

LEGAL ISSUES CONCERNING NATIONAL SECURITY

*Ranbir Singh**

Introduction:

There is little need to elaborate on the assertion that there is a current and chronic crisis of national security in India. An unending succession of events has made this far too obvious to demand argument or illustration. Terrorism, organised crime, caste and communal violence, the immense and increasing criminalisation of politics, the growing numbers of the poor and rootless, accumulating pressures of population and consumerism on limited natural and national resources, and a widening area of abject non-governance – once associated only with Bihar – have all combined to make internal security the most urgent issue of our time. Where optimists find some evidence of improvement, such illusions are brutally swept aside by some new crisis. The record of declining communal violence over the past decade was one such datum that lulled some into a sense of temporary security and a feeling that, at least on some variables, there was a positive process of political evolution – till Godhra and the carnage in Gujarat reminded us of how close to the edge we actually live.

The essence of the argument is that the unending search for an elusive ‘consensus’ that has stalled all national security legislation in this country, even as criminal audacity expands exponentially in a legislative vacuum, is an unacceptable and potentially disastrous response to the rising crises that confront us. Parties will have to rise above partisan interests and legislate on crucial issues in this context, and will have to do so quickly in order to stem the rising tide of anarchy and the growing power of those who threaten not only the state, but civilisation itself. All such legislation would and must remain open to amendment in the light of evolving experience – and such processes of review must not be structured around a one-time and all-or-nothing approach that has characterised debates in the past. If elements of a law are found to be susceptible to abuse or to have caused unacceptable hardship to the innocent, these – and not the law in entirety – must be rejected and redrafted.

Governments adopt various means of maintaining national security, these broadly categorized under the following heads:

1. International Conventions and General International Law,
2. Military Force,
3. Diplomacy,
4. Implementation of anti-terror legislations, and

*Vice-Chancellor, NALSAR University of Law, Justice City, Shameerpet, Hyderabad.

5. Economic Sanctions,
6. Legislative framework
7. Judicial functionalities and activism
8. Maintenance of efficient policies regarding vigilance methods.

Appraising the Present Scenario:

There are, of course, many and complex reasons for the state of permanent and rising tensions that has become the essence of our way of being. One, at least, of the most significant, is the progressive burden on Indian Judicial System. The truth is, today, the link between crime and punishment has almost entirely been severed. This is true for almost all types of crime, but is most unambiguously the case among those who harness criminal violence to political or sectarian ends. Here, even the moral imperative of punishment is compromised, if not rejected, as every case becomes an exception to the rule. Perverse arguments of a populist sanction are advanced to protect political players from criminal prosecution; and Prime Ministers meet, or send their emissaries to negotiate with, terrorists, warlords and mass murderers.

Accountability:

The abdication of responsibility goes much further. Indeed, in situations of persistent mass violence, the entire system of civil administration is effectively suspended. The only agencies of the state that continue to function, at varying levels and with varying degrees of effectiveness, are the uniformed services – the police, the paramilitary forces and the Army– and it is these services that come in for the greatest measure of abuse and harassment once a degree of order is restored. With the agencies of civil administration either withdrawing from areas afflicted by widespread violence, or even evolving complicit arrangements with the forces of violence and subversion, the entire gamut of the tasks of development and governance are simply abandoned.

These are natural consequences, on the one hand, of gradual processes of erosion within all institutions of government in the country and, on the other, of dramatic transformations in the nature and range of the internal security threats that confront the modern state. The tectonic shift in the character and scale of these threats was brought home dramatically by the 9/11 attacks in USA, as also by mounting evidence thereafter that many terrorists groups have been exploring the possibilities of the acquisition and use of a range of weapons of mass destruction (WMD). What is needed, consequently, is a comprehensive reappraisal of all contemporary threats to national security, and a refashioning of the nation's responses in terms of the legislative and institutional framework, and of executive action.

Organised Crime:

Underlying any such reassessment must be a clear understanding that, today, very small minorities can directly and significantly threaten, undermine and, through determined, persistent and extreme violence, even destroy the edifice of the state and the integrity of the nation – and this is especially true where they act with foreign support and safe havens. The arguments that the manifestations of terrorism are located in ‘root causes’ of poverty and popular discontent, though they may have some grains of truth, are consequently far from an accurate reflection of reality. Terrorist movements today can be sustained by minuscule groupings, sometimes composed entirely or predominantly of foreigners, often exclusively supported by hostile states, and increasingly indifferent – if not inimical – to the hopes and aspirations of local populations [More than 85 per cent of the civilian victims of terrorism in J&K, for instance, are Muslims, something of a problematic for ‘Islamic mujahiddeen’ to consistently explain away in terms of a ‘struggle to protect oppressed Muslims’].

