TRANSCRIPT OF THE VII[th] ANNUAL NATIONAL LAW SCHOOL OF INDIA REVIEW SYMPOSIUM: BRIDGING THE SECURITY-LIBERTY DIVIDE

I. SESSION I: SECURING LIBERTY FROM THE STATE- REDEFINING CRIMINAL THRESHOLDS IN LAW

The opening session of the symposium was moderated by Mr. Kunal Ambasta.

The first speaker was Justice Bilal Nazki of the Jammu and Kashmir High Court, who addressed the tension between the demands of national security and the liberty of criminal defendants. He began by pointing out that the rhetoric of national interest and sovereignty is very deeply entrenched in the legal system. The conflict is between two ideas, rather than between different groups of people. It is not unusual to find advocates who take anti- human rights positions and ex-military governors who are ready to protect human rights. While one can easily identify the legislature enacting a law that is against human rights, the situation at other levels is a little more complex.

Another important relationship to bear in mind is between state security and the rule of law. A greater respect for rule of law ensures better state security. Pakistan and Afghanistan have very low security and this is directly attributable to their terrible standards in observing the rule of law. This principle applies to the state's response to Naxalite violence, where the state's use of force only legitimizes the Naxalite claim that the rule of law is a farce, and this is the real threat to national security. Justice Nazki buttressed his point by indicating how the AFSPA destroys police accountability and encourages resort to violence and how irresponsible media reporting, exemplified by the Arushi Talwar murder case, is subverting the rule of law.

The last point of focus for Justice Nazki was the Indian police. He noted how practices like routine encounter killings without investigation and indefinite preventive detention severely undermine the rule of law and the credibility of the police, who are entrusted with the maintenance of law and order. He

also observed that perhaps such abuses are inevitable in a system whether law enforcement and investigation are entrusted to a single entity, and perhaps the responsibility to prosecute should be denied to the police entirely and transferred to the court instead. As an alternative to this radical reform, the police should be given basic legal training so that they are sensitive to human rights while carrying out their duties and functions.

The second panel speaker was Mr. Bharat Karnad, who offered a very interesting perspective on the tension between national security and human rights. The crux of his argument was that Indian democracy being an imposition by the Constitution's framers and not the product of a gradual process of evolution, it is erroneous to evaluate the performance of the Indian state in terms of Western conceptions of human rights. Calling for a culturally relative and contextual understanding of the Indian state's conflict with human rights, Mr. Karnad spoke in detail about the importance of Western countries' historical evolution.

Most democracies take a very long time to evolve, such as the British system, which does not have a written constitution. Till the 1920s when women were granted the right to vote, the idea of a democracy had not been properly realised in the UK. The US Constitution which has been a source of inspiration for a number of other systems also, for a long time denied equal treatment to African-Americans. Indian democracy did not evolve from anything endemic to our system and is largely an Anglo-Saxon conception. India was suddenly born as a republic in 1950 and there were no property laws. Literacy was equated to rationality and hence the ability to make a decision to vote. This gradual development process that took place in America and other countries around the world never took shape in India. Thus, the question of whether Western metrics of human rights protection would have made India a better democracy is merely speculative.

Mr. Karnad pointed out that most nation building is a bloody and violent process and even after 200 years of trying, incidents such as the independence referendum in Scotland do take place. Even the USA, which is often seen as the very model of democratic behaviour, has its roots in removing and suppressing the Red Indians by exercising governmental authority Within this framework, an Indian law like the AFSPA is indicative of the State declaring its inability to solve a particular problem and delegating the solution to the Army. The Army, whose expertise is limited to solving situations of war and conflict, adopt their strong arming techniques to civilians as well, which gives rise to human rights violations.

Mr. Karnad argued that the trade-off between security and liberty is not always an easy one to make, and is unrealistic to expect India to be an exception to the trend of bloody nation building. For the sake of self-preservation, a state is bound to commit excesses and violations. The solution is not easy and it is too

simplistic to say that respecting human rights is the answer to problems such as Naxalism and secessionism. We must acknowledge that in the development of a political system, a certain amount of conflict and bloodshed is inevitable.

The third speaker of the session was Mr. Yug Mohit Chaudhry. He began by saying that while Mr. Karnad had rightly pointed out the need to adopt a historical perspective, this should not prevent us from evaluating where India is headed in the future as far as the rule of law is concerned. According to him, speaking of national security against individual liberty is a false dichotomy, as the very idea of a democratic state entails a commitment to the rule of law and therefore the protection of rights.

