakers have not been recorded. Only the answers by Justice Saldanha are there)

Justice Saldanha:

There are very many controversial areas, which I did not deal with. First of all, as far as the cases relating to the high and the mighty, or the rich and the famous are concerned, you are probably right in pointing out that if the investigative agency is government controlled, then the possibility of a fair and impartial investigation becomes very remote. That is one of the reasons why the institution of the Ombudsman was thought of. Unfortunately, in our country, we have re-christened it by the names like Lok Ayukta and things

like that. Those offices or officials have not been so effective. I would share the view that as far as the conduct of investigation of this small category of cases is concerned, it would be very healthy to think of a situation where by we have a high powered investigative agency that is not under the influence or control of the government. But as per as the general investigation of other criminal cases is concerned, it would not really be feasible. But you didn't make a point when you talked about this aspect that basically the principle that you are advocating is judicial supervision.

It does exist in many countries and as you are aware in some of the situations, where cases have gone to the High Courts or Supreme Court, the courts have virtually monitored, at times they have even monitored investigation, even the conduct of prosecution at times, without interfering with it. Now that would be useful in the first category of cases where we require very high calibre of independent investigation, and I would share the view that perhaps it would be a healthy practice to consult the judiciary with regard to the appointment of a prosecutor because you are 100% right, in fact in as many as 17 of my judgements, I have had to not only pass strictures but I also found that passing strictures was useless. I have laid down very concrete guidelines with regard to the manner in which the prosecutors are required to be selected, but more importantly the manner in which we have, to have some system, some the guidelines, some effective control, with regard to what they do in the courtroom because otherwise you are quite right, a good investigation can be totally frustrated. If a dishonest prosecutor is there, he will say the eyewitnesses are not available or the documents are not traceable and so on and so forth. All sort of things happen. So perhaps, with regard to the more important cases it would be useful and maybe it would also be a salutary practice because those panels are not appointed every day. It should be a salutary principle to say that the judiciary

should be, the higher judiciary preferably, should be consulted with regard to the choice of these panels, because otherwise, as is happening in most of the cases, the persons who are chosen on these panels are chosen for political reasons and the competency and the loyalty levels are both in serious doubt. So I do share the view that there is much in the suggestion which you put forward.

The last thing that I want to point out is that I have repeatedly had occasions while dealing with these problems to specifically point out that within the existing framework of the law, even the trial judge has not only the powers but he is invested with the duty not only to act as a dispassionate observer at the trial, but he is also required to participate as a live human being and he is required to ensure that it ends in a fair result, which means that if somebody tells him that a witness is not

traceable, he need not do away with the presence of an eyewitness, if he knows that the reason given is sham.

The law itself prescribes the means under which we can ensure that, that witness is traced out and brought to the court room. I will just give you one very funny example. In those appeals against acquittals, as you know, once an acquittal order is passed, the accused is released from custody if he is not required for any other criminal offence. Now we have got all sort of orders that are passed. I told you what happened in the gang rape case; I can tell you about other cases also. There are all sorts of orders that emerge from the trial courts and the accused is acquitted. The state comes in appeal because that acquittal is wrong. By the time.....

(Tape No 1 ends here)

(Tape No 2)

....The next stage is as far as presentation and again I am indebted to my friend from Chennai, he is very right when he points out that even investigated case can be destroyed by a dishonest or irresponsible prosecutor.

Thirdly, it is very necessary for us to work towards a situation whereby we have some kind of effective supervision in order to see that the judicial officers in the trial courts do not sabotage the law. An appeal came up before me in a murder trial. The evidence was not only hundred percent conclusive, it was 150% conclusive, if we can use that expression. It was one of those shut cases. The trial judge had acquitted the accused. The state had come in appeal. I was breaking my head to find out how did this judicial officer justify the acquittal. And I think if all of you are a little wary, the humour would be worthwhile.

You know what the learned judicial officer had said in the concluding part of the judgment. Right from the law college days we were taught the very sacred principle of criminal jurisprudence and one of the most important ones was that it is better that 9 guilty persons go scot free rather than one innocent can be wrongly convicted. Now where this norm has come from, I personally don't know, but we were also taught the same thing. I don't subscribe to it because my simple view is that if you have a pure and effective system, if a person is guilty he should be convicted and if he is innocent, he should not be convicted. That is how you have got to work. All this business of 9 guilty persons and 1 innocent person, I don't subscribe to it. But anyway, this is what he says. Then he proceeds to say – look at the logic – "I have acquitted the accused in the last eight cases and this is the ninth one; hence I am acquitting it". *(Laughter)*

These are cold jokes, my friends, but I have not made them up. When I related the para from the judgment at one of the international seminars because I was trying

to illustrate this point with regard to the aspect of competency levels, one of the British judges at the tea interval came and asked me whether I had made it up. He thought I had made it up in order to humour the audience. I said, No, I am incapable of making it up.

Well, my friends, the Supreme Court was to hear the challenge today and they have probably given the answer to that. But there is an inflexible principle, as you know, whether we like it or not, particularly the judicial decisions of any court, more so when they happen to be of the highest court, the High Court or the Supreme Court, those decisions have to be respected and they have to be followed. This is also principle of good governance.

Now, if you do something that flies in the face of a judicial decision, then it is very vulnerable action and when I was asked in Bangalore as to what was the solution, I had pointed out that the right course of action would be to go back to court and point out like in this instance, the government says that (I had pointed out to the government) the interests of 41% of the students are very seriously endangered and that if in the light of the Supreme Court orders, serious practical difficulties have arisen, nothing prevents you from going back and pointing it out to the judges.

Judges are not going to be unreasonable and particularly when you point out that the interests of the students, – a sizable number of the students – is involved. The courts, numerous times, do reconsider. Now this case has not been finally decided, this has to be referred to a large bench on certain issues, but with regard to the existing order, I would’ve preferred to have seen the course of action. I personally feel that if you go and bring about an Act or Bill or an Ordinance or something that flies in the face of the order of the highest court, that would be very vulnerable.

Vote of Thanks

Mr Shetty:

Our esteemed Chief Guest, Justice Saldanha, Mr. Raju, the National President, Mr Giridhar, delegates from all over the country, dignitaries, gracious ladies and gentlemen. I am here to propose a Vote of Thanks as part of the concluding session of the inaugural session wherein we heard a very illuminating speech, rather a lecture, on a subject of his choice. My only request to Justice Saldanha will be to please give us 'one more chance' on a subject probably of his choice which we will utilize at the appropriate time for the benefit of the citizens of Mangalore. Thank you very much, Sir, for having come over here.

We have amongst us Shri S.V. Raju, our National President, who has taken a special interest to have this seminar in this part of the country, as he said, he has given enough reasons why it should be held here also. Sir, thank you very much for having come here with your entire officials. Thank you very much.

I also thank Kashmira Rao who is the main livewire behind the entire things happening around here. Thank you, Madam.

We have delegates from all over the country who have taken lot of interest to he here. Again, thank you very much for your gracious presence.

And finally, for the dignitaries who have also gathered here, for having taken part and also having asked good questions, thank you one and all for your presence and making this function a lively one.

Finally, a small announcement. We have got very few but very good literature around here and if you are here it is free and for others there is a nominal charge. You are free to go through it and buy whichever you need.

Lastly, we have a high tea arranged after the session, please have the tea. And thank you all for your gracious presence. Thank you.

