

**National Conferences of High Court Judges on Criminal Law and
Human Rights (Development of Law) P- 923**

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Programme Report

Programme Coordinator:

Mr. Rajesh Suman, Assistant Professor, National Judicial Academy

Minutes of the Conference prepared by Ms. Meenu Goel, intern, National Judicial Academy
and Edited by

Mr. Rajesh Suman, Assistant Professor, National Judicial Academy

The National Judicial Academy organised the National Conferences of High Court Judges on Criminal Law and Human Rights (Development of Law) during April 18-19, 2015 to focus on the protections afforded to persons in the context of the administration of criminal justice in India. The sessions in the Conference provided an opportunity to introspect on recent debates in procedural and substantive rights afforded under the criminal justice system and to assess the role of high courts within such discourse. The resource persons present during the Conference were Justice D.M. Dharmadhikari, Dr. Justice V.S. Malimath, Mr. Dayan Krishnan, Mr. Stephen P Goldrup, Mr. Daniel Clegg, Ms. Karyn Kenny, Mr. Ravi Nair, Mr. Shekhar Naphade, Mr. Anup Jairam Bhambhani, Mr. Gaurav Agrawal, Justice U.U. Lalit, Dr. Justice V.S. Malimath, Mr. Somasekhar Sundaresan, Justice A.K. Goel, Dr. K.P. Kylasanatha Pillay and Mr. Siddharth Luthra.

Summary of the Discussion/Presentations made by the Resource Persons

APRIL 18, 2015 (DAY – 1)

Session – 1

Constitutional Protections Afforded in the Context of the Administration of Criminal Justice

Dr. Geeta Oberoi, Director, NJA addressed the gathering and gave a brief introduction about the Conferences. She stated that there is an inseparable link between substantive and procedural law and it is important to protect rights of all the individuals involved in the criminal justice system.

Justice D.M. Dharmadhikari said that India is a signatory to several international conventions but barely follows all. The Supreme Court and High Courts have helped in the better interpretation and functioning of the Constitution. The courts have extending the scope of human rights and the Supreme Court of India encouraged legislature to suitably amend the criminal laws in our country. Criminal justice revolves around the accused, victim, witness and the social justice and a number of times the victim turns hostile. The Justice Verma Committee after the Nirbhaya incident has given a lot of power in the hands of women. He added that there is no witness protection in our country. Further he said that criminal administration of justice would become proper only if there is a fair investigation. Investigation methods in our country are very poor and a number of times innocent people suffer because of this. There is need to train trial court judges regarding the complete control over the trial of a case. Protection of the witness plays a crucial role in the trial. The facilities provided by the government for the police officers are pathetic and no police officers have proper equipment. There is a need for proper training of the police. Judges must have all the information about the victim, accused, witness and the media. It is the need of the hour to develop a better culture. Prisoners too have fundamental rights and some kind of psychological support and help should be given to prisoners.

Justice Malimath then emphasized on the validity of Article 21 of the constitution of India and stated that the state have been provided the power to execute the lives of people by the

established procedure of the law. All the important were framed ages back when the perpetrators had low strategies of life. Laws that were framed at that time, are now outdated. Criminals have become more intelligent and use advanced technologies, but the law and law enforcement agencies are static. There is no place for victims to participate in the trial. Sensitivity to the loopholes in the law and sensitivity for the need of change in the law is required. We don't feel concerned about the victim when acquittal occurs in a case. System fails in such acquittals. We must find answers as to why acquittal happened. This signifies injustice to victim. We must strike down the law which is coming in giving justice to victim. The accused cannot be compelled to give incriminating evidence under law. Accused is the best person to say about the crime and in many cases he is the only eyewitness. If he has not committed the offence he is the one to tell judge about that and if he committed the offence he is the one who can be cross examined. Accused is the best evidence but we keep him unavailable to adjudication. The best evidence is protected and other evidences are only considered. Law that permits the accused not to be cross examined is an unjust law. Such unjust laws can be struck down. The judges must not merely interpret the law, but interpret it in a fair and effective manner. The law must be fair, just and reasonable and any law that is not conferring with the principles stated in the Maneka Gandhi case should be struck down.