According to Mr. Chaudhry, the rhetoric of national security can stifle dissent, and in numerous cases becomes a mantra to create a fear psychosis in the minds of people and make them more receptive to intrusive legislation and executive action. What is even more problematic is that even judges are not immune to the pressure of this mantra. Instead of being bulwarks against state oppression, the judiciary ends up colluding with the government. When terrorist trials are conducted in this atmosphere and heightened sense of fear and paranoia, the presumption of innocence means nothing. He illustrated this proposition by referring to the case of Kasab, against whom there was abundant evidence and a trial could have been conducted fairly. However, egregious violations of criminal procedure and constitutional rights were committed. The defence was denied copies of essential medical evidence, prevented from even visiting the scene of the crime where the crucial evidence was found, and perhaps worst of all, when the case reached the High Court, Kasab's lawyers were not allowed to meet him before the trial. There have been cases where rather than direct the police to stop their harassment, the judge has chastised the accused for not cooperating with the authorities at such a sensitive time.

Aside from judicial complicity in spreading the paranoia of national security, Mr. Chaudhry also highlighted the questionable motives of the police at times, where they even go to the extent of manufacturing incriminating evidence against the accused. He warned that if these trends are not checked, we are heading towards a police state, sacrificing everything on the altar of national security. That this may reach ridiculous proportions is illustrated by the recent claim by the government that returning Afsal Guru's dead body to his family is against national security. It is worth remembering the words of Oliver Wendell Holmes, who said that those who sacrifice liberty for security deserve neither and will lose both.

The final speaker for the first session was Dr. Mrinal Satish. His presentation addressed the different standards applicable to preventive detention under the National Security Act and Chapter VIII of the Criminal Procedure Code, which applies only when there is a serious threat to national security. There are three

categories of people who may run afoul of Chapter VIII: terrorists, those who breach the peace, and habitual offenders. It is the last category where the definition is heavily influenced by class bias, and most of these people are from the poorer sections of the society. The judiciary's approach to terror related cases has been minimalist, and it tends to side with the State in its enforcement of the Chapter VIII provisions. Dr. Satish distinguished between two forms of the state: *first*, the punitive state where the application of the criminal law machinery depends upon a clear and specific charge, adherence to the procedure established by law, particularly in evidentiary matters, with a definite appeal process; *secondly*, the pre-emptive state, that encroaches on a person's liberty even before basic elements of a crime are satisfied.

Preventive detention laws are a manifestation of the latter state, and the evidence is often vague and secretive. It targets dangerous criminals and they can be incarcerated before they have an opportunity to cause harm. This provision gives more powers to the police, contrary to some of the most important provisions in the Code where their powers have been curtailed. Police are now not confined to investigation. This is also a politically beneficial move as it gives the government a 'tough on crime' image in the eyes of the public. Further, much greater public attention is focused on a detainee who goes on to actually commit a crime than on detainees who turn out to be innocent. In balancing liberty and security, the latter always takes precedence because of the need to protect human life.

Dr. Satish went on to note the salient features of the National Security Act. Section 3 of that Act allows preventive detention for upto a year. In deciding when to invoke the provision, it is useful to bear in mind the Supreme Court's observation in *Ram Manohar Lohia* v. *State of Bihar*[1] that there are three concentric circles of law and order, public order and security of the state, and that violation of one need not always mean a violation of the other. However, courts have endorsed detention orders on broad contentions such as violence and robbery. Because of the vagueness in the offences, Section 5A was added, requiring concrete grounds for preventive detention. A person who is outside the jurisdictional limits of the magistrate can be arrested without reasons for 5 days and even when reasons are given, facts can be held back in public interest. Art. 22 of the Indian Constitution requires an advisory board to be set up to look at every order of preventive detention that is being made and the board must give its report within 6 weeks. However, the Supreme Court has held that there is no need for representation in these cases and the order can be confidential, whittling down this constitutional protection. In practice, the police have carried out detentions for at least 3 months. Most of these people in Madhya Pradesh, numbering over 200, were those who are kept under surveillance. For such people, no charge or charge sheet is required and the police can register an FIR on their own without any

[1] AIR 1966 SC 740.

corroboration on "secretive" grounds. This extensive power given without oversight leads to many arrests without any questioning.