(End of Inaugural Session)

Session 2

The Judiciary as Lawmaker

Mr S.V Raju:

Now we move into the sessions. One or two small things, one is of course that the numbers are much more than we had bargained for, which is a happy coincidence. We will see that all of you have got a copy of the list of participants. There is only one name, that gentleman came at the last minute. I don't know who it is. He is requested to take the folder and the badge from Kashmira, write his name on it and put it on. A number of them are from the Faculty of the Law School.

Secondly, before I hand over the mike to Justice Jahagirdar who will take the chair at this session, from Mr. Mihir Desai who speaks on the subject 'Judiciary as the law maker", I would like to say that the entire proceedings are being recorded, the idea being that we produce a report not for publication but a report that will form the basis of a draft. We will be setting up a working group tomorrow evening which will, hopefully, work on producing a series of recommendations/policy statements on the various issues that we would have dealt with. We are making sure that this is not one-off seminar. We don't believe in one-off seminar where nothing happens after we all go home. we want to continue this. This process has just taken off. It may take the next seven or eight months till we come out with a very considered policy statement which we can then promote. So, everyone must be able to get a chance. The normal practice is, we have 90-minutes

sessions and in that session, not more than 30 minutes, between 20 to 30 minutes, are given to the person who moves the discussion and the Chair to make comments.

As far as possible, since we are so many, try and restrict your intervention to as briefly as possible. Whatever you have to say, say at once and if you have more than one thing to say, then wait for another chance to say. With that I request Justice Jahagirdar to take the Chair and conduct the proceedings.

Session 2

The Judiciary as Lawmaker

[Justice Jahagirdar in the Chair]

Mr. Chairman:

Thank you, Mr. Raju. The subject of this afternoon session is **'Judges or Judiciary as the Law Maker'.** I am now no longer in the judiciary. I left the judiciary around about the time when Justice Michael Saldanha joined the judiciary- 15 days after he joined the judiciary. In the earlier session, he made me repeatedly blush by referring to me in glowing terms which I am not sure I deserve. But I had seen him at the bar. For fourteen years he was appearing before me in the courts. Prior to that, many people don't know, he was in Rajni Patel's chambers for some time. Of course, he left Bombay High Court after I had retired. So, we thought it was a loss to the Bombay High Court but it was a gain to the High Court of Karnataka to which l also belong because I am also a Kannadiga born in Bijapur district, but both of us cut our teeth in the profession in Mumbai.

Coming to today's speaker, Mr. Mihir Desai is a very well-known social and human rights activist in Mumbai. He is a very active lawyer and there is a personal equation between him and me because his father was a professor in the University School of Economics and Sociology when I was a student studying in my MA. in 1950-52, i.e. nearly 52 years ago. So, I regard Mihir as a *'Guru Putra* '. I have known him for long and we have worked together in some areas in Mumbai. When the question arose, who would fruitfully do justice to this subject, the first name that occurred to me was that of Mihir and I suggested it to Mr. Raju. I am not quite sure whether he is a 'liberal' in the sense in which Mr. Raju understands the word, but he is a liberal in the sense that he believes in freedom of the individual, he believes in the human rights movement and more as a duty rather than as a profit, he has spent hours and days in the defence of human rights in Maharashtra and particularly in the High Court. *'Judges as law makers'* is a ticklish subject and this I think started in the Asiad Labour case in the eighties. *'Judges as law makers'* is probably synonymous with judicial activism and this has been going on for some time. When I get my chance to make my concluding remarks, I will give my own observations on the subject. In the meantime, I am sure you are all eager to hear what Mihir has to say, so may I request Mihir to take the floor.

Mr. Mihir Desai:

Thank you, Mr. Chairman. Justice Jahagirdar, Justice Puttuswamy, Justice

Saldanha and Mr. Raju and the Indian Liberal Group. I thank you all for inviting me here to share my thoughts and apart from anything else to visit this beautiful city. From whatever I have seen of it up till now, it is really beautiful. I am seeing this beautiful city for the first time, this is my first visit to Mangalore and I have already begun liking it very much.

Coming to the topic of today, *'Judges as law makers'*, this has been a very

controversial subject, as Justice Jahagirdar was saying, especially in the last 20-25 years, since the beginning of the era of public interest litigation (PIL) and judicial activism. There are people who feel that the judges have crossed their limits, have been regularly crossing their limits. There is that distinct view that they are encroaching into the field which is earmarked for the legislature. There are some others who feel that this is the need of the hour and what the courts are doing is justified. So, there is a sharp polarization on this issue of the role of the judges as law makers. Before I go into the present scenario of the last 20-25 years, ultimately this has its roots in the whole issue of what is the role of a judge. This controversy has been going on since possibly the time the judicial institution as such has been established. What is the judge supposed to do? Is the judge only supposed to sit and interpret the law, or is the judge supposed to do something more? The classic understanding is that you have the legislature which makes the law, you have the judiciary which interprets the law. But this classical understanding itself has been challenged from time to time by various sources.

For instance, if you look at our entire common law, the law of torts etc., it is a judge- made law. It is not something which the legislature drafted and put before you that this is the law. It is a judge-made law. So judicial activism in that sense begins with common law. Similarly, when one is talking about the legislature being the only source of law drafting, that itself is a misconception because we have the whole gamut of personal laws.

One may feel that the personal law may be done away with or not done away with. That is a different debate altogether. But the fact of the matter is that today we

have a whole set of personal laws, customary laws, we have hundreds of thousands of administrative instructions, bylaws, rules and all which were not necessarily ever placed before the legislature.

So, you have this classic distinction between legislative role and non-legislative role of the judiciary. It has been going on for quite some time. In fact, earlier it used to be believed that there is a Blackstonian principle which came up for consideration before the Supreme Court especially in Golak Nath 's case in a different kind of context.

The Blackstonian principle basically says that the judges only discover the law or interpret the law. So, the question in Golak Nath 's case was that if you are only discovering the law, whatever you see as the law today should have been the law since the time of its inception; it could not have been any different. And then the courts had to say, but that causes lots of problems because a lot of things might have been done in the past on the basis of the earlier interpretation of law. Are you then going to tum the whole wheel backwards and set aside all those decisions which might have been taken in these 40 yeas, people might have acted on them, bought properties on them, on the basis of which they might have done a lot of things on the earlier interpretation because today the interpretation has changed. If you go by the classical theory of 'judges only discovering the law', then whatever is the law which is discovered today should have been the law as interpreted 40 years back, 30 years back or 20 years back because you can't change the law, you are only discovering the law.

Apart from that, what I want to focus right now on is essentially the last 20-25 years when this whole dispute about judges as law makers has come up. In order

to realize what this whole controversy is about, we have to look at it in the larger context of public interest litigation. That is what I feel that we have to understand the role of judges as law makers within the larger context of the rise of public interest litigation and law-making being used as a tool in aid of public interest litigation. That is how the present situation has arisen. PIL in the present sense in which it is being talked about arose in the late seventies. It arose not because suddenly somebody felt that now let us start doing public interest litigation, it arose in a given political context. The political context was, just before PIL emerged, you had the days of emergency when the rights of the people had been trampled upon quite badly. Not only had the rights of the people been trampled upon badly but the judiciary had behaved during the emergency in an extremely - I don't know what harsh words to use - very, very subservient way towards the Parliament.

Justice Jahagirdar: It was a judicial suicide.

Justice Mihir: Yes, as Justice Jahagirdar has pointed out, it was a judicial suicide. That was the second thing.