Justice Dharmandhikari said that the framers of constitution borrowed the concept of examination of the accused from common law system from England and there is need of changing this law in India. He said that any law which gives immunity to the accused cannot be considered just, fair and reasonable.

Session 2

Regulation of International Criminal Activities: Distinction between Role of the State and the Role of Judiciary

Mr. Dayan Krishnan started the discussion and said that law of extradition is not only important in international terrorism cases but we need international cooperation in routine economic crimes as well. He further deliberated on the principles of double criminality and the principle of speciality and the concept of mutual assistance. He stated that there has been a movement away from the traditional concepts as far as common wealth jurisdictions are concerned. He discussed *Mr. Carlos Cabal and Mr. Marco Pasini Bertran v. Australia, Communication – cabal* case deals with the conduct and not with ingredients of double criminality principle. The judgement marks watershed in this area and it deal with issues related to double criminality from the point of ingredients which has led to a lot of issues between countries. He was of the view that the second principle of extradition which is the principle of speciality has got India into trouble. He deliberated that it is internationally accepted principle that a person be tried only for the offence he has been extradited for. Making a Reference to *Abu Salem 2013* case, he mentioned that because the courts did not respect the principle of speciality, the Indian lawyers face a lot of difficulty at the international forum. During the course of discussion, the key note speaker took the discussion forward by elaborating on the provisions of Extradition Act. He stated that the principles of extradition can be used in a positive sense by our country. He also discussed

the defences and approaches of different jurisdiction in the matters of extradition including:

Mr. Stephen P. Goldrup shared some perspectives on cooperation in the context of international criminal activities. He discussed principles of federalism, separation of powers, federal court system, federal crimes, and role of the U.S. attorney, the U.S. Constitution, the first amendment, the fourth amendment. He cited that within the federal government, the power and authority is distributed among different branches of government. The relationship between different organs of the government is ambiguous. The U.S. Constitution provides for checks and balances through three different branches of the government which are: Executive, legislature and judiciary. Each branch can partially limit the powers of the other two branches. The government in U.S. holds three kinds of powers which are: express powers, implied powers and inherent powers. He further deliberated on the 10th amendment of the Constitution. He further discussed about federal crimes with the help of examples. He said that in U.S., a federal crime is an act which has been made illegal by the U.S. government. Some examples of these crimes are: aircraft hijacking, kidnapping, bank robbery etc. He further discussed various aspects of the U.S. judicial system.

The session was further addressed by Mr. Daneil clegg. He stated that the threats are global and criminals generally don't bother about the boundaries and also mentioned about the intelligence sharing at the global level and the concept of extradition. All the countries are fighting against a common enemy whether it be cyber intrusions or terrorism. The attacks of 26/11 are a classic example of the same. Thereafter he elaborated on the functioning of the FBI and said that FBI does not align with any one single organisation in India. It works in cooperation with IB and CBI. The FBI investigates the war crimes, handles public corruption, economic crime and the money laundering. Thereafter he discussed the need for investigation to be an independent organisation. He elaborated on the term of directors and gave the participants a brief idea as to what kind of training the people of the FBI have to go through. Director of the FBI enjoys complete independent powers. FBI receives the budget at the beginning of the year and can spend money in a very independent manner for investigation. He opined that for modernisation of police forces and investigators, people process and technology are the three most important components.

Ms. Karyn Kenny stated the brief common law history from where have emerged the principle of separation of powers. She deliberated that the U.S. practices the method of checks and balances. She specified that as the world progresses, the laws become more blurred. She discussed various aspects of the courts in U.S. The speaker concluded her deliberation with the remark that the slow change and development of law is good in a way because it is very important for the law to be consistent, uniform and regular.