Under the Criminal Procedure Code, Sections 107, 111 and 113 are relevant and courts have held that desperateness and dangerousness can be proved by evidence of general repute. An order can be made for general security under Section 117. The magistrate under Section 121 can reject the surety if he feels that they are not fit for the task. If there is a default in payment of the bond, that is a ground for resuming preventive detention. The constitutionality of Chapter VIII under the old Code was challenged in *Madhu Limaye, In re*[2] where the court held that such an enactment is needed not just in a barbaric society but even in today's world, thereby yielding to the pressure of national security. In conclusion, Dr Satish pointed out that we need a stronger monitoring and accounting mechanism. We never know the limits of a pre-emptive state and this is an important issue to consider. Courts need to rise to the occasion and be less deferential to the executive and we must start safeguarding the rights of those who are brought under this preventive detention framework and exposed to the coercive machinery of the state.

II. SESSION II: INTRUSIVE INTELLIGENCE - SURVEILLANCE PROGRAMS AND PRIVACY IN INDIA

The second session of the Symposium was moderated by Mr. Badrinarayan Seetharaman. He began the session with a few words about state surveillance as a facet of governance, and the questions it raises about the nature of information: how it is obtained, from whom it is sought, and how it is used. He also dwelled on the deleterious impact it has on the private behavior and autonomy of citizens.

The first speaker for the session was Mr. Shyam Divan. He began his presentation with remarks on how India is at an important crossroad with respect to privacy, emphasizing how our actions today would decide the future boundaries of the right. He then proceeded to discuss the AADHAR programme under UIDAI in detail. The AADHAR purports to have three objectives: *first*, it guarantees identity, which the state claims we all have a right to; *second,* it aims to prevent social welfare leakages; *thirdly,* it increases convenience for companies, consumers, and governance. However, Mr. Divan condemns the programme as unconstitutional.

He pointed out that as an administrative body created by Planning Commission notifications, it has no statutory backing. Despite that, more than Rs. 1.5 lakh crores of taxpayer money is being spent on collecting sensitive personal information of every citizen. The irresponsibility of the venture is put in greater focus when one takes into account the fact that private enterprises, in the form of

[2] (1969) 1 SCC 292.

corporations, partnerships, and trusts, have been engaged in the process. Not only is the threshold for qualification very low, these private entities, which are not subject to the same constitutional standards as the state, are those collecting and transmitting this personal information. As this process is poorly monitored, and the relationship with the state loosely defined, Mr. Divan pointed out that there is no privity between the citizen and the state.

AADHAR is expected to, and has already become, ubiquitous. It already informs citizens' access to bank accounts, registration of leases, booking of LPG and other utilities, access to government scholarship, and rights to draw a salary in several parts of the country. This coerces citizens to part with their personal information, violating the right to human dignity. Although interim Supreme Court orders have stayed the mandatory enrolment, Mr. Divan was of the opinion that this linking of AADHAR to civil rights is slowly turning India into a police state. He remarked that despite the shocking absence of consent by the citizens, the government has proceeded to collect data that is not only insecure, but also freely used for commercial purposes. This clear transgression of personal autonomy, in the absence of law, is destructive of limited government. Limited government, which draws from the social contract theory, is a part of the basic structure. By permitting this infringement into our private spheres, Mr. Divan argued that we are bringing an Orwellian state into existence, and condemning ourselves to permanent submission.

The second speaker for this session, Mr. Gautam Bhatia, began by noting the reference to an Orwellian state with great interest. He referred the panel to the decision of *Klayman* v. *Obama*[3], where a US Federal Judge had recently remarked on the Orwellian nature of the NSA surveillance program. Mr. Bhatia then began his presentation on the Central Monitoring System initiated by the Indian government, which collects both metadata as well as undertakes content monitoring. He explained the concept of metadata with an example of telecom records, which the NSA had been collecting. While the telephone number, the duration of the call, and the location of the speakers were collected, the content was left untouched. This shocking overreach had come to light during the Edward Snowden disclosures, leading to filing of suits by civil society bodies like the ACLU. Mr. Bhatia drew attention to the fact that not only was the Indian government engaging in collecting metadata, it also had access to the content of calls, text messages, emails, and other electronic communication.