Unfortunately, on every occasion when the issue of internal or national security legislation, or any of its components, such as counter-terrorism legislation or legislation against organised crime, have been discussed in the recent past, an entirely irrational, even hysterical response has greeted any such proposals, and it has generally been argued that the IPC is capable of dealing with every existing and emerging challenge. This is interesting, and ascribes to the IPC something of a sacred and immutable character – which no statute book in a changing world can ever enjoy. This is particularly the case where patterns of criminal action have assumed proportions that undermine the very fundamentals of the institutions of democracy and of civil society. It is high time we understood the dangers and possibilities of a terrorised society, and the inadequacy of the conventional law – which approaches criminal conduct as an individual infraction violating individual rights – to deal with movements that collectively subvert and disrupt the structures of governance and enforcement themselves.

Confronted by such movements demands not only ‘more stringent’ laws; but real-time legislative responses that accommodate each significant transformation of criminal conduct. We may disagree with the basics and content of such legislation, but the speed and proportions of the American legislative response to the 9/11 attacks, and before these, to the attacks on the World Trade Centre in 1993, are what will be necessary if democracies are to defend themselves effectively against fanatical forces that accept no limits of law or conventional morality on the violence they are willing to inflict on others to secure their ends. This does not imply a blind and submissive acceptance by

all Americans to every legislative excess of the Bush administration, and a vigorous democratic discourse is certainly in evidence on the new legislation, and its provisions can be expected to be amended and diluted over time, and in the light of the evolving experience. What is missed, however, is the fact that this swiftness and scale of response made it possible to avert many potential follow-up strikes that had evidently been planned by the Al Qaeda, and as new cells and evidence is uncovered, it is clear that at least some lives have been saved and possible catastrophes averted, without extraordinary and irreversible harm being inflicted.

Institutional Mechanism:

A review of the institutional mechanisms and processes for the protection of these rights to ensure that it is these that are, in fact, protected, and that their protection does not inadvertently extend to criminal intent and operations. If we are to take human rights even half-way seriously, we will have to recognize that terrorism, low intensity warfare and their linkages with organised crime have created new and unprecedented dangers to the unity and integrity of the country, to the survival of democratic governance, and to the very possibility of human rights.

It must, of course, be accepted that the possibility of abuse of laws will always exist, and we will have to define safeguards with each legislation to limit the possibility and scope of such abuse. We must, however, understand at the same time that weak laws, or the absence of appropriate legislation, yields greater dangers, both of the victimization of innocents by wrongdoers, and – bluntly put – in the form of resort to extra-legal solutions by those charged with the protection of lives and property, and the preservation of order. Without order, and without a concomitant security of life and property, there can be no freedom and no rights.

Conceptualizing and Contextualizing the issues:

Defining – and perhaps constantly redefining – possible legislative solutions to our present predicament will demand enormous sagacity on the part of the nation's collective leadership. It is neither possible nor the intent, here, to enumerate some simple solutions or preconceived formulae that will magically resolve all problems. A fair beginning can, however, be made if the areas that demand urgent legislative attention and reform are reasonably and clearly identified.

A comprehensive set of counter-terrorism laws, as well as laws to combat organised crime must be drafted and given a permanent place in our statute books. Terrorism and organised crime are not transient crises, but have emerged as stable long-term threats to national security, and it is delusional to believe

that 'special' and temporary laws are adequate to deal with the problem. The proposed laws would need to take into account, at least, the following areas of concern:

A clear conceptualisation and definition of the complex patterns of crime that constitute 'terrorism' and 'organised crime.' It is crucial, here, to bear in mind that these are unique categories of criminal behaviour. While the actions – murder, intimidation, extortion, possession and use of illegal arms, etc. – that terrorists and organised criminal gangs carry out may be separately covered by existing laws, their character and context is fundamentally transformed by the element of massive, often transnationally coordinated activities. The threat these activities constitute, and the damage they inflict, is incalculably greater than any pattern of individual criminal activity – the whole, to borrow the gestaltist principle, is greater than the simple sum of its parts. These threats can only be contained if this is explicitly recognised, and legislation targets not only the executioners of terrorist action, but the entire network of support that makes such action possible.

The transfer and use of illegal revenues is the lifeblood of both terrorism and organised crime, and stringent laws must be devised to deprive criminal and subversive groupings of funds. This will require the implementation of harsh penalties on illegal transfers and money laundering, as well as the criminalisation of a range of economic offences, including the use of such resources in legitimate businesses.

