

CONSTITUTIONALISING CRIMINAL JUSTICE

Dr. K. BALAGOPAL MEMORAIL LECTURE

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Prof. Srikrishna Deva Rao,

Vice-Chancellor, NALSAR

I: Remembering Balagopal

It is a great honour and privilege to deliver Dr. Balagopal Memorial Endowment lecture today at my almatamater, Kakatiya University, Warangal. The Kakatiya University and Warangal occupy significant place in the Indian social, cultural, and political history. Warangal is also known for its progressive and liberal tradition of literature, rich poetry, and glorious history of protection of human rights. Be it *Bammera Potana*, who refused to dedicate his poems to king, to Peoples Poet *Kaloji Narayana Rao*, who always challenged injustice where ever it existed to *Balagopal* who zealously safeguarded civil liberties and constitutional rights of people.

Balagopal is an exemplary human being, outstanding Teacher-scholar and citizen-lawyer and above all a warm, friendly humane person. *Nelson Mandela* outlines some crucial factors to assess the development of a human being. They are: “honesty, sincerity, simplicity, humility, generosity, absence of vanity, readiness to serve fellow men. These qualities are within the reach of every soul and they are the foundations of one’s spiritual life”. All these qualities were embodied in one person, that is Balagopal. He was revered and admired by many people due to these exceptional qualities.

His was a life that refused easy categories. He was a mathematician by training and lawyer by vocation, but above all a public intellectual who combined doctrinal sharpness with an unsparing engagement with lived realities of people of Telangana. Balagopal’s writings in Economic & Political Weekly (EPW) were

grounded in field realities, detailed statistics, village testimonies based with a sustained critique of law and state power.

The Indian civil liberties movement has a rich history of over 200 years. The Rowlatt Satyagraha of 1919 and *S. Satyamurthy's Treatise on "Rights of Citizens"* in 1919 were the milestones in the history of civil liberties movement during colonial times. But it took another 17 years to establish a formal institutional mechanism to safeguard the civil liberties in India. It was in 1936, the Indian Civil Liberties Union (ICLU) was formally inaugurated (24 August 1936) by *Sri Pandit Jawahar Lal Nehru*. *Sri Rabindranath Tagore and Sarojini Naidu* were the Honorary President, President and *K.B. Menon* was the General Secretary. The objective of ICLU was to collect information about violation of civil liberties particularly about condition of prisoners and political detainees and safeguard freedom of Press and prevent police brutalities¹.

We could see the resurgence of the civil liberties movement in independent India particularly in the late 1970's aftermath of 1975 emergency. APCLC even though was established in the late 1960's, it started working with full vigour after Balagopal taking over as its General Secretary in 1983. The Fact-finding Missions of Andhra Pradesh Civil Liberties Committee (APCLC) and later Human Rights forum (HRF) took him to the nook and corners of the Andhra Pradesh state. His civil liberties work represents a distinctive epistemology of human rights advocacy in India. His work and leadership in the civil liberties movement taught us that constitutionalism is not exhausted by courtrooms or textbooks. Its true test lies in police stations, trial courts, and prison cells. The APCLC took up issues of life, liberty, freedoms, and Dignity including the violation of human rights by the state and other structures of domination in the society.

The post-emergency judicial activism of the Indian Supreme Court, investigative journalism, human rights and women's rights activism inspired many of us as young students in Warangal. The protection and safeguarding of the core rights: life, liberty, dignity and equality and other constitutionally guaranteed rights became the modern mantra for the civil liberties movement. *Late Shri KG*

¹ See Sitharamam Kakarala, *Human Rights Movement in Colonial India: An Historical Perspective*, National Law School Journal, Bangalore 1994.

Kannabiran, Pathipati Venkateswarlu, Prof. Haragopal and Balagopal played a pioneering role in spearheading the movement in the state. I have been actively engaged in the civil liberties movement over a decade as a law student (1981-85) and later as a lawyer (1985-88) till I moved to National Law School, Bangalore to pursue my higher studies in law.