Session 3

General Principles of International Human Rights Law Applicable to the Criminal Procedures of Individual Nations

Mr. Shekhar Naphade started the discussion with the definition of 'International Law' and deliberated that the control and implementation of the international law principles is a matter of debate and concern. He stated that if there are crimes against humanity the fact that one acted under the order of the superior authority is no defence. The second important principle of discussion was that in Germany even the judges were tried during the national emergency. The tribunal held even the judges guilty. Thereafter the resource person deliberated that after the World War 2, international laws like the UDHR, Convention on Genocide, Convention against torture, etc. came to be recognised. The question of enforcement of International law is another issue of concern. He further discussed the role of India as a country at the international level.

He said that the Supreme Court has dealt with a number of case laws related to the international conventions and human rights. He deliberated that we can derive from all Supreme Court judgments that courts will give effect to International law in relation to human rights as long as such provisions are not inconsistent with the Constitution scheme. He further discussed the principle of burden of proof. He further discussed the grey areas in concern with Article 21 of the Constitution. He mentioned about the significant development of the Rome statute in 1998 that happened on the international scenario. It vests in that particular court the jurisdiction to try cases for genocide, war crimes, and mass murder etc. He emphasised on the question of human rights and criminal law in regard to the exercise at the national boundaries. He further discussed the principle of universal jurisdiction which means that a sovereign state can enact a law and enforce that law within its territory. The power of the state to deal with the violation of human rights across the globe is acquired even by the domestic courts. He stated the example of anti air craft hijacking. Indian courts have recognised the applicability of international laws relating to human rights as long as they are not inconsistent with the basic constitutional scheme. Next issue of concern as mentioned by the resource person is the implementation of the international law principles through the domestic laws.

Mr. Ravi Nair then stated that while the judiciary in India is concerned about human rights, the executives are not sensitive to it. He addressed that India has been lucky that our constitution and battle for human rights has been formed by anti colonial struggle. He mentioned that people in India have understood that the civil liberties are not to be given away very easily. He deliberated that India raised the first human rights issue at the UN in 1945. It is very essential for administration of criminal justice that the individuals must be protected with the depredations of the state especially against the persons and there is a need for global legal framework to enhance these protections. If we don't have protection against the abuses of power then life and integrity of individual will be at stake. Mr. Ravi Nair concluded the session with the discussion on the issue of compensation and issue on compensation and the issue of impunity was dealt with.

Session 4

Conviction vs. Acquittal Debate

Mr. Anup Jairam Bhambhani started the discussion on the topic of proof beyond reasonable doubt. He stated that in proof beyond reasonable doubt, there appear to be three real standards which included: firstly, the preponderance of the rule or deciding the matter on probabilities, Secondly, the clear and convincing standards and thirdly, the proof beyond reasonable doubt. He deliberated that the concept of proof beyond reasonable doubt arose in the U.K. in the context of the jury system. The jury consisted of lay man at that time. The jury was not used to the judicial way of assessing the matter. They would decide on possibility. He stated that in the common law jurisprudential system that we follow in criminal law namely the adversarial system, the police is only geared towards the concept of arrest and conviction. A police officer does not get out of his police station to crack a crime and geared only towards arrest and conviction. Also the moment the person is called an accused, a certain stigma is attached to the person. The accused faces serious credibility issues and he is disbelieved. This is one of the major problems with regard to the interference by the media in criminal trial. The resource person further discussed the logistical physical and practical problems faced by the accused in relation to the process of arrest. The lack of family and societal support was also discussed as a problem faced by the accused. After which the key note speaker stated that the biggest problem of our system is the lack of understanding of the system and most people who are in a brush with the law are of certain under privileged strata of society. They have complete lack of understanding of the system. They face a problem to afford a competent legal help as well. It becomes very difficult to bring exculpatory evidence before the court at the right time by the accused. The accused is stigmatized. No action is taken against the witness that turns hostile. There are very rare cases of perjury. He stated that in cases of extreme interference of the media in case trials, the courts must go ahead and stop the media from doing so. He said that the category of publications, publications concerning character of the accused, comments on merits of the case, publishing photographs, disclosure of the investigation reports, and the concept of media investigation must be taken into account by the respective courts in a serious manner.