The activities of the 'fellow travellers of terrorism' must also be brought under scrutiny. This includes a range of front organisations, political actors, non-governmental organisations, businesses, etc., who provide the needed 'overground' support that makes the 'underground' activities of extremists possible.

The framework of counter-terrorism policy must be clearly articulated. This is not just a question for the political executive to determine, some limits of law must be placed on what is or is not permissible. Elected governments have, in the past, made every principle of rule of law and constitutional governance negotiable under threat of terror. Statutory limits must now be placed on how much governments can actually 'put on the table' or 'negotiate' in such situations. The present system has created a structure of incentives that actually reward terrorists and extremists, and this will have to be dismantled. Those who intercede with terrorists on the government's behalf must also be statutorily prohibited from any negotiations or commitments that would require constitutional changes. Such changes are an exclusive prerogative of Parliament, and cannot be offered or discussed by any emissary of government without

prior Parliamentary approval.

Existing 'surrender' policies must also be brought under statutory review. Current practices have created more problems than they have solved. There must be some limitations on the 'rewards' and incentives that attach to the surrender of terrorists, to amnesty or dropping of prosecution for criminal offences against those who surrender, etc., and practices must be brought in line with the principles of the rule of law.

There is now a strong international mandate for effective laws against terrorism, and this includes various United Nations resolutions that impose a duty on all member states to legislate effectively to control the activities of terrorists and their support organisations. It is now time to bring Indian laws into conformity with this mandate, and also to establish efficient structures of international co-operation and exchange of intelligence to counter the international threats and networks of terrorists and organised crime actors.

The burgeoning wave of terrorism that is sweeping across the country – and indeed, the entire world – demands a suitable, coherent and comprehensive 'use of force' doctrine. It must be clear that the ideas and orientation that were devised to deal with civil riots and transient political violence are entirely inadequate to confront the scale, intensity and character of contemporary terrorist violence. As the lethality and the linkages of terrorist groups grow, this orientation will become more and more a hindrance to a co-ordinated and effective response.

Terrorism and low intensity warfare have imposed new structural challenges on law enforcement that we are yet to accommodate even at a conceptual level. Our police and paramilitary forces continue to operate under mandates and legal provisions drafted by the British colonial government, and these have, at best, been tinkered with after Independence. The Evidence Act is another anachronism in need of urgent amendment, and must swiftly incorporate the use of emerging technologies and devices in the prosecution of crime.

Although low intensity wars and widespread terrorism have ravaged many parts of the country for decades now, these conflicts are still conceived of by the national leadership and the so-called 'intelligentsia' as 'non-military threats', and an ill-equipped Home Ministry is required to deal with them. The entire orientation to low intensity conflicts is of 'emergency deployment' – stop-gap arrangements to deal with what are still thought of as transient emergencies. The result is that the Army is repeatedly called out in these conflicts, supposedly to 'aid civil authority'. The fact is, neither the police nor the army, by virtue of their basic orientation and training, is properly equipped

to handle these crises. In view of the future threat potential of low intensity wars, it is crucial that a radical reformation of internal security forces be initiated, creating the skills, knowledge, attitudes and infrastructure necessary to confront this danger, and possibly raising entirely new forces to grapple with this specific hazard.

The parameters within which each agency of government must respond to such challenges need to be clearly assessed, and the powers, the range of extraordinary actions permitted in these situations, and the applicable legal criteria and context of evaluation of these actions - whether these are the same as those applicable in peacetime or are to be akin to articles of war, or are to be redefined in terms of the new category of 'low intensity wars' - have to be clearly determined and suitably legislated. In the absence of such legislative intervention, enforcement agencies and security forces will continue to fight with their hands tied behind their backs - and this situation is not only entirely unacceptable, it is suicidal.

The legislative framework must provide for the suppression and containment of subversive and extremist activities by religious institutions and organisations. The present system has made a 'holy cow' out of any group or organisation that claims religious inspiration or affiliation, virtually placing these outside the bounds of the law. While Constitutional freedoms, including the freedom of belief, must be vigorously protected, the abuse of such freedoms for activities and ends that lie outside the intent and objectives of these Constitutional provisions must be punished with equal vigour. This will be something of a tightrope, but it has to be walked.

Existing provisions and penalties on mass communal violence are also far from sufficient. The record of convictions for major riots in this country is abysmal. Even where thousands have been killed - as in 1984 - there have been virtually no convictions. This is not just a matter of 'political will', but is, in fact, evidence that existing laws are