The third thing was, you had at that point of time, certain judges whom we now characterize as 'activist judges' in the supreme court. I am talking right now 'of the Supreme Court, because many of the high courts did play a very good role even during the emergency, or they tried to play but then they were told not to do that by the Supreme Court. But that was the situation. And you also had a situation in the Supreme Court where the court itself was in a big crisis because of the whole dispute about supercession of judges which happened from 1973 onwards up to 1977. Where traditionally the senior most judges were appointed as chief justices,

that traditional concept had been bypassed and people were picked and chosen and appointed as chief justices who basically followed the diktats of the ruling party. It was in that situation when the judiciary itself and its credibility was in crisis. On the other hand, people were losing faithin the Parliament, in the bureaucracy and in the various other machinery, when suddenly like a swing the judiciary raised its head through PIL. For doing that they did three or four important things. They made three or four procedural changes and made certain substantive changes. The procedural change they made was, they changed the whole doctrine of locus standi, namely who can file a case in court? Ordinarily only the person affected can file a case in court. For the purpose of PIL, they said, No, not necessarily, even a person who is not directly affected by an action which that person is challenging can approach the court on behalf of groups which are not in a position to speak for themselves. That is how it initially started. Now of course it has expanded further.

The second thing is, approaching the Supreme Court or high court was a big

problem for any common person because it is quite an expensive task. Apart from the lawyer's fee which can be very high, you have to pay in terms of transport, in terms of typing, in terms of court fees. It is an expensive business going to court, it is a luxury going to court, it is not something which any ordinary person will think of at the drop of a hat. There the court adopted the second procedure, i.e. of letter petition, that even postcards written concerning violation of fundamental rights could be treated and would be treated as petitions, would be converted into petitions and could be heard on them.

The third thing which the court did was taking suo motu action more and more. Suo motu powers were always there, they used to take actions even earlier. But more and more courts, reading something in the newspaper, taking action on the

basis of that, seeing something on the TV and taking action on the basis of that, increasingly the courts were not waiting for people to approach them but were going directly to the injustice, trying to deal with that injustice, that was what was happening.

These were the procedural changes that were taking place. But in that whole

situation, there were also certain substantive changes taking place and which had to take place in order the public interest litigation to really root itself. The first thing was that they had to widen the interpretation of fundamental rights because you always had fundamental rights and any citizen could approach either the high court or even directly the supreme court in order to enforce the fundamental right. That was always the case from the beginning of the Constitution. Now what happened was that increasingly from mid-seventies till date, the interpretation of fundamental rights had been widened and was increasingly widened. For instance, right to life initially to some people meant only right to animal existence, as long as I am not killing you, I am not affecting your right to life.

But then the court concluded, no, the right to life includes the right to

shelter, right to free legal aid, right to speedy justice etc. etc. How many of them are implemented is a different matter. I am right now talking about the wider interpretation which the court was giving to fundamental rights. That is very essential because in order to cover within its range various issues which earlier were not being taken care of, they had to expand the notion of fundamental rights. That was what was being done. Article 21, Article 14, right to life, right to equality, right against discrimination etc. etc. were given wide interpretation and those wrongs which were earlier not even treated as wrongs, were now sought to be treated as violations of fundamental rights. And for those you could approach the courts.

The other thing which courts started doing is, the normal practice is that the court sits as a passive recipient of evidence which both parties bring before it. That is what the judge is supposed to do. You have a case against somebody else, you bring the proof, you bring the evidence, I will look at whatever you bring, whatever the other side beings and on the basis of what both of you have brought, l give my decision. But in order to promote public interest litigation and deal with injustice in various ways, what the courts started doing is, it said, Look, we will not wait, we will not depend only on what the parties being before us, but we will act as inquisitors, we will appoint inquiry committees, we will appoint commissioners and those people will do the fact finding and come back to us with the facts. That is how the courts' role started changing.

This was done in various cases. There are innumerable cases. You see in a number of environmental cases, for instance, the courts have appointed certain expert environmental agencies to go and find for itself whether there is actually an

environmental violation. Because a citizen would go to a court and say, Look, I know that the water I am drinking is polluted, but I don't have the means to test that water, I don't have the money to go to a certain hi-fi laboratory and get it tested. I know that my crop is getting damaged every year, what am I supposed to do? In a traditional judicial system, the court would have said, you have not proved that your plant is polluted or your water is polluted, sorry, you are dismissed. Now the court has changed its role and said, Sorry, we cannot deal with it this way, we will appoint a commission, that commission or expert body will go and find out whether there is actually the pollution, what is the course of pollution and how to deal with that pollution. So, there is a whole change. As.one can see, the role of the court was slowly changing from just being a passive recipient of evidence to an active inquisitor in order to find out what was happening for itself.

And one final thing happened. There are a number of other things which happened which I cannot go into just now but we will possibly go into them during the discussions.

The final thing which happened was that the courts started doing something which it had not done, at least in a big way, before. It started as one may call it, making law, it started issuing what are called guidelines, it started issuing directions which no law provided for.

I will just give you an example. There was a woman called Bhanwari Devi who was working in Rajasthan on a government project. Her job was basically to stop child marriages in the villages. She tried to stop the child marriage in a particular very high caste person's family and she was gang-raped. Cases were filed and they were going on.

In the meanwhile, an organization approached the Supreme Court. Look, this is the problem not only of Bhanwari Devi, Bhanwari Devi is an example, this is a problem of all working women at the workplace. Today we don't have a law dealing with sexual harassment at the workplace. That was the problem with which this organization went to the supreme court that there is no law dealing with sexual harassment. Ordinarily the Supreme Court would have turned around and said, if there is no, go and knock at the door of Parliament, why are you coming here? If there is a law, we will interpret it. But if there is no law, what can we do? That is what traditionally Supreme Court would have done.

But in this changing scenario, what the Supreme court said was, Okay, if there is no law, we will issue the guidelines. These are not guidelines which tells you how to. implement the law. These are guidelines which begin with the definition of sexual harassment at workplace. It defines 'sexual harassment at workplace'. This is a clear case of law making. This is not a little bit of a commission being

appointed and all that. It very categorically starts with definition of 'sexual harassment at workplace', the judgement says what every employer has to do, it says that every employer must have a grievance committee, it further says that the grievance committee must have 50% women, it says that it must have an NGO representative, it also says at the end, it is recommended that the government should pass a law on these lines, but till such time the government passes the law, this will be treated as the law of the nation. Now this is a clear case of law

making.

Now one has to be very clear about one thing: The Supreme Court whenever it makes law never says we are making law. And to the credit of the Supreme Court, it uses very ingenious arguments to say that we are not making law. l will give you an example, e.g. Vishakha's case. It is a very interesting case. A lot of time the Indian Government will go and sign something in Geneva, something in New York, in an international UN convention etc. etc. And they don't bother. You go and sign it, that is all. You sign and then forget about it. You are supposed to show to the world that you have signed some international conventions. So, you go and sign it. So, they had gone and signed this convention on elimination of all forms of discrimination against women which is called CEDA W in short. They signed it, they had ratified it and forgotten about it. These kinds of conventions are signed day in and day out. Internationally it should look good that we are signing these conventions. But the Supreme Court found out that India has ratified this convention. Ordinarily, the Supreme Court would have said, Look, there is no law passed, we have ratified the convention but that does not make it a law. But here the Supreme Court came out with an argument which it has systematically accepted in various other judgements, Look, the government can't take a double position - one position when in Geneva, another position when in Delhi. If you have signed and ratified a convention and if there is no contrary or conflicting law

in India-- about sexual harassment there was no law at all, so there was no question of a conflicting law - the convention which you have signed there, we will treat it as part of the Indian law. Now CEDA W defines all these things, what is sexual harassment etc. etc. So, they borrowed it straight from CEDA W and put it into the Indian law and said, we are not making law, we are just saying that this is the law anyway because you have signed the international convention. So more and more now they say that if you are signing an international convention, if you are ratifying any convention or covenant, and if there is no conflicting law, we will treat that as part of Indian law and you will have to implement it. So, this is one method used by the Supreme Court at law making. Supreme Court would of course say that we haven't made any law, we have only declared that this is the law, namely international convention is the law, we have not made any law. I have no problem whether they call it making the law or declaring the law because I would personally stand on the side of judicial law making. That is my personal opinion. To an extent one would not go beyond a point, but to an extent I would definitely feel that in certain areas where Parliament for whatever reasons, for populist reasons etc. etc. is not really passing any laws because it will hurt some constituency or hurt another constituency, there is nothing wrong at times by judges giving directions, giving guidelines etc. etc.