He said that state surveillance posed three specific issues in the Indian context. *First*, there was no statutory backing for any surveillance. The only exception to this is Section 5(2) of the Telegraph Act, 1885 which allows for limited monitoring; however, it does not envisage the monitoring of conversations in

[3] 957 F Supp 2d 1 (2013).

bulk. In light of *Kharak Singh* v. *State of U.P.*[4], Mr. Bhatia said that it is essential to have statutory safeguards in place before embarking on surveillance.

The second issue it poses is that there is no fundamental right that surveillance directly violates. However, it does create a chilling effect on the rights of citizens. Mr. Bhatia pointed to the case of *NAACP* v. *Alabama*[5], where the Supreme Court of the United States had found an order requiring the NAACP to release a membership list to be violative of the First Amendment. The rationale was that if the state and white supremacists had access to these details, people would refrain from joining the NAACP. This *chilling* of participation violates the right to join associations. This doctrine of chilling effect although recognized in other jurisdictions as well such as Canada, South Africa, and Sri Lanka, has not been expressly recognized in India. Although there have been a few decisions of the Delhi High Court in this regard, no detailed argument regarding chilling effect has yet been made before the Supreme Court.

The third issue it raises is with respect to the right of privacy. Mr. Bhatia began by discussing it in the American context. Interestingly, there is no direct mention of a right to privacy anywhere in the text of the Constitution. Courts have read this right into the 4th Amendment, which restricts the right of the state to conduct searches and seizures. This expansion of the 4th amendment proceeded on the basis that the 4th amendment grants citizens a reasonable expectation of privacy, and that government interference in a citizen's private sphere would violate this expectation.

In the final part of his presentation, Mr. Bhatia discussed the right to privacy in the Indian context. He traced the change in the stance of the Supreme Court, which had rejected the right in *M.P. Sharma* v. *Satish Chandra*[6] and *Kharak Singh* v. *State of U.P.*[7], only to recognize it later in *Gobind* v. *State of M.P.*[8]. He also focused on the test of narrow tailoring, which requires the state to restrict infringement to the minimum possible level. He argued that while this had been implicitly recognized in *Gobind*[9], it was explicitly adopted in *People's Union for Civil Liberties (PUCL)* v. *Union of India*[10], and affirmed in *State of Maharashtra* v. *Bharat Shanti Lal Shah*[11]. He finally referred to the third party doctrine as

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4 AIR 1963 SC 1295.
5 2 L Ed 2d 1488 : 357 US 449 (1958).
6 AIR 1954 SC 300.
7 AIR 1963 SC 1295.
8 (1975) 2 SCC 148.
9 (1975) 2 SCC 148.
10 (1997) 1 SCC 301.
11 (2008) 13 SCC 5.

recognized in *United States* v. *Miller*[12], and in *Smith* v. *Maryland*[13], and rejected in India in the *Canara Bank case*[14].

The third speaker for the session was Ms. Chinmayi Arun, who focused on the importance of structural safeguards. She contrasted Indian jurisprudence on privacy with that of other jurisdictions, particularly Europe, which strongly values the right. Ms. Arun discussed the *PUCL case*[15], pointing out that given the presence of a statute permitting telephone tapping, the court could only provide for interim safeguards. These were later incorporated into the statute on the recommendation of a review committee. However, evidence suggests that these safeguards have not proved effective.

Ms. Arun proceeded to draw the attention of the panel to European and American jurisprudence, focusing on the cases of *Katz* v. *United States*[16], *United States* v. *Jones*[17] and *Gori* v. *United States*[18]. She pointed out the importance of constructive personal space, which is becoming increasingly important as technology advances. Ms. Arun drew the attention of the tribunal to surveillance mechanisms which permit the interception of over 10,000 phone lines simultaneously, with no clear purpose being specified for the same. Oversight by senior government officials has frequently been raised and approved of as sufficient protection for rights of citizens. She discussed how the ECHR has sought to extend privacy principles applicable to individuals to such cases of dragnets as well.

In conclusion, Ms. Arun argued that the current system of having a review committee validate requests in unfeasible, and that India should consider shifting to the system followed in Germany. This has a subsequent notification provision, where the surveillance details have to be revealed as soon as the public order risk subsides.