The Indian Constitution was one among the ‘post-colonial wave of constitutional documents. The process of creation of Constituent Assembly began initially in March 1946 and received the stamp of legitimacy after the transfer of governmental power in June 1947. The Indian Constituent Assembly worked for two and half years to draft, enact and adopt this living document called the Indian constitution.

Balagopal forced us to ask: what does the Constitution mean to those most exposed to state power – the arrested, the detained, the accused, the incarcerated? Does it live in their experience, or only in judgments and speeches?

It is in that spirit that I speak today of the constitutionalisation of criminal justice. By this I mean the process by which the Constitution’s values – liberty, dignity, equality – penetrate the criminal process: from arrest to bail, from trial to prison, from surveillance to reintegration.

II. Constitutionalisation of Criminal Justice

Let us begin with understanding the important concepts of constitutional law and how it transformed the criminal justice system.

The Constitution is the text of 1950: Articles 14, 19, 20, 21, 22 and 39A which form the core of criminal procedure safeguards. Constitutional law is the case law built upon that text – from *A.K. Gopalan’s* deference to procedure in 1950, to *Maneka Gandhi’s* expansion of fairness in 1978, to *Puttaswamy’s* recognition of privacy in 2017. The judgments affirm to us the living nature of the Constitution of India.

But constitutionalism is something deeper. It is the culture of restraint. The idea that state power – especially coercive power – must always justify itself. It is not enough that a code authorises arrest or detention; constitutionalism demands that such power be exercised fairly, proportionately, and transparently. Balagopal's commitment was precisely to this dimension. He constantly asked whether constitutionalism had seeped into the everyday practices of criminal justice.

The arrest, custody and subsequent detention and the whole process of custodial violence is a major sight of conflict between the state and citizen. Arrest activates the police system of inflicting summary punishments during investigation. It is not just a mere personal conflict between state juxtaposed to the citizen, but the age-old, conflicting debate between two theoretical and philosophical conceptions of criminal law, the *Crime control and due process models*.²

The over emphasis of criminal law and criminal justice system on the individual occurrences of crime in the form of offence/s perhaps gave more prominence to the 'crime control' model highlighting the "law and order" dimension. The law-and-order framework of the criminal justice system gave less prominence to the 'deeper foundations of liberal conception of the commitment to human inviolability' which is the bed rock of the 'due process' model. The dignity, respect, identity and bodily autonomy and integrity were the core values underlying the principle of human inviolability. *John Rawls, Robert Nozick, Jermy Waldron, Upendra Baxi, Mohammed Ghouse, N.R. Madhava Menon and BB Pande* underscored the moral, ethical and legal inviolability of principle of human dignity.

Speaking about the conflicting and competing models of criminal process, *Justice Krishna Iyer* observed in *Nandini Satpathy* case in 1978 that "*there exists a rivalry between societal interest in effecting crime detection and constitutional right which accused individuals possess... Our constitution has a perspective, therefore, to be relative and cannot afford to be absolutist, especially when torture technology, crime escalation*

² **Herbert Packer**, an American Criminologist in 1960 while analyzing American criminal justice system developed two conflicting models of criminal process; crime control model and due process model. The crime control model believes in repression of crime, maintenance of law and order and obtaining more convictions. Whereas, the due process model concerns about individual autonomy and integrity and argues to safeguard the individual rights and liberties and attempts to control the state power.

and other social variables affect the application of principles in producing humane justice.”³

There is constant conflict between crime control model, which is ‘interrogative friendly’, and due process model which attaches greater importance to protection of human rights. *B.B. Pande* has also observed that, “despite the proliferation in the legislative, administrative and judicial initiatives in the human rights field in recent times, the human rights rhetoric hardly been able to transform the concrete reality.” The important reason for the departure is due to the conflict between “Law mans ways” and “police mans ways”. *Balagopal* documented the custodial deaths and encounter deaths, critiqued fabricated cases, exposed prison conditions, and insisted on judicial accountability. He reminded us that unless the criminal justice institutions agencies internalised constitutionalism, the criminal justice would remain a theatre of arbitrariness.