(Side A of Tape ends here)

Side B of the Tape

The same thing has happened in international adoptions. The Supreme Court has given detailed guidelines as to how international adoptions can be carried out, what are the basic guidelines, what are the precautions to be taken and if you don't do it, it will not be treated as valid adoption. In July 2004, they have come out with a judgement where they say that while you are cross-examining the rape

victims and child sexual abuse victims, there should be a screen between the accused and the victim because the victim does not get terrorized while deposing before the court. Now this is not part of the Criminal Procedure Code, this is not part of Evidence Act, this is not part of any law. This is a clear case of judicial Jaw making when you are saying that there should be a screen.

No Law provides for it. This is one method used.

Different methods are used for judicial law making. The other method which is used is, of course, adopting various doctrines. This has happened specially in environmental law. What are the various kinds of doctrines which they have been adopting? I will just list a few because I don't think we will have time to go into it. They have been adopting, for instance, the doctrine of trans-generational equity. Trans-generational equity means that today you can't say that I am not going to harm the environment and therefore my act should not be struck down. Suppose I am carrying out an activity which will impact the environment after 50 years, I can't say that therefore you don't control my activity because there is no harm being caused today. How are you telling me something which is to happen after 50 years? The Supreme Court says, No, you can't do that because there is something called 'trans-generational equity', your actions will be judged not only by what you do and what its impact will be today, but also after 50 years or 100 years and you can definitely be controlled as far as that is concerned.

You can go on and on. Whether it is a question of medical fees, how much fees the medical colleges charge, or whether it is a question of what is the method of recruitment in a particular establishment, one can go on and on as to how many instances of judicial law making are there.

One can have a debate whether this is right or wrong, but I personally don't think today we can deny that there is judicial law making going on. One can say that the

judiciary is going beyond its limits, the judiciary should not go beyond these limits A, B, C, D, that is a different matter. But there are two aspects in which the judiciary, despite its law-making efforts, has not encroached. Those two aspects we must keep in mind. One is in respect of economic policy. Judiciary has consistently refused to interfere in matters of economic policy. That one can see in a number of cases - whether it is the case of BALCO disinvestment, whether it is the case of Mauritian double taxation, whether it is the case of Enron where again one of the aspects was economic policy, it wasn't just an environmental argument. So there have been any number of cases where the judiciary has been consistently saying that they will not interfere as far as economic policy is concerned. There might be a case here or there. There was this case of oil privatization where the Supreme Court said that we will not allow it because the privatization Act has not been passed by Parliament, it has been done by delegated legislation which can't be allowed. But that is one small kind of an instance where the court refused to allow that on highly technical ground and sent it back to Parliament. But otherwise on economic policy, the judiciary has resisted in going into law making.

The second aspect where the judiciary has refused to go into law making is the aspect of personal laws which according to me - this is my opinion, some of you may share it, or may not share it - is on an absurd argument. Any law can be challenged as being violative of fundamental rights, discriminatory, violative, this, that and the other and it can be struck down. The Bombay High Court in the fifties and since then the Supreme Court has been consistently taking the stand that personal laws are not laws in force and therefore we cannot touch them because they are not susceptible to Part III of the Constitution, i.e. fundamental rights, which according to me is an absurd argument.

But the point is that as far as the uncodified personal laws are concerned, that is those personal laws which have not been enacted by Parliament, but have some traditional force either of some custom or some holy book or whatever, the Supreme Court has consistently stopped encroaching as far as that is concerned.

My friends, these two major areas, namely the economic policy and the personal laws, are the areas where the Supreme Court has not really gone into law making, but otherwise if you see, whether it is in respect of rights of prisoners, whether it is in respect of rights of women - for instance, in MC Mehta's case, concerning rights of children, or child labour - the Supreme Court directed that any person who is caught with a child labourer should be directed to pay Rs.25,000 as fine. The Child Labour Act doesn't provide it, the Criminal Procedure Code does not provide it. The Supreme Court judgement provides it. And I feel it is a right decision. The point is it is a judicial law making. One should not run away from the fact that it is a judicial law making. It is judicial law making. It may be right, it may be wrong, that is a different matter. The fact is that it is judicial law making. That is what happened, I was giving the example of MC Mehta's case on child labour.

Similarly, there are a number of other cases which one can just keep on going on and on because there are hundreds of cases. I just referred to Supreme Court cases because many of you might be familiar with those. But there are hundreds of cases of various high courts and the Supreme Court where law making in terms of giving directions, in terms of giving guidelines, in terms of providing basic framework of how a particular law will operate, has been done by the Supreme Court.

Of course, when somebody tries to legislate, then the Supreme Court comes down heavily. For instance, Justice P. D. Desai, when he was in Himachal Pradesh High Court, directed the government to pass a law concerning ragging, and the

Supreme Court came down heavily on him saying that you can't direct the legislature to make a law, it is not your job. So, these things also go two steps ahead, one step backwards kind of thing. That situation always happens. But essentially today we are in a situation - I would just like to end by saying that today we are in a scenario wherein you have acceptability of judicial law making, whether one calls it judicial law making or not, whether one calls it expansion of fundamental rights, whether one calls it incorporation of international instruments into our law, or whatever one calls it, but we have this whole judicial law making which has been taking place since the last 20-25 years, especially since the beginning of the public interest litigation scenario in India. Whether it is good, whether it bas, what should be its limitations etc. I better leave it to the debate which will follow from now. Thank you very much.

Justice Jahagirdar (Chairman) (After Mr. Mihir Desai's presentation)

I have presided over several functions and seminars. Whenever there is a professor, normally he would not end his speech within 45 minutes, and a lawyer normally does not end before 3 hours because he would like to spill over after the lunch hour so that if any point strikes him, he could take it up. But Mihir has spoken exactly for 29 minutes and stuck to the upper limit of 30 minutes set by Mr. Raju.

It was a beautiful and very succinct exposition of the subject of judicial activism or judicial law making. Only one thing I want to say before I throw open the subject for discussion.

Mihir said that the Supreme Court has not explicitly stated that it is making law. In fact, it has stated so. Under Art. 142, the provision is that the law declared by the Supreme Court is binding upon all authorities. The word "declared" almost means law made by declaration. And they have said that where there is a vacuum, that vacuum will be occupied by the Supreme Court orders. In fact, I am a victim of this law because judicial activism has been playing a very active role in the field of medical education.