The last speaker for the session was Dr. Aparna Chandra, who looked at state surveillance and privacy from a feminist perspective. Although it is frequently argued that state surveillance is a consequence of technological advancement, Dr. Chandra argued that surveillance has always been used against minorities to ensure status quo. This social control it seeks to achieve has been addressed in the writings of Bentham and Foucault. Foucault in particular argued that surveillance, accompanied by social sanction, ensured the continuance of hierarchies and preservation of power. In this context, Dr. Chandra spoke of how

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12 48 L Ed 2d 71 : 425 US 435 (1976).
13 61 L Ed 2d 220 : 442 US 735 (1979).
14 *Collector* v. *Canara Bank*, (2005) 1 SCC 496.
15 (1997) 1 SCC 301.
16 19 L Ed 2d 576 : 389 US 347 (1967).
17 181 L Ed 2d 911 : 132 SCt 945 (2012).
18 6 L Ed 2d 901 : 367 US 364 (1961).

surveillance maintains male hegemony, by subjecting women's bodies and their choices to constant surveillance.

Apart from social control, Dr. Chandra identified discrimination, leading to subordination, as another consequence of surveillance. Participation and access in society are increasingly determined by the data generated through surveillance. She argued that vulnerable sections of society like slum dwellers, racial minorities, and sexual minorities are denied opportunities or are actively targeted by the state, which entrenches their subordination.

In the final part of her presentation, Dr. Chandra argued that the right to privacy was an important, but an inadequate response to state surveillance. She referred to how privacy has been strongly contested in feminist literature. While privacy can prove to be autonomy enhancing, it also leads to depoliticizing the private sphere, which can be detrimental to feminism. She buttressed this argument by pointing out how privacy law is most often spatial in nature. The home, over which the patriarch is sovereign, is privileged. In such a discourse, it is inevitable that the woman's voice is relegated to the background. Where it is not restricted to spatial privacy, Dr. Chandra argued that the categorization of what is private and what is not is problematic. To illustrate this, she drew attention to how marital rape is considered private, whereas adultery is not.

On a final note, Dr. Chandra argued that the right to privacy is always understood as a negative right against the state. Consequently, individuals are not protected against surveillance by private bodies. One answer to this would be to understand it as a positive right that states have to guarantee to its citizens.

III. SESSION III: BEYOND BORDERS: EXTRADITION, ASYLUM AND CONCERNS OF STATE SECURITY

The third session of the Symposium was moderated by Mr. Shailesh Rai.

The first speaker was Ms. Roshni Shanker who dealt with the actual practice of granting asylum in India. India is not a signatory to the 1951 Refugee Convention, which makes its obligations under the convention unclear. It is fundamental that a person's citizenship status is irrelevant in granting asylum. The *non-refoulement* principle provides that a person within borders who is likely to face persecution within the borders of their home country cannot be deported. Ms. Shanker spoke about the existing situation of refugees in India, who are divided into two main groups: those from neighbouring countries except Burma who get Home Ministry support (which is usually just a mass influx) and those from non-neighbouring countries and Burma, who get UNHCR support. Refugees from Bangladesh and Pakistan constitute a significant proportion of the refugee population.

In the process of granting asylum, there is no clear basis for the former group and a form must be duly filled and submitted with the Home Ministry's office. India has a very careful and restricted policy which is not clear. Over the years the refugees have usually been governed by ad hoc policies and we have come under scrutiny because of the conditions imposed on those seeking asylum. For the UNHCR assisted group, the refugees go through a Refugee Status Determination Process which is in interview format. The asylum seeker can present their testimony in great detail. In countries which are not signatories to the convention, UNHCR conducts the process on behalf of the government. After registration, the interview is undertaken and within two to three months the seeker is informed whether they have been given refugee status. If successful, they are entitled to a number of benefits. There is an appeal mechanism only if there is a rejection at the early stage and a closed case can be reopened only in exceptional circumstances.