Police is the first agency of the criminal justice administration which has the widest point of contact with citizens. The Police functions are mostly prohibitive and regulative in their impact. It left an impression on the individual that this agency interferes with the life, liberty and freedom of the people. Police custody acts as a ‘fundamental gateway’ into the criminal justice process. Arrest is a frightening experience of not only surrendering the liberty but also subjected to various kinds of intrusive police practices search, seizure, medical examination, DNA sampling etc. Above all, it is the most disempowering for suspects and accused and more vulnerable for children, women, physically challenged and mental health detainees.

Those people who enter prison face a complex environment where the coercive power of the state does not stop at the loss of liberty. Instead, the state, through prisons and their staff, intervenes in almost every aspect of their existence. Indian jails are filled not mainly with convicts but with undertrial prisoners who cannot secure release on bail and must wait for their trial. Their detention is based solely on ensuring their presence before the court. The locked doors, high walls, and iron bars of prisons tend

³ Nandini Satpathy v. P. L. Dani (1978) 2 SCC 424.

to sustain violence, stripping individuals of rights, dignity, liberty, and freedom, thereby legitimizing the functioning of the criminal justice system. A part of the sordid story is: “overcrowding of jails, prolonged detention of under trial prisoners, solitary confinement, unhygienic living conditions, denial of proper food, clothing and even medical treatment”. The condition of women, delinquent children, young offenders, destitute persons, vagrants, and those suffering from mental illness is even more appalling.⁴

The troubling reality is that prisons, prisoners, and their difficulties remain invisible. This invisibility arises from their character as ‘closed institutions.’ Just as in police stations and other places of custody, what occurs inside prisons is hidden from public oversight, leaving most violations of rights concealed from view. The result is the denial of detainees’ dignity and the erosion of their personality. At this point, legal aid and other institutions play an essential role in bringing visibility, moving the criminal justice system from the margins to the mainstream, and ensuring transparency, accountability, and protection of rights.

As *Justice Krishna Iyer* observed in *Sunil Batra* case “Freedom behind bars is part of our constitutional tryst... If wars are too important to be left to the generals, surely prisoners’ rights are too precious to be left to the jailors.” For Balagopal, institutional design was constitutional design. The state of our institutions is the state of our constitutionalism. This is the transformatory thinking burst forth from the Indian Supreme Court in the Post-emergency era resulting in the new wave of constitutionalisation of criminal justice.⁵

III. Constitutional History of Victories and Silences

Balagopal’s work spanned what we may call the four pillars of the criminal justice system.

⁴ Srikrishna Deva Rao, “*Bars and behind bars*” and “*Tihar: Prison or Mortuary?*” 1995

⁵ Srikrishna Deva Rao, *Custodial Deaths in India: A Critical Inquiry into Law, Procedure and Practice*, National Law School Journal, Bangalore 1994.

- *The police*, with their wide discretion over arrest, interrogation, and violence.
- *The prosecution*, which in India remains structurally subordinate to the police.
- *The judiciary*, which is slow and overburdened, yet the ultimate guardian of liberty.
- *The prison system*, hidden from public view, where rights are most easily forgotten.

Balagopal used the courts and the constitution as an arena for people's empowerment and in that process he attempted to develop new tools and weapons to reimagine the criminal justice. It is here that his long association with the Andhra Pradesh Civil Liberties Committee (APCLC) becomes crucial: APCLC's painstaking documentation of police encounters and custodial violence, and its insistence on public accountability, was in effect an effort to constitutionalise the routine exercise of coercive power.

Let me illustrate the tensions in constitutionalising criminal justice with the first pillar of Balagopal's engagement: arrest and detention. Few areas reveal the tension between constitutional promise and practice more sharply than arrest.

Arrest and Detention: Fragile Victories

The doctrinal breakthrough came with *Maneka Gandhi v. Union of India* (1978). By holding that "procedure established by law" must be fair, just, and reasonable, the Court laid the foundation for scrutinising police power. *Joginder Kumar v. State of UP* (1994) added substance, requiring necessity for arrest. *DK Basu v. State of West Bengal* (1997) went further, constitutionalising eleven safeguards: arrest memos, medical examination, intimation to relatives, among others. In *Arnesh Kumar v. State of Bihar* (2014), the Court directed magistrates to enforce Section 41A CrPC notices, to prevent routine arrests for offences carrying less than seven years.

On paper, this body of law constitutionalises arrest and detention. But empirical reality is sobering. Section 41A notices are often ignored. Arrest remains the default tool of investigation. Magistrates frequently rubber-stamp remand. Compensation for illegal detention is rare. This is the "fragile revolution" of arrest law – rich in

doctrine, weak in implementation. And it reflects precisely the gap that Balagopal's work taught us to interrogate.

Prisoners' Rights: Expanding Dignity, Evading Reform

From the trial court, let me move into the prison cell.

The late 1970s and early 1980s saw a wave of prisoner-rights jurisprudence. *Sunil Batra (I and II)* (1978, 1980) declared solitary confinement and bar fetters unconstitutional, insisting prisoners retain fundamental rights. *Sheela Barse* (1983) protected women and children in custody. *Shatrughan Chauhan* (2014) recognised delay in mercy petitions as a ground for commutation, foregrounding dignity even for the condemned.

These were victories of principle. Yet prisons remain overcrowded, with two-thirds of inmates undertrial. Parole and furlough are treated as executive discretion, not constitutional entitlement. Mental health and rehabilitation remain marginal. Open prisons exist only as isolated experiments. For instance, the Death Penalty India Report (2016) highlighted that long periods of incarcerations are the real product of retaining the death penalty in India, and the actual punishment that is lived by death row inmates is the uncertainty of life itself as they await court decisions and executive action on their mercy petitions. The death row prisoners pending Supreme Court appeals were found to have a median incarceration time of over six years, while those whose mercy petitions were rejected had spent a median of almost 17 years on the death row, not knowing whether they would live or die at the end of such time. Further, the study *Deathworthy* published in 2021 found that an overwhelming majority of death row prisoners that were interviewed (62.2 percent) had a mental illness and 11 percent had an intellectual disability.

Visitorial mechanisms – independent boards of visitors or regular external inspections – are supposed to act as constitutional guardrails here. But these mechanisms have remained either weak or dormant. APCLC's own prison visits and reports were attempts to fill precisely this vacuum of oversight. Balagopal's writings from his APCLC years chronicled the everyday indignities of prison life and insisted that without independent visitorial oversight the constitutional promise of dignity inside the prison walls would remain illusory.

Here again, doctrine has moved in the judgments of the court emphasising dignity of even prison inmates and their right to mental health; institutional practices and cultures on the ground have not.

Police Reform: A Blueprint Ignored

If prisons reveal institutional inertia, policing reveals active resistance to constitutional reform. Executive recalcitrance in making the police force accountable remains a real barrier to spreading a culture of constitutionalism.

For instance, *Prakash Singh v. Union of India* (2006) was the Court's most ambitious structural intervention. It required fixed tenure for officers, separation of investigation from law and order, and independent complaints authorities. It was an attempt to constitutionalise policing by embedding autonomy and accountability.

Two decades on, compliance is minimal. Most states have diluted or evaded the directives. Oversight bodies exist in name but not in substance. This is constitutionalisation in reverse: a landmark judgment undermined by legislative inertia.

Legal Aid and Speedy Trial: Rights without Remedies

If the exercise of the power to arrest reveal the fragility of constitutional gains in theory, the story of legal aid and speedy trial further adds to the caution that courtroom victories need to be worked on the ground.

The *Hussainara Khatoon* case (1979) constitutionalised speedy trial and legal aid. For the first time, the Court declared that undertrials could not languish for years simply because of systemic delay. In *Khatri (II)* (1981), Justice Bhagwati insisted that legal aid must be provided from the moment of arrest.

Yet four decades later, the right is more formal than real. State legal services authorities are underfunded. Panel lawyers are poorly trained and overburdened. Most accused meet their lawyer for the first time in court, and not in the police station.

The constitutional silence is even starker when it comes to what might be called “in situ legal aid”: the presence of counsel not just at trial but during interrogation and even during magisterial inquiries – such as inquiries into custodial deaths or police encounters. Although Sheela Barse (1983) directed that detainees must be informed of their right to legal aid and that legal aid committees should be notified of arrests, implementation of real-time, on-the-spot legal assistance remains rare.

Visits to police stations and prisons serve as a simple yet effective method for preventing torture. In India, the visitorial system is formally applied only to prisons under the Prisons Act. Both official and non-official visitors are given the responsibility of overseeing the treatment of prisoners and the overall conditions within prisons. But in reality in a number of states the governments have not constituted the Board of visitors, even if they are constituted, there are no regular and periodic visits. We should extend the visitorial mechanisms to police stations. There is a need to develop effective mechanisms of visits to prison and police stations in India.

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012) highlight the importance of ensuring access to legal aid from the very first stage of the criminal process, beginning at the police station. Such services include providing general advice and assistance at the police station to both victims of crime and accused persons, visiting police lock-ups or cells, and monitoring custody time limits to ensure timely production before the court. They also cover participation in police interviews, screening juveniles for diversion programmes, contacting or tracing parents, guardians, or sureties, and facilitating bail directly from the police station. In addition, the guidelines require the police to cooperate with service providers and to display information in every police station on the availability of these services and the means of accessing them.⁶

APCLC and similar groups repeatedly pressed for victims’ families and detainees to have legal representation during such magisterial inquiries, but the law still treats this as an administrative courtesy rather than a guaranteed constitutional entitlement. As Balagopal often wrote, for the poor, “process is punishment.” Unless legal aid is effective and early, the constitutional right remains hollow.

⁶ Srikrishna Deva Rao, *Unmet Legal Needs in Indian Criminal Justice System*, NLU Odisha Law Journal, 2015.

Preventive Detention and Surveillance: Constitutional Contradictions

From policing, Prisons and legal aid, let me turn to preventive detention and surveillance – aspects of the criminal justice system where constitutionalism is most compromised.

Even after *Puttaswamy* (2017) repudiated *ADM Jabalpur*, preventive detention laws endure, allowing incarceration without trial for up to a year. Courts rarely apply proportionality review in evaluating the validity of such laws. This co-existence of liberty rhetoric and preventive detention is a constitutional dissonance at the heart of our system.

Surveillance produces a similar paradox. Privacy is now a fundamental right. Yet the CrPC's and now the BNSS' search and seizure provisions; interception under the Telegraph Act; and digital forensics remain untouched. Phone cloning, data scraping, algorithmic profiling – these are deployed without constitutional scrutiny. The new Income Tax Act 2025 even grants tax officers the powers to enter and search any place where a computer system is located, inspect personal and professional communication platforms, cloud storage, and even social media accounts. It has been argued that a power once limited to seizing documents and cash from physical premises has now been extended to permit digital access into the intimate lives of taxpayer. Criminal law's intrusive aspects were, to begin with, not limited by constitutionalism in the most effective manner. Such powers now, however, are even extending to other statutes without constitutional safeguards embedded in them.

Custodial Justice

The accused or suspect brought to the custodial institutions end up dead in mysterious circumstances and the state circulates stories of 'suicide' or 'natural death'. The tortured body becomes a silent voice and mute in suffering and pain. If the victim survives, he or she can speak and bear witness. But in the process if the victim dies, there is no one to speak the tale marks of Torture and death.⁷

⁷ Srikrishna Deva Rao, *Rethinking on Custodial Justice*, Human Rights in India: Theory and Practice, Edited by Justice A.S. Anand and A.V. Afons, IAS, Shimla, 2011.

There has been a consistent failure in India to address thematic issues that surrounds custodial deaths. Inquest is the public examination of the apparent cause of death. There are allegations that no information is given concerning dates, place and details to interested parties. The family of the deceased also feels excluded from the proceedings and creates a feeling of ‘hiding’ something.

The present system of legal representation during inquest is inherently unfair. The police and prison officials as public body are represented with a considerable public expense while the relatives of the deceased remain unrepresented and many cases were unheard. *Phil Seraton*, rightly observed that, “the inquest represents an institutional denial of the principals of equality, fairness and justice enshrined in international Conventions.”

APCLC documented and investigated into to all custodial deaths in Andhra Pradesh from 1980s onwards and provided free legal advice to bereaved families during magisterial inquiries. Unlike most other legal hearings there is no automatic right to legal aid during inquest, though now it is available in ‘exceptional circumstances’. Even this limited legal representation is made possible due to the consistent efforts of civil liberties groups in India. This is another area where Balagopal made immense contributions to the development of custodial justice.

Balagopal would have pointed to all of this as evidence that constitutionalism thrives in rhetoric but withers in practice. So where do we go from here? The next phase must move beyond judgments to institutional embedding of constitutional values. We need to:

- Shift from arrest-first to notice-first policing, with supervisory liability for unlawful detentions.
- Guarantee early access to counsel, within hours of arrest.
- Enact an exclusionary rule, making evidence obtained by torture or illegal search inadmissible. This is especially since we continue to not follow in India the doctrine of fruits of the poisonous tree: illegally obtained evidence is admissible if it pertains to relevant facts.
- Reform bail, taking into account socio-economic status so liberty is not priced out of reach. Let us not forget the special criminal laws such as UAPA

and PMLA continue to dilute the ‘bail is the norm, jail the exception’ principle.

- Recognise parole and furlough as rights, not favours.
- Regulate forensic and surveillance technologies, with audits, accuracy checks, and defence access.
- Publish real-time data on arrests, bail, and prisons, to make compliance visible and measurable. The National Crime Records Bureau has not published its annual report since 2022, with 2023’s data still being processed.

To constitutionalise criminal justice is not to romanticise the Constitution, nor to despair at its silences. It is to insist that its values – fairness, dignity and equality become the grammar of daily practice. This was Balagopal’s challenge: to carry the Constitution into the darkest corners of policing, prosecution, and prisons, until even the most powerless can feel its presence.

As a strong votary of constitutionalisation of criminal justice, I argue that we need to transform the rights and its jurisprudence from the pronouncements into routine practice to make it more humane with love, compassion.

IV. Jurisprudence of Peace, Love & Justice

Most of the times, people were caught up within the web of the criminal justice system under various names and forms. They need love, empathy and to recognise and respect their human dignity. Behind the criminal cases and dockets, “we see the human beings, they smile, they cry”. We need a new criminology and criminal justice that minimize suffering, maximise dignity, peace and love. What is urgently required is the love, peace and promotion of humanistic criminology.

The peace-making perspective originated in criminology debates in 1970s initially in the writings of *Richard Quinney*, *Pepinsky* and *Braswell* and the Indian civil liberties movement, particularly *Balagopal* carried forward and institutionalised it in the work of APCLC. The Peace-making criminology promotes reducing sufferings of others and strongly influenced by Buddhist teachings. The peace-

making perspective begins with the transformation of individuals becoming more compassionate, meditative, altruistic and non-judgemental in their relationship with others. The restorative justice movement is indeed an extension of the nexus between humanist sociology, peace-making and humanistic criminology. The humanism and peace making promotes humanity, compassion, peace, and respect for individual human dignity and identity for each person.

Balagopal lived his fulsome life as a citizen-lawyer learning and understanding their fellow creatures. Practising law for people is the best way that keep pace with human sympathy and understanding of law.

The true tribute to him is not in nostalgia, but in continuation. To continue asking difficult questions. To continue testing doctrine against experience. And to continue demanding that the Constitution live not in law reports, but in people's lives.

That, I submit, is the unfinished project of constitutionalising criminal justice in India.

Thank you.