There was what was known as Unnikrishnan 's case where a particular system of fee fixing was evolved. That judgement was set aside in 2002 in what is known as TMA Foundation case which came from Karnataka. Then less than a year after that came the Islamia Academy of Education case, again from Karnataka and there the Supreme Court said, "Look, what we said in the TMA Foundation case that they can fix the fees anyway they like doesn't mean that they can fix any amount that they like." Therefore, who is to fix the fees? Appoint a committee for fixing the fees. That is Islamia Academy of Education case. I am the Chairperson of that committee in Maharashtra for fixing the fees of the medical colleges and all professional colleges. This is a tremendous task. Actually, the Supreme Court legislated. Fee fixation is a legislative act. And that delegated legislation has been given to the Committee of which I am the Chairperson. So, this is a legislation. It is not as if the Supreme Court has always camouflaged what it is doing.

And one more thing. Probably some of you have asked that question. What Mihir has said is laudatory of what Supreme Court has done. For example, bandh has been declared illegal. It is also judicial activism in the reverse. Kerala High Court says, bandh is illegal, the Supreme Court has confirmed it. Only last week, Maharashtra High Court has imposed a fine of Rs.20 lakhs each on Shiv Sena and BJP for having declared bandh.

Now judicial activism is not always lauded (Interruption: Now it is hartal) 'Hartal ' was the word 'which Mahatma Gandhi used. He used that word to mean 'day of mourning".

The subject is now open for discussion.

Session 2

The Judiciary as Lawmaker

Dr V. K. Ravindra, Principal, Law College Mangalore:

Your lecture was really interesting but I have a few questions to be raised. My first question is, is the word 'judicial activism' right? Was the judiciary inactive all these years? When you applauded the Supreme Court judgement so much, and when you said that the horizon of Art.21 has been expanded, and you have quoted a number of cases appreciating the court judgement. Right from the Keshvanand Bharati case, I find as a law teacher that the judiciary was active and the word 'judicial activism' is not appropriate.

The second question I would like to ask is, when you spoke about public interest litigation, what is the effect of PIL? Now I find in some articles that the Supreme Court is not trying to stop this PIL because a number of letters are going to the Supreme Court and the court is finding it very difficult to deal with these letters or petitions that have been sent to the court.

The third is, when lawyers go on strike, there is prohibition. When judges go on en masse casual leave, no action has been taken. Why is it so?

The fourth is, the judiciary, I find, is crossing the limits. When you have the 'separation of powers' theory, when we say that the executive, legislature and judiciary should do their business within the compartments laid down, judiciary is crossing its limits. I say this because as far as judiciary is concerned, judiciary is trying to read all fundamental duties as fundamental rights. You see how the judiciary has tried to read the fundamental duty as a fundamental right by bringing it within the purview of Art.21 of the Constitution of India.

And the last is that you might have read in the papers today that the Supreme Court has exonerated doctors from criminal liability. As far as civil liability is concerned, it says that we are going to fix damages, but not criminal liability. If a doctor were to have a greater intention, then why not he be penalised, why should he not be punished for that?

Coming to the common civil code, you talked about the personal law. My submission is why not the judiciary lay down the guidelines like in Vaishakha 's case as far as uniform civil code is concerned? It is a tricky issue, a delicate issue. I have seen a good number of judgements where the court says succinctly, well, uniform civil code, well, the legislature should take up the task of bringing uniform civil code. But like Vaishakha's case, why can't the Supreme Court lay down guidelines for a uniform civil code?

So, my humble submission is, if the judiciary were to cross the limits like this, I say that the judiciary is transgressing the limits. Therefore, there should be an end to this.

Otherwise it will be a conflict between the legislature and the judiciary and that leads to confusion. That is what I would like to say. What is your opinion regarding that?

One delegate: I would just like to know from the moderator if there are so many questions from a single speaker, whether we will be able to do justice within the time allotted, which is half an hour.

Some speakers: You can give your views. It need not be questions.

Ms. Mary Thomas, ILG Member:

On the Judiciary as Law Maker:

I am responding to the point the previous speaker made about the judiciary transgressing its limits. When legislature makes law, it is not possible for it to visualize all situations on which a judge may have to give judgement. Hence it becomes imperative for the judges to interpret the law in a suitable manner to cover the issue at hand. These interpretations gain the validity of law. They are known as precedents, get codified and are referred and used in similar situations by other judges in other countries also.

On Personal Law vis-a-vis the Rights of Citizens, especially Women: As a liberal, I have a dilemma. I am inclined to believe as a liberal that there should be minimum interference from the State in the Personal Laws of a community. But if my fundamental rights are violated by such laws as a liberal, I feel that I need to protect my rights by inviting the interference of the judiciary.

On the Right to Freedom and Equality of Women: Are often violated by the laws of communities.

On the Issue of the Undertrials: Many of us may not be aware of the fact that thousands of Indian citizens who are arrested on suspicion have not been produced in front of a magistrate and are languishing in various prisons for a very

long part of their lives. It is stipulated by law that any person who is arrested should be produced in the presence of a magistrate within 24 hours to ascertain whether he is guilty or innocent. Today, many of these persons - young, old, men and women are innocent and many more may deserve only minor punishments. But they-are treated as criminals, forced to stay with criminals and stay for a period much beyond the punishment they deserve. Can the liberals live without a feeling of guilt where all the ideals they swear by- freedom, justice, opportunity, for growth and development of every human being etc. are violated in one stroke? If the ILG is identifying priority areas for immediate action, this deserves to be on top of the list. There are many reforms that need to be brought about in the judiciary. But this is a specific one that needs to be solved urgently. I suggest that if any citizen who is taken into custody on suspicion is not brought before the magistrate in 24 hours, he be given bail and let out of the prison and summoned when the court is ready to take up his case.

Mr. B. S. Hegde:

While referring to judicial activism, do you think that the personal 'isms' that people generally have will influence the viewpoints or judgements or dictums of different judges?

Mr. Arvind Pandian:

Some views on this judicial activism. Mr. Desai was referring to 20-25 years of evolution of this particular area. But if we analyse specifically, they started only after 1990 particularly when there was no majority government as such. The first time when this started was when Narasimha Rao who was the Prime Minister started leaving the issue of the temple or the Shila Nyas being conducted as to what is to be done. That was the first time the Supreme Court legislated on this particular issue directly, though it has been there for more than 30 years. First

time, it started then and then a plethora of judgments started coming continuously where the government did not do anything but left all the issues continuously for the next five years to supreme court and that is what has diluted.

While coming to why do we talk of 'isms', as the previous speaker has said, till a particular point there is the border of the country and after that there is a 'no man's land' and then the next country starts. As far as you get into the 'no man's land', there is the possibility of encroaching upon some other area but not actually going into another person's area, that is you are getting out of your purview but not entering somebody else's area. So, there is an element of you going out, stretching yourself a little bit but not breaking away. But the moment you break into somebody else's area or jurisdiction, you have actually encroached and there is also what we call as "a terrorism area". I feel from 'judicial activism', we are now entering into an area of 'judicial terrorism'. This is a phrase which I would also like to throw about. It is open for debate, but still.....

In fact, another participant had earlier told me it could also mean 'judicial fascism'. So, we find newer and newer terms which also will come up, but I would like to phrase this that for the last few years, we also find judicial terrorism where right from the National Flag which surely is our pride to fly on our house, to bandhs, or don't burst crackers after 10 p.m.- all these things we have started finding more and more from day to day. So, this has also to be taken into account, what is judicial activism, or are we crossing that border of judicial activism and entering whatever term you would like to call it. Thank you.