Mr. Gaurav Agrawal then continued the discussion. He stated that the courts in India are generally not in a position to convict the cases in most of the situations because of various reasons, which include: lack of proper and fair investigation of the case, witnesses turning hostile etc. Thereafter he stated that because of a number of factors the parliament in India ends up framing very harsh laws aiming at providing for a deterrent effect. The parliament frames such laws presuming that harsher laws will stop people from committing crimes, which is not true. He emphasised that the setup of the entire judicial system is to provide and deliver justice. He further stated that there are a number of legislatures that have put the presumption of innocence in jeopardy. He mentioned that the dowry cases are a clear example of cases where the presumption helps in the recognition of the crime.

APRIL 19, 2015 (DAY - 2)

Session 5

Judicial Control Over Transgressions to Limit the Violation of Rights by Law Enforcement Agencies

Mr. Somasekhar Sundaresan discussed Section 11B of the Securities and Exchange Board of India Act, 1992. Power to issue directions and the principle of double jeopardy was also dealt with. He stated that there is not an aberration but the norm and stated the following provisions: Sec 35A of the Banking Regulation Act 1949, Sec 12A Of The Securities Contracts (Regulation) Act 1956, Sec 34 of the Insurance Act 1938, Sec 15 and 16 of the Pension Fund Regulatory Development Authorities Act 2013, Sec 69A of the IT Act 2000 and Article 19(2) of the Constitution Of India. The resource person further carried the discussion on the topic Of Ex Parte Order of Restraint. Mr. Somasekhar Sundaresan concluded the discussion with the discussion on the topic of debilitating factors, accountability deficit, regulatory attitude, judicial attitude and introspection time.

Justice U.U. Lalit thanked Mr. Somasekhar Sundaresan after which he reflected on the point of disclosure. He referred to the term ‘exculpatory material not shared’ and referred to the decision of *Natwar Singh*. Justice U.U. Lalit stated that according to the law that we have adopted, only such material to be relied upon needs to be shared with the accused. He said there are transgressions that happen at the initial grass root level which is suppressed.

Dr. Justice V.S. Malimath deliberated on the role of the judiciary in protecting the law enforcers from violating or transgressing the law. The judiciary has not hesitated to correct the mistakes that the law enforcement agencies have committed by stepping into the shoes of the law enforcement agencies. He stated that judicial control is nothing but keeping an eye on the law enforcers and seeing if the laws are really enforced or not. He deliberated that in cases where we observe a partial or an incomplete investigation done on any particular case, the judiciary can exercise their wide powers. Justice V.S. Malimath discussed few provisions of the code of criminal procedure which empowers the judicial officers to act and exercise the powers. He also stated that in cases where the law enforcement agencies do not produce the evidences that are so required, the judicial officers can question the accused and can clear the doubts. He added that the judges are scared to completely exercise their powers. There is mostly a problem of the presentation of the case. The defence lawyer is way more committed and devoted than the prosecution lawyer. He stated that there is a need to find ways and means to ensure a true and a fair system. There after he stated that the level of competency of the law enforcement agency in our country is very low whereas the perpetrators have become intelligent and use advanced technologies.

Justice U.U. Lalit then addressed the gathering. He focussed on the concepts of ‘Conduct of Investigation’, ‘Conduct of Prosecution’ and ‘Quality of the Investigation’ in the first part of his deliberation. He stated that there is a need for the judiciary to look into the proportionality of the investigation and the custody of the accused. Justice U.U. Lalit deliberated that the role of the judiciary is to reach the truth and judiciary must moderate

the truth. In spheres where the wrong committed by the law enforcing agencies is irreplaceable, the judiciary must actively come forward. He concluded the session by stating that the judicial officers must see that the conscience of the court is completely satisfied and the judges must sense the danger, the wrong before it actually takes place.

