

Security and Justice – An Indian perspective

Paper submitted for the Indo-US forum on Security and Justice
at University of Georgia Law School - April 3, 2010

by Hon'ble Mr. K.G. Balakrishnan¹

There are inherent linkages between any liberal democracy's interests in maintaining physical security and delivering justice. From a conceptual viewpoint, the relationship between the ideas of security and justice can be viewed in two different ways. The first of these approaches is derived from the fundamentals of political philosophy wherein the state is responsible for protecting the life, liberty and property of its citizens. This is of course a precondition for dispensing justice in the wider sense of social, economic and political equality as well as the narrower sense of an efficient, reliable and fair judicial system. In pursuit of this obligation, the State is expected to hold a monopoly over violence through mechanisms such as the armed forces and the criminal justice system. The implicit coercion in the exercise of state power becomes essential for sustaining the collective life of a society. However, our judicial system must also guard against excesses committed in the exercise of state power. It is in this context that we need to examine the second category of linkages between the ideas of security and justice. To borrow an often-repeated statement, sometimes the measures that are designed to defend liberty can themselves become a threat to liberty.

¹ Serving as Chief Justice of India (January 2007 –present) at the Supreme Court of India, New Delhi. This paper has been developed from an address delivered at a Conference on the theme 'Terrorism, Rule of Law and Human Rights' which was held in New Delhi on December 13, 2008. Some changes have been made to reflect developments since then. Research assistance provided by Sidharth Chauhan (Law Clerk) is acknowledged.

In recent years, the often-competing claims of security and justice have posed complex questions for our legal system. As much as the public discourse in the United States has been shaped by the events of September 11, 2001 and their aftermath, Independent India has faced comparable threats on account of terrorist attacks, insurgencies and communal violence. There has been a fair amount of discussion on what should be the appropriate legal responses to the problem of terrorism. Our frame of reference has largely been confined to the content of Anti-terrorism legislations such as the Terrorist and Disruptive Activities (Prevention) Act (TADA) and the Prevention of Terrorism Act (POTA), both of which now stand repealed, but some of their contested provisions find a place in the Unlawful Activities (Prevention) Act which is currently in force. Some of the concerns that have been raised by the media and civil society organisations touch on aspects such as the imprecise definitions of terrorism-related offences, provisions for long periods of preventive detention, dilution of the guarantee of fair trial and the arbitrary targeting of individuals belonging to socially marginalized groups. The concern with the protection of human rights in such a climate has been aptly summarized in the following words by a group of American scholars who had published a study in 2006:

“Continuing a pattern established by the British, India's antiterrorism and other security laws have periodically been enacted, repealed, and reenacted in the years since independence. To some extent, this cycle derives from underlying weaknesses in India's ordinary criminal justice institutions. Even when they create distinct mechanisms and procedural rules, India's antiterrorism laws rely upon the same institutions - police, prosecution, judiciary - used in fighting any serious crimes, and to the extent these institutions fail to protect human rights when enforcing ordinary criminal laws, they are no more likely to do so in the high pressure context of fighting terrorism. At the same time, the impulse to enact special laws stems from real and perceived problems concerning the effectiveness of the regular criminal justice system itself, which create intense pressures to take

particular offenses outside of that system. To break this cycle and fully address the human rights issues arising from India's special antiterrorism laws, it is therefore necessary to improve and reform the police and criminal justice system more generally, both to protect human rights more adequately and to alleviate the pressures to enact special antiterrorism and security laws in the first place".²

While the constructive suggestions for reforms in the police and criminal justice system are well taken, I must highlight that the above-mentioned legislations are only an extension of the domestic criminal justice system and they have not been effective in tackling well-organised terrorist groups, many of whom have cross-border networks. In the age of increasing globalisation, better facilities for communications and the flow of capital across borders has also made it easier for terrorist activities to assume cross-border dimensions. As in the case of the 26/11 attacks in Mumbai, such networks often involve individuals located in different countries who collaborate by transferring funds and procuring weapons and explosives. With the easy availability of information over the internet, sometimes individuals learn how to build explosives on their own. This clearly means that terrorism is an international problem and requires effective multilateral engagement between various nations. However, there are several practical hurdles and delays on account of the wide disparity in the procedures for assistance in investigation and extradition. In some cases, a particular government may be reluctant to act against persons who are suspected of involvement in terrorist attacks in another country. Such a situation may arise when the terrorist group enjoys considerable local support.