Prof. Pylee:

Here, I want to bring to the notice of our group how judges can amend the Constitution. Judiciary has amended the Constitution not by simply bringing in new

law. They have amended the fundamental law through their decisions. Take for example the latest decision of the Supreme Court in the Presidential Reference regarding the appointments of the judges of the Supreme Court and High Courts, the Supreme Court in its decision said that four senior-most judges of the Supreme Court will make the recommendations to the President and those recommendations are final. The only role of the Executive in making these appointments is to issue the appointment orders by the President.

That is all, nothing else. This was not what was intended at the time the Constitution was passed, This I call "judicial forgery". But this is the law now, the fundamental law, the law of the Constitution, this is what has happened in our country.

Prof. Krishnan:

We observe a very peculiar situation in our country, as Mihir was sharing with us. One of the reasons perhaps for the judiciary not intervening in personal matters may be that they are ticklish, as some of you are saying. But stranger situations have arisen in the past two to three decades in our country where a set of duties, the so-called fundamental duties, particularly after Rajiv Gandhi's period have been included in the constitution. Somebody was saying that they are being misused or misinterpreted as rights. In fact, some of these so-called fundamental duties contradict the so-called fundamental rights.

For instance, the fundamental duty to encourage or practice scientific attitude or spirit of inquiry and investigation and to respect the science is in fact against some of the religious practices, whatever you may call them under the personal name or personal law, they contradict some of the personal beliefs in almost any religion or every religion as they are practised today, as Mihir was trying to say. A time has come where you have to be clear about it. Where a fundamental right contradicts a

fundamental duty of a citizen, whether it is right at all, whether it is the right that should be prevailed over, protected, interpreted broadly, or the duty has to be first and the right to be next. Rights cannot exist at the expense of the duty.

Chairman, Justice Jahagirdar:

Rights are exercised; duties are enforced. Now all the fundamental duties in law have no meaning unless there is a law which enforces those duties. For example, it is a fundamental duty of every citizen of India to pay income-tax honestly. This is a fundamental duty. How can you enforce it unless you make a law? So, these fundamental duties are all illusory. They were introduced in Part IVA. They have no meaning.

Mr. Jayanti Patel:

First of all, about the concept of separation of powers, when Montesquieu presented this concept, I think so many centuries have further passed. This separation of powers is not in water tight compartments and that is why in American Constitution we find checks and balances which is an improvement. Prof. Pylee would bear me out that there is nothing like air tight separation of powers.

Secondly, I would rather wish that we discuss this point, that this is concerned with philosophy of justice. What do we mean by justice, what is the concept of justice?

Whether judgement is justice because we get so many judgements. But do we get legal justice? When we are talking about this PIL and all those issues, I think we are going nearer to this basic, philosophical concept of justice and if any institution

in our society renders this service, I think it is commendable and should not be criticized by us.

Justice Puttaswamy:

I would be very brief in my presentation. Of course, we cannot enter into a big debate on the three organs of a state, namely, the executive, the legislature and the judiciary. In my view, the true role of judiciary is only to adjudicate disputes. Of course in the adjudication of disputes, interpretations of laws do arise. But interpretation of laws is not making of laws. The making of laws is the function of. .

(Tape No 3 ends here)

Tape No 4

The Supreme Court has re-written the constitution. Justice Sharma says, consultation means concurrence, what I say is binding. Abraham Lincoln said, Democracy is government by the people, for the people, of the people. Now judges appoint for themselves, by themselves, of themselves. This is the situation. My view is that Supreme Court is not really supreme in the sense. It is the final court in the country.

In fact a great American Judge whose name I forget but it used to be repeated by Justice Subba Rao also, said, Supreme Court is not right because it is right, but because it is final, it gives the concept of finality.

Now I would like to read one memorable speech of Justice Sir Morris Doyen who was the first Chief Justice of Federal Court of India. I will read only one or two passages. The role of the Federal Court came into being under the 1935 Act.

Unfortunately, the 1935 Act had not full play. But anyway the Federal Court came into being. This is what Justice Sir Morris, one of the greatest judges of the world, who was intimately connected with the framing of the 1935 Act, said - and I quote:

"I will not forget the immediate functions of the court and these are of first importance. Independent of government and parties and unaffected by the vicissitudes of politics, its primary duty is to interpret the constitution and provide a peaceful and rational solution of difference which in the absence of an impartial and independent arbiter might inflame passions and might even look at the constitution of India whether in its present form or in any other form which it may assume hereafter not with the cold eye of an anatomist but as a living and breathing organization which contains within itself, as all life must, the seeds of future growth and development, and let me add, that I hope that no canons of interpretation which it may adopt will ever hamper the free evolution of these constitutional usages and conventions for which indeed the law provides no sanction but in which, if opportunity is given, the political genius of a people can find its most fruitful and effective expression. The Federal Court will declare and interpret the law and that I am convinced in no spirit of formal or barren legalism. But I don't wish to be misunderstood. This court can, and I hope, will secure those political forces and currents which alone can give validity to a constitutional free play within the limits of the law. But it cannot under the colour of interpretation alter or amend the law"

This is what he said. Unfortunately, some of our Supreme Court judges (I don't know whether they have read this opening speech of Sir Morris Bayer while inaugurating the Federal Court. But we know that the judges have now re-written the constitution.

"I don't doubt that the Federal Court can make a unique and perhaps even a decisive contribution towards the evolution of India into a great and ordered nation, a link between the East and the West that we may forget but with a polity and civilization of its own". That is the Federal Court Report, Sir.

I will read two more small paragraphs:

"This is equally application in the interpretation of the provisions regarding the fundamental rights which are meant to secure to inhabitants the enjoyment of basic freedom under the law without endangering the existence, the security and unity of the country. It is difficult to improve upon this approach which harmonizes the British tradition of interpreting the written instrument with the added feature which one has to keep in mind that it is the constitution, a living document under which laws are made which is being made. Some basic principles of the constitutional law of India should be noted as have direct relevance and significance in the interpretation of the constitution".

These two paras are added by Prof. J. N. Joshi, a great professor of constitutional law at the Bombay University, a great authority on the Indian Constitution, who has delivered what is called as the Chimanlal Setalvad Lectures in 1964 when Dr. Sathe was the Vice-Chancellor of the Bombay University. It is published and I have extracted.

I will end with one quotation of Sir Alladi. Alladi Krishnaswamy Iyer was replying to the debate on the restrictions to freedom under Art.19 of the Constitution. You know what is called the great debate on 'the due process' and the 'procedure established according to law' and all that. There some of the legal luminaries were of the view that 'due process clause' should be inserted in the constitution. But Alladi, while dealing with the criticism of imposing reasonable restrictions under Art.19 of the constitution, said: "It cannot be denied that there is a danger in

leaving the courts by judicial legislation so to speak to read the necessary limitations according to the idiocrasies and prejudices it maybe of individual judges".

Mr. Desai was saying something about public interest litigation, what is not covered by the statute law. What is not covered by the statute law can certainly be the common law. But what is covered by the laws of the country, it is none of the judges' role to amend the constitution or rewrite the constitution.

Mr. Chairman:

Mr. Raju has gently reminded me that hardly seven minutes are left now and I don't want to miss my chance of making my presidential remarks.

Mr. ---

Who makes more laws? The parliament or the judges?