Ms. Shanker next addressed the legal factors affecting recognition. Persecution, which is an essential element, is a term not defined in any instrument and is generally construed as a grave threat to life or other serious harm. Grounds for persecution are narrow and must affect the core of their identity such as race, religion, nationality, social-group, political opinion. Proof of coming from places that generally experience heightened violence is sufficient to afford recognition as a refugee. An important legal issue is the exclusion trigger under Article 1(f) of the Convention. Applicants are denied refugee status protection if they have perpetrated acts such as crimes against peace, crimes against humanity, very serious non-political crimes and acts contrary to the principles of the United Nations. In determining such cases, the Commission first examines how much responsibility can be attributed to the applicant and defences are available for lack of mental capacity (as in the case of child soldiers) and being under superior orders. The proportionality of punishment, the applicant would be subjected to in their home country is also relevant. Ms. Shanker concluded by addressing the interface and possible conflict between asylum and extradition law. Under international law, the principle of *non-refoulement* applies because of persecution but under Indian law, courts have never had to deal with such cases and hence it is rather unclear how such a conflict might be resolved.

The second speaker of the session was Ms. Yamini Pande. She began by stating that refugee status by its very nature is declaratory. The minute one crosses the international border on grounds of persecution, they become a refugee and gain rights such as *non-refoulement*. The Refugee Status Determination procedure only names one as a refugee as opposed to any other category of foreigner. Ms. Pande then spoke about the historical role of the UNHCR in India. It first came to India in the late 1960s and returned in 1979 after leaving for a brief period. While it is a non-political organisation, refugee status is inherently a political statement because it means recognising that people will be subject to persecution in their home country. India has always been open to refugees such

as the Jews in Cochin and the entry of Parsis and they are governed by the Foreigners Act. While this is a restrictive legislation meant to keep people out of India, the Government has made innovative policies that courts can interpret in a refugee friendly manner.

Current events of a particular time have deeply influenced refugee protection. For instance, in 1999 when the Indian Airlines flight was hijacked, the Government reduced the number of residence permits issued to Afghans. If a person was in India for a particular period, and was recognised as a refugee by the UNHCR for only a part of that period, they would be penalised for the remaining part. This reflects the tension between the competing notions of refugee status as created by the act of crossing borders or by declaration of the UNHCR. Ms. Pande also highlighted an interesting legal development in the form of the long term visa policy for foreigners. Refugees as defined in the 1951 Convention could apply for long term visas, which would act as work permits and give the option of enrolling for higher studies. A considerable number of refugees from Myanmar have benefited from this policy. She also pointed out that all Constitutional rights and public facilities that are available to non-citizens are available to refugees as well. There are no special UNHCR camps for refugees and asylum seekers. The process of registration is cumbersome and long drawn but no more than it is for an Indian citizen. Probably the most important right they receive is that of the legal process, owing to the recognition and acceptance of UNHCR documentation.

Between the years 1990 and 2000, relations between the Indian government and the UNHCR soured especially because of the latter's reputation for shielding terrorists. However, this concern is adequately addressed by the exclusion mechanism in the asylum procedure which is an inbuilt safeguard to ensure that only deserving applicants get protection. Ms. Pande concluded that for the most part, India is a country where a refugee can be actually ensured of protection of human rights, even better than some signatory countries.

The third speaker was Mr. Douglas McDonald, who dealt with the asylum process in Australia. He described the credibility assessment process that is undertaken before granting asylum. A system which functions on the assumption of lack of credibility and follows stringent evidentiary requirements will prevent asylum seekers from getting protection. While compliance with the Convention guarantees a minimum amount of procedural fairness, such procedures must be transparent and inclusive, and not be designed with an eye on border control or national security alone.

The main barriers to credibility assessment according to Mr. McDonald are lack of available evidence, the requirement of nature of persecution being arbitrarily defined, and a lack of resources for decision makers to decide whether the refugee is telling the truth about their situation or not. There are three major

grounds on which adverse findings are made. *First*, there is the plausibility problem. The applicant's reasons appear to decision maker to be implausible. Here the main reliance is on human experience which is problematic because of biases that arise due to dramatic differences in culture and lifestyle. Merely because an occurrence is rare does not mean it did not happen on this particular occasion.

Secondly, there is the consistency problem. To expect absolute consistency from people who are expected to narrate their stories multiple times is unreasonable. There are often genuine problems of recall connected with trauma experienced by asylum seekers. A memory being recounted differently on different occasions does not amount to wilful distortion to suit one's case. To asylum seekers, the interview seems like an interrogation and smacks of unfriendly and totalitarian government. In this scenario, a certain degree of nervousness and caution must be expected. When assessing credibility, decision makers must always take into account human memory and emotional condition of the asylum seeker.

Thirdly, there are problems of vagueness and demeanour. It must be noted that lack of detail is not necessary evidence that the claim is fraudulent. This could be attributed to inarticulateness, memory problems, shyness, nervousness, difficulty of understanding and interpreting because of linguistic barriers among others.

In conclusion, Mr. McDonald emphasised that decision makers need to be more sensitive and recognise that culture has an impact on how people react to questions. Furthermore, there must be reasonable procedures in place to check the untrammelled discretion of decision makers, such as according the benefit of the doubt to asylum seekers so that substantive fairness can be done. The consequences of according refugee status to someone who does not really fear international persecution is vastly outweighed by the harm that is caused by wrongly denying it to people who will actually be persecuted if they return to their own countries.

The fourth speaker was Mr. Bhairav Acharya, who dealt specifically with India's extradition policy and its impact on political dissidents. His focus was on how asylum law intersects with dissidents and whistle blowers and on seeing refugee law as a smaller subset of extradition law. Foreigners and refugees are different and the latter is a special subset of the former. Within foreigners, there exists an uneasy balance of people who are fleeing to escape persecution of a different kind and we can call them dissidents. They are subject to the Foreigners Act as well and are vulnerable to extradition.

Mr. Acharya drew attention to the categorisation problems that plague the system. *First*, a majority of the people who cross international borders to enter India are not counted at all and hence statistics are largely skewed. Without a specialised immigration law, we are unable to distinguish between the various foreigners who enter the country such as refugees and migrants. *Secondly*, asylum seekers

are usually subject to a preliminary screening mechanism despite not being part of the initial mass influx. *Thirdly*, there are citizens of other countries who apply to the UNHCR.

India has no specifically recognised right of *non-refoulement*. Although India ratified the Torture Convention in the late 1990s, the judiciary has not developed a consistent principle of according protection to the refugees who enter India over all these years. Indian state practice has been traditionally hospitable to refugees, but the problem is that if these people are not recognised officially, they will be vulnerable to extradition. The Extradition Act, 1962 flows from two previous legislations. The Fugitive Offenders Act, 1881 dealt with requisitions in the British Empire as an internal matter and did not deal with issues like double criminality.

Mr. Acharya then spoke about Chapters II and III of the 1962 Act. Chapter II proceedings were used to deal with countries outside the commonwealth and this chapter was subsequently removed. Section 29 contains a political crimes exception and provides an important protection. This provision applies to extraditions covered by Chapter III. It is a common phenomenon that two countries try to return a political dissident by violating the Extradition Act, which shows the defect in the existing legal regime.

Another problem is the classification of a deportation order as an executive power under Article 73 of the Constitution. This power has been delegated to state government and sub-delegated to the police, and courts have upheld this regularly. The Supreme Court has held that in relation to refugees there are untrammelled powers and this is permissible. Further, no reasons for the deportation need to be given and there is only a limited right to appeal. Since the Foreigners Act overrides the Extradition Act, while a refugee may be protected by the procedural formalities in the latter, the provisions of the former will apply. This interpretative act is known as disguised extradition, and is commonly used in various jurisdictions, being first dealt with in a Court of Appeal judgment in the UK. Mr. Acharya pointed out that disguised extradition will be used by India in relation to those it feels it is not politically expedient to protect. Indian courts should keep in mind the principle *male captus bene detentus*, which states that even if someone is wrongly captured, it will not prejudice the detention or fair trial in a foreign country.

The final speaker of the session was Dr. Luther Rangreji who addressed the legal issues that are actually involved in the Indian extradition regime and the practical implementation of these legal norms. Much before the law on extradition evolved there was a general rule in international relations that a country was within its rights to expel aliens if they satisfied certain conditions, provided that there were rendition agreements between states. There is no legal principle in customary international law on extradition. The basis has always been bilateral

treaties, which have provisions on extradition requiring a proper judicial determination prior to issuing an order of extradition.

Dr. Rangreji mentioned the extent of the obligation to extradite. A political dissident cannot be extradited unless there is fool proof evidence that he is wanted by another country for prosecution involving a criminal offence. For this judicial determination all relevant documents need to be provided. The Extradition Act is largely a colonial vestige. Any offence punishable with one year or more constitutes grounds for extradition. Many other states may not agree with this threshold and in many cases, along with extraditability, dual criminality was considered. Law enforcement officials have found that non-extradition of own nationals is misused by taking advantage of open borders. The political offence exception was applied flexibly about twenty years ago, but now, owing to geopolitical factors such as the anti-communist ideology in the USA, offences of political character are generally not extraditable.

For international execution of extradition requests, often an Interpol Red Notice is issued, stating that as soon as one country sees another country's citizen in immigration, the latter should be detained by means of a provisional arrest. In this way, the extradition provisions can be misused to provisionally apprehend a person even when there is no reasonable cause to do so. When Abu Salem's request for extradition was issued, he was wanted for trial in India in relation to the Mumbai blasts of 1993. Portugal stated that they were parties to Protocol 11 of the ECHR and could not extradite him if it was for an offence punishable by death. Thus, India had to provide sovereign assurance that he would not be sentenced to death and even if he was, the execution would not be performed. This shows how extradition requests present complex challenges to the sovereignty of nations.

Dr. Rangreji concluded on the note that despite having laws in place, their actual implementation is inadequate in many respects. The basis of extradition law is to foster international cooperation in prosecuting crimes. While no state wants a fugitive to go unpunished, states do not like responding to extradition requests. As a result, the operation of the law is fraught with political tensions and considerations of international comity, and this is clearly reflected in its implementation in India.

IV. SESSION IV: CONNECTING THE DOTS

Session IV, which was meant to weave the issues raised in the previous three sessions into the larger theme of the symposium, was moderated by Mr. Shailesh Rai.

Mr. Michael Sanderson began by focussing on the ambiguous position India has adopted towards refugees. The principle of non-refoulment, enshrined in the Refugee Convention which India has not ratified, has been generally followed. However, in the absence of legal bindingness, refugees have always been handled in an *ad hoc* manner. He pointed out that the principle of non-refoulment having become customary international law, India was bound to follow it. In support of this argument, he cited *Gramophone Company of India* v. *Birendra Bahadur*[19] decided by the Supreme Court, as well as the fact that the Foreigners Act, 1946 operates in a different sphere. In the absence of any legislation dealing with refugees in India, he contended that India "*has legislated by default.*" In conclusion, he underscored the importance of enacting a legislation on refugees in India.

The second speaker, Dr. Mrinal Satish attempted to connect themes through the rule of law. He referred to Justice Nazki's point that when the state crosses boundaries in the name of "security", people will take the law into their own hands. He then referred to Mr. Chaudhry's claim that courts are heavily biased against terror suspects, often accusing counsel of hampering the functioning of the court. The politicization that accompanies this prevents a fair trial, which is essential in ensuring rule of law. He concluded by pointing out the importance of maintaining "constitutional borders" in cases where the existence of the state is threatened.

In response to Dr. Mrinal Satish, Mr. Shailesh Rai stated that when law and order problems arise, 'order' is prioritized over 'law'. The state, by always assuming wrongdoing, creates a culture of skepticism and paranoia.

Mr. McDonald connected Mr. Rai's point to migration and refugee issues. He pointed out how developed states, including Australia, viewed migrants and refugees with deep suspicion. In the context of Indian Constitutional law, he pointed out that the courts of law have been sympathetic to citizens' rights and innovative in their approach, but have also been frequently arbitrary.

Drawing from this, Dr. Chandra stated that constitutional norms, while treated by the higher judiciary respectfully, are frequently violated in lower courts. She related her experience with trial court judges and policemen, who did not understand the importance of the Constitution in their daily interaction with the common man. Echoing this, Dr. Mrinal Satish pointed out how this attitude results in courts denying accused persons a fair trial. In the Kasab trial, the courts shockingly commented how it was tragic that instead of hanging him, they were forced to go into the technicalities of the law.

Mr. Bhairav Acharya attempted to provide context to this failure of the judiciary. He argued that the era of "intellectual judges" like Krishna Iyer are long

[19] (1984) 2 SCC 534.

over; instead of the expansive approach to rights that had been taken in the past, courts are more inclined to retreat. This can be seen in the aborted development of environmental rights in India.

Dr. Chandra made the concluding remarks to the discussion by talking of how there is an undue emphasis on courts to resolve these problems. She argued that it is equally, if not more, important to tackle other spaces where the state exists as well, if notions such as liberty and the rule of law are to be meaningfully realised.