² See: Anil Kalhan, Gerald P. Conroy, Mamta Kaushal, Sam Scott Miller and Jed S. Rakoff, 'Colonial Continuities: Human Rights, Terrorism and Security Laws in India', 20 *Columbia Journal of Asian Law* (2006) at pp. 93-234

In this scenario, there has been a constructive suggestion that terrorist attacks should be treated as a special category of armed conflict, wherein obligations can be placed on all nations to collaborate in the investigation and prosecution of terrorist attacks that have taken place in any particular country. This calls for a blurring of the distinction between the international and domestic nature of armed conflict when it comes to terrorist strikes. Another suggestion is that of treating terrorist attacks as offences recognised under International Criminal Law, such as ‘crimes against humanity’ which can then be tried before a supranational tribunal such as the International Criminal Court (ICC). However, the obvious practical problem with this suggestion is that prosecutions before this Court need to be initiated by the United Nations Security Council (UN SC) and the latter body may be reluctant to do so in instances of one-off terrorist attacks as opposed to continuing conflicts.

Terrorist acts themselves are broadly identified with the use of violent methods in place of the ordinary tools of political participation. India is facing multiple terrorist threats that owe their origin to a variety of factors such as religious fundamentalism, separatist movements and even endemic poverty in areas where developmental schemes have either not reached or failed. While it may be easy to identify the causes behind terrorist attacks, the more onerous task is that of preventing and deterring them. In this regard, the various anti-terrorism legislations and the criminal laws are only one part of the legal response to terrorism. More efficiency in investigation and prosecution may help in preventing some attacks and punishing the perpetrators, but this does not strike at the root of the problem. For instance, when a particular terrorist group has widespread support amongst a

particular community that is discontented with the state, even successful prosecutions may not deter others in the community from committing similar acts. In fact there is a real risk that those who are convicted and punished will be seen as ‘martyrs’ for their respective cause, which may in turn provoke more people from a discontented community to use violent means to air their political grievances.

Even though stronger anti-terrorism laws can strengthen the hand of law-enforcement agencies in the short-run, the more meaningful response to terrorism should be based on strategies involving dialogue with the discontented groups. This position is open to the criticism of being a lofty ideal since our army and police personnel who are engaged in counter-terrorism and anti-insurgency operations routinely face grave and immediate dangers which are far-removed from the relatively secure spaces where decisions are made about our politics and economics. In relation to this issue, an oft-repeated argument is that since our security personnel are constantly exposed to serious risks of violence, they should be empowered to use harsh measures in order to prevent such violence. In such circumstances, conferring a very broad legal protection on security personnel has also been problematic. For instance, the implementation of the Armed Forces Special Powers Act (AFSPA) in some of the North-Eastern states has attracted considerable criticism since it is said to have encouraged a climate of impunity. While I am not equipped to comment on the ground-realities, this should awaken us to the fact that the State’s response to terrorism should not come to resemble the terrorist acts themselves.

I must also emphasize that the symbolic impact of terrorist attacks on the minds of ordinary citizens has also been considerably amplified by pervasive media coverage. In India, the proliferation of 24-hour T.V. news channels and the digital medium has ensured that quite often some disturbing images and statements reach a wide audience within a short span of time. One of the ill-effects of unrestrained coverage is that it can provoke a disproportionate level of anger amongst the masses. While it is fair for the media to criticise the inadequacies in the security and law-enforcement apparatus, there is also a possibility that the resentment fuelled by media coverage can turn into an irrational desire for retribution. For instance, if terrorist strikes are attributed to individuals belonging to a certain ethnic or religious community, then the same may result in unreasonable discrimination and retaliation against most ordinary members of that community. Such a trend was clearly visible in the United States in the aftermath of the 9 /11 attacks and is evidently a fact of life in India as well.

Furthermore, the trauma resulting from the terrorist attacks may be used as a justification for undue curtailment of individual rights and civil liberties. Instead of offering a considered response to the growth of terrorism, even democratic nations may resort to questionable methods such as legislations which permit the prolonged detention of terror suspects, authorising coercive interrogation techniques and the denial of the right to fair trial. The mass hysteria generated by terrorist attacks can also lead to more support for increasing governmental surveillance over citizens and unfair restrictions on immigration.