Chairman Justice Jahagirdar:

The discussion can go on and on. It is a very interesting subject. What is happening is that of the three pillars of government, two other pillars have failed the people - legislature and executive. And the people are swallowing anything that comes from the third pillar, i.e. the judiciary. But don't think that this will last for ever. For example, the decision on Bandh is not likely to be received very docilely by the people at large. There might come a time when the people will throw stones at the judiciary also if this activism spills over into *excessivism*, or as another friend says, into terrorism.

On the personal laws, I only want to make a small remark. Why the courts have not interfered in personal laws is simply because, as Mihir rightly pointed out, they are laws which have come down customarily. Say, for example, if the law relating

to talaq is set aside by the court as violative of fundamental rights, then there will be a vacuum. This vacuum cannot be filled in by the Supreme Court. Supreme Court will have to make a fresh law.

Regarding the gratuitous remarks of the Supreme court about the uniform civil code, I want to point out that there is already an optional uniform civil code. If a person wants to marry, he can marry under the Special Marriages Act and then the law of succession will be the one under the Indian Succession Act. That is available. Why shouldn't you first bring a uniform Hindu Code? There is no uniform Hindu Code. Then there is no uniform Christian Code. So many complicated questions are involved. The main thing is that if any of these laws is set aside, there will be a vacuum and this vacuum cannot be filled in, because there is no previous state of affairs which were prevailing when these personal laws were made. We cannot revert to that previous status quo ante of the person law. That is one of the jurisprudential principles involved in the refusal of the courts to interfere in personal laws. That has been explained by Justice Sujata Manohar when she was in the Bombay High Court.

Mr. Mihir:

I will just take two or three minutes. I just wanted to respond to the various kinds of opinions and views which have been expressed. As far as I am concerned, for me personally as a person who has been a human rights activist, it doesn't really matter what are the historical roots of the theory of separation of powers. It really does not affect me. What affects me is whether a particular order of the Supreme Court or high court is doing justice or injustice. If it is doing justice, I will support it; if it is doing injustice, I will oppose it. It is this simple thumb rule which for me matters. If the Supreme Court lays down Vishakha guidelines, even if it amounts to judicial encroachment into legislative territory, I will support it. If it rewrites the

constitution in the way it has done, I will oppose it because I personally feel that it has gone much beyond a democratic, transparent, accountable judiciary as it should be. So, I would definitely oppose it. For me personally, it is not so important whether the theory of judicial encroachment into legislative field is right or wrong etc. Justice is being done, support it. Justice is not being done, oppose it. It is as simple as that, that is the thumb rule I adopt. Thank you.

Mr. Giridhar Prabhu: [during the discussion (almost winding up) of "The Judiciary as the Law Maker" by Mihir Desai]

What I would like to bring to the organizers' notice is, Mr. Mihir has done an excellent job in encapsulating quite a complex subject as Justice Jahagirdar has observed. We can go on discussing endlessly but I thought the discussions ought to be centred about what the PEE and the Indian Liberal Group can do about this, what is the plan of action that we have to adopt as far as this issue is concerned?

In that respect I would just like to place two things for your consideration. One is, where do we rank this? In the administration of justice, do we recognize this as a problem? If it is not a problem, we don't have to discuss it. We are not discussing advantages here. If it is a problem, we need to look at it, if it is not a problem, we just don't worry about it.

If you look at problems of administration of justice, I would request you to consider the following which l have listed: One is laws' delay. Second is inadequate funding of judicial infrastructure. This is a very major issue because the state spends hardly anything on the judiciary whereas it spends enormous amount of money on the Parliament and on the executive. Third is, insufficient training of judges. Fourth is, a proper process of appointing judges. The process that is currently in vogue is extremely faulty. Where do we go for getting a proper process of appointing judges? Then, as Justice Saldanha had pointed out, contempt of court powers. ·

Next is, is the judiciary really independent? Because recently to organize even a small function, the judiciary had to run behind the executive and ask for a sanction of 5 lakhs or 10 lakhs. Are we talking of the independence of the judiciary? Is judiciary sufficiently independent?

Second is, total revamp of the criminal justice system which has absolutely failed to yield any fruits at all. And enforceability of court orders. After you get a decree, it takes another ten years for you to enforce that. So, in the process of administration of justice, we need to address that issue also.

Then delay in appointment of judges. Law making by judiciary would, in my opinion, rank last. It would possibly rank just before proper implementation of any legal services authority. You should understand that after enactment of the Act, legal services authority in theory is available free to between 74 to 78% of the population, because under the Act all women, irrespective of their financial status, are entitled to free legal aid, all children, irrespective of their financial status, are entitled to free legal aid, all members of the scheduled castes/scheduled tribes are entitled to free legal aid. Therefore, this covers about 77% of the population. But do we have sufficient infrastructure to address this? ls the state doing anything about it at all?

So, this 1 would suggest to PEE - there may be more, 1 am not saying that this list is exhaustive - that these are issues to look up. When it comes to the issue of judges making law, I would say that the problem is that the judiciary does not have the machinery, it does not have the benefit of a deliberative exercise, it does not have recourse to experts. These are the problems as far as the law making by the judiciary is concerned.

Lastly, what can PEE do about it? I would suggest, let us make a list of all the issues on which the Supreme Court has made judge-made law. You should

understand that in all these instances, the Supreme Court has made judge-made law only as a stop gap arrangement. It is expecting the Parliament to react. Parliament, on the other hand, is only condemning the judiciary. It is not taking up the challenge, nor is it enacting. Judiciary does not want to react. If you look at all the cases where judiciary has reacted and come out with legislation, it has derived its source of powers from Art.21 of the constitution. It says, I am a defender of Art.21 and I perceive this to be a right to life and therefore it legislates. Parliament tomorrow can very easily legislate a law on all these subjects.

I think it would be a worthwhile exercise for PEE to make a list of all the judge-made laws and throw the challenge open to Parliament and say, why should the judges make law? You make law on these subjects. I think that is where PEE can contribute.

Mr. Giridhar:

Not yet. There is no gender bias here. On the other hand, we respect women largely Yes, you can disagree in writing and I request Dr. Thomas to kindly convey the views in writing. This is one request I have that we have a large number of delegates at this session. If anyone has an expression to make, we would also like that to come in by way of written notes by tomorrow before the closing session. And also, we need a lot of assistance in framing the propositions. I certainly welcome what Mr. Raja said. 90% of what I would have said, you have said very nicely of what we need to go into action on what Justice Saldanha spoke about. We want to start next week. It is not as if we are going to languish on this. Therefore, I request that you assist PEE and the ILG as much as you can do through draft resolutions or positions or even suggestions on administration of justice like improvement in budgets, in writing, tomorrow by 4 o'clock. Thank you.

Mr.Raju:

Matters of the stomach. The dinner is at 8 o'clock at the coffee shop downstairs. And we meet tomorrow at 9.30. It means 9-30 here in the same room.

Session 2 Ends

Project for Economic Education

INDIAN LIBERAL GROUP

National Seminar on the Administration of Justice

Taj Manjuran, Mangalore, August 6 and 7, 2004

Session 3 - Saturday, August 7, 2004

The Law's Delays

Mr. Giridhar Prabhu (in the Chair, Introductory Remarks):

We start with another major issue today - judicial administration, the law's delays. We have with us a very distinguished judge, Justice K. S. Puttuswamy who resides in Bangalore. He is a former Judge of the Karnataka High Court. He was Counsel to the Karnataka Government from I 969 to 1977, CAT Bangalore Bench, and he is former Chairman of the AP Backward Classes Commission. He is President of the Bangalore Chapter of the Indian Liberal Group. He was

instrumental, along with Dr. Sivaji, for making the first Convention of the ILG at Hyderabad a resounding success.

I don't think I will pre-empt Justice Puttuswamy who has prepared a paper for us and is now circulated to you. I request Justice Puttuswamy to begin his presentation and then will follow the discussion.

Justice K. S. Puttuswamy:

Thank you, Mr. Prabhu. Good morning to all of you, friends: I have of course prepared a working paper. I may not stick to everything there, I may also add here and there. I will start by reading some paragraphs.

Law's delays in our country has become very much endemic and has assumed gigantic proportions. The law's delays have seriously eroded the faith of the general public and the litigant public in particular in the efficacy of the judicial system in our country. Judiciary in a country is one of the great departments of any government and more so of a democratic government and is an essential and indispensable organ of the state. Our Founding Fathers have made very detailed provisions in our Constitution for an independent and efficiency judiciary and the same cannot and must not be allowed to lose the faith of the public. Every one of the public authorities, the public, the professionals and all the NGOs must do everything to preserve the glory of the Indian judiciary. The Seminar arranged by the Project for Economic Education is timely and topical. I have every hope and faith that this Seminar will make a significant contribution in focusing and remedying the law's delays in our country.

On the subject of law's delays, numerous commission/committees commencing

from the Ranking Committee to the latest Justice Malliamath Committee have given reports. There are two reports, the first one dealing with speeding up case

disposal in all the courts in the country (hereinafter referred to as the First Report), and the second one dealing with the recommendations of the committee on reforms of criminal justice system. This Ranking Committee report was submitted as early as in the year 1924.

Ranking was the Chief Justice of the Bombay High Court. He was also elevated to be the Privy Councillor. He was considered to be one of the great judges of the Indian judiciary and also of the British Judiciary. He submitted his report as early as 1924. Now we are in the year 2004. Right from that time, the problem has accentuated and not diminished, unfortunately. I have drawn reference to only two latest reports. The First Report on speeding up case disposal in courts and the Second Report dealing with recommendations on reforms of criminal justice system (hereinafter referred to as the second Report) has studied the problem in depth and has made valuable recommendations thereto. In the very nature of things and because of time constraint, it is not possible for me to refer to all of them in detail. I will briefly refer to the First and the Second Reports. But before so doing, I will furnish the figures on pendency of cases in all the courts in our country, including Karnataka High Court and the number of cases pending in the subordinate courts of Karnataka.

Fortunately, I have now been able to get the pendency before the Supreme Court with the good cooperation of one of my friends, Justice Santosh Hegde who is No.2. His father in fact was practising here as public prosecutor. He was a lawyer here and in 1957 or so when the first Karnataka Lawyers Conference was held here, Justice Chatterjee, father of Somnath Chatterjee, presided over it. I had the good fortune to visit Mangalore as a delegate and I was one of the members then. That was my first visit to this city.

Now, in the Supreme Court, as on 1.7.2004, there are 11094 cases ready for hearing, that is, every process is completed, they are ready for hearing. I am giving you the figures of the Supreme Court, because I would like to start from the Supreme Court. This I had not included in my note because I had not those figures at that time. I got it from Justice Hegde later. 11094 cases are pending which are ready for hearing. There are 4260 cases pending which are not ready for hearing - i.e. they are in the process of what is called service of notice, pleadings complete and all that. But you will be somewhat surprised, I have been able to get the figures from Justice Hegde for the year 2003. This is how these were: There you will find 20,562 SLPs (relating to civil matters) were filed and 6139 SLPs relating to criminal matters were filed for the year 2003. There are various other cases, earlier pendency and all that, that is they had 42823 cases out of which 41074 were disposed of, leaving a pendency of 11463.

(Mr. Raju, I am totally confused by these figures which he is reading out. They somehow don't tally).

There are various details of the nature of the cases. I don't think we should concern ourselves with those. This is the position. What I want to highlight for your kind consideration is that on an average 25,000 SLPs per year are filed, both civil and criminal. I am giving a rough figure. I am not going by the exact numbers. But what is of importance to be noticed by us is that the SLPs that are filed are mostly from Allahabad High Court, Chandigarh and Delhi High Courts. The largest number of contributed these high courts because it is so easy. For anything and everything, what is called as recasting the issues, or amendment of the plaint or defence, anything and everything, the matter is taken to the Supreme Court. Why I am highlighting this is because I have got to make a submission later.

As of 31.12.2002, as many as 33,68,621 cases were pending in all the high courts of the country and out of them as many as 24,61,600 cases were pending for more than two years. I don't have the latest figures but I am sure they have only increased. It will be very interesting to give a break-up of cases in high courts. The top position is occupied by Allahabad High Court. You will be surprised that as many as 6,97,985 cases were pending as on 31.12.2000. Their number has only swelled and it has not decreased. The largest number of judges is in the Allahabad High Court, but the poorest disposal also is probably in that court.

Andhra Pradesh I will leave. Coming to Karnataka High Court, as on 31.12.2002, 1,41,077 cases were pending. Now the latest I have got from the Karnataka High Court, that is as on 1.7.2004, the number of cases pending is 1,23,486. Out of them, probably in the Karnataka High Court 25,596 were pending for more than 2 years as on 31.12.2000. I don't have the correct figures about the year-wise pendency. In fact, I had sought it but I was not able to get it.

Justice Saldanha:

Karnataka High Court refuses to disclose it. I don't know how you got it.

Justice Puttuswamy:

Since M'Lord Justice Saldanha has provoked me to give how I got it, I wrote a letter to the Chief Justice requesting him to give me year-wise pendency and all that. First it was refused. Then I had contacted Justice Hegde. He was good enough to provide me the figures of all high courts. I personally met the learned Chief Justice and when I showed the letter also of Justice Hegde, giving me the figures of all the high courts, then he relented and he reconsidered the matter and gave me the figures.

Interruption:

Here we need not use 'learned Chief Justice'.

Interruption:

It is better to drop that preface.

Justice Puttuswamy:

In the Karnataka High Court, as on 1.7.2004, 1,26,260 cases were pending. As on 1.7.2004, the total number of cases pending in the subordinate courts of Karnataka was 10,65,380. Please note these numbers. Out of 10,65,380 cases pending in our Karnataka subordinate judiciary, including our Mangalore district, 60% of the cases are criminal cases, 40% are civil cases. This I got by contacting the Judge. Out of these 10,65,380 cases, say about 7 lakhs or six and a half lakhs are criminal cases. Out of them, it will be surprising for you to know that as many as 13000 sessions cases are pending. Sessions cases are serious criminal offences. They are pending. How many are custody cases, how many are non-custody cases, I don't have the figures, but the figures themselves are simply staggering. In spite of my best efforts, I have not been able to secure the details of other states of the total pendency cases in our country but my guess is that at least 10million cases are pending as on 1.8.2004 in our country. These figures by themselves are simply startling and call for immediate remedial measures. I have only made a guess work, but I think my guess is fairly accurate.

The First Report has dealt with Law's delays comprehensively under 33 heads and has made various recommendations to tackle the problem. From the summary of the First Report, some of the important reasons for law's delays are litigation explosion, radical changes in the pattern of litigation, increasing legislative activity, inadequacy of judges. In Karnataka High Court, I am told (in my discussion with

the learned Chief Justice he revealed this to me) that 11 posts are vacant, including the last one which was vacated by Justice Saldanha.

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