Session 6

The Scope of Inherent Powers u/s 482, Cr.P.C.

Justice A.K. Goel started the discussion with the reference to the Bombay High Court's *Price Water House case*. He stated that there has been a tremendous increase in the litigation since past few years u/s 482 of the CrPC because of false cases under Section 498(1) IPC, cases where no provisions for anticipatory bail is present, cases where courts do not have any inherent powers, additional evidence cases, cases complaining lack of fair trial, checking police harassment cases, and registration of FIR cases etc. Referring to the judgement of *Price Water House case* he expressed his concern regarding Section 482 of the Code of Criminal Procedure and the scope of the same. He stated that the important point that is to be taken into consideration in such petitions is whether the case is to be entertained or not.

He further discussed the various parameters on which Section 482 of the CrPC is interpreted. He was of the view that even though the guiding words are mentioned in the statute, they are very vast, vague and wide in nature. He mentioned that the Article 226 of the Constitution of India is also very vague in interpretation. The inherence of the article is itself not clear. He added that where there is illegality, injustice and abuse of the process of the court, the judiciary must exercise its powers. He stated the various parameters that can be applied while taking into account the petitions under Section 482 of the Code of Criminal Procedure. He shared some of his personal experiences regarding the same.

Thereafter he mentioned that the registration of cases under Section 452-506 of the Indian Penal Code is very common in Punjab because that generally does not require much evidence and the case can be dragged to for a long time. In such situations the accused has no remedies.

He then mentioned the cases that were registered under Section 420 of the Indian penal code. He also stated various ways in which a judicial officer can come to a conclusion if the case is false or true. The next topic of discussion included the concern regarding the registration of the FIR's. Justice A.K. Goel stated that this is one genuine problem faced by the police. He added that the power of the high court's is very important power if 482 power of high court is very imp power of judicial review over the police administration as well as the judicial administration but only where there are parameters to determine the truth or falsehood without adjudication. He elaborated the same with the help of the provisions of the Code of the Civil Procedure and the Code of the Criminal Procedure. Justice A.K. Goel concluded the session stating that where on the face of it, it is proved that the absurd, the judges can quash the petition but where the judges are not sure if the case if true or false, they must order an enquiry into the same and must call such a case for

trial. Where it is primarily visible that the case is of civil nature but is given a colour of criminal nature, the cases can be dismissed. He said that the judge must mention the reasons for acting on the petition under 482 and deal accordingly.

Dr. K.P. Kylasanatha Pillay then addressed the gathering. He stated that the powers provided under Section 482 of the CrPC have certain limitations attached to it. But with the advancement in the litigation and judicial mechanism, the powers mentioned in the provisions of the CrPC have been widened. He stated that the courts must exercise their jurisdiction in a positive manner and the judges also have discretion to choose between the options by looking into the conduct of the case. He also discussed the brief history and the development of the legal justice system. He deliberated that the scope of Section 482 of the CrPC is immense and the laws are very clear regarding the same and stated that it is the judicial review of the criminal actions that holds importance.

Mr. Siddharth Luthra started the discussion by mentioning a brief history of Section 482 of the CrPC. He referred to few land mark decisions and the role of the 14th report of the law commission, 1958 and the 41st report of the law commission, 1969 in regard to the inherent powers of the court. He further stated the 41st report of the law commission empowered the high courts with inherent powers. He also discussed Article 21 of the Constitution of India and its reference to Section 482 of the Code of Criminal Procedure. Mr. Luthra also discussed the rights of a fair trial which includes the principles of fairness to both, the accused and the victim, secondly the rights recognised under Article 21 of the Constitution of India. He concluded the session by stating that in his view Section 482 of the CrPC be interpreted liberally but effectively at the same time.

Dr. Geeta Oberoi ended the session by conveying heartfelt thanks to the gathering.