In recent memory, a widely-discussed example of this ‘slippery-slope’ leading to the curtailment of individual rights is the treatment of the detainees in Guantanamo Bay. It is admitted that the U.S. military authorities have detained hundreds of suspects for long periods, often without the filing of charges or access to independent judicial remedies. The legal device used for the same was that of classifying these detainees as ‘*unlawful enemy combatants*’, thereby denying them the protections guaranteed by the Geneva Convention to ‘prisoners-of-war’. This means that even the ordinary right of *habeas corpus* was denied to these detainees, primarily on the ground that they were not citizens. For some time, these practices were defended by asserting that these detainees had access to safeguards such as appeals before Military Commissions, Administrative Review Boards and Combatant Status Review Tribunals. It must be noted that the Combatant Status Review Tribunals were themselves created after the United States Supreme Court ruled that the detainees had a right to contest their description as ‘unlawful enemy combatants’. A subsequent ruling established that the terror suspects could not be denied the right of *habeas corpus* and should be granted access to civilian courts. The rationale for this was that the various military tribunals did not possess the requisite degree of independence to try suspects who had been apprehended and detained by the military authorities themselves.

Even in the United Kingdom, the House of Lords in the *Belmarsh decision* (2004) struck down a provision in the Anti-Terrorism, Crime and Security Act, 2001 which contemplated the indefinite detention of terror suspects of foreign nationalities. This ruling prompted the enactment of the Prevention of Terrorism Act, 2005 which was fiercely debated and the British

Parliament accepted 42 days as the maximum permissible period for detention without framing of charges. Evidently, the judiciary in these two countries has played a moderating role in checking the excesses that have crept into the responses to terrorism.

In some circles, it is argued that the judiciary places unnecessary curbs on the power of the investigating agencies to tackle terrorism. In India, those who subscribe to this view also demand changes in our criminal and evidence law - such as provisions for longer periods of preventive detention and the admissibility in evidence of confessions made while in police custody. In response to such demands, the Unlawful Activities (Prevention) Act was amended in 2008 to provide for a 180-day period for the detention of terror suspects without trial but the demand relating to the admissibility of custodial confessions was rejected. While the ultimate choice in this regard does indeed lie with the legislature, as a polity we must be careful not to trample upon 'due process' norms. The necessary implication of the same is that all governmental action, even in exceptional times must meet the standards of fairness, reasonableness and non-discrimination. This implies that we must be wary of the use of torture and other questionable techniques by law enforcement agencies. Coercive interrogation techniques mostly induce false confessions and do not help in preventing terrorist attacks. Furthermore, the tolerance of the same can breed a sense of complacency and compromise the quality of investigation efforts if they are viewed as 'short-cuts' by investigative agencies.

The apprehension and interrogation of terror suspects must also be done in a thoroughly professional manner, with the provision of adequate judicial

scrutiny as mandated in Sections 160-167 of the Code of Criminal Procedure. This is required because in recent counter-terrorist operations, there have been several reports of the same individuals being repeatedly arrested on flimsy grounds and the concoction of evidence – such as the production of similarly worded confession statements by persons arrested in different locations. In this regard, the role of the judiciary should not be misunderstood. Adherence to ‘due process’ norms should be at the centre of our response to terrorism. As part of the legal community, we must uphold the ‘right to fair trial’ for all individuals, irrespective of how heinous their crimes may be. If we accept a dilution of this right, it will count as a moral loss against those who preach hatred and violence. It must also be kept in mind that a fair trial for a terror suspect serves two broad objectives, namely that of securing conviction as well as unearthing the entire conspiracy behind an attack so that the State is able to improve its response to similar threats in the future.

In the long-run, the only real solution is to strengthen the investigation machinery so that attacks being planned for the future can be effectively prevented. This means that intelligence as well as law-enforcement agencies at different levels must continuously share information among themselves and work together to unearth terrorist conspiracies and prevent the commission of violent attacks. The creation of the Federal Investigation Agency (FIA) by an Act of Parliament is a step in this direction. It is of course very important for our legal system to agree on appropriate solutions rather than choosing remedies which worsen the problem.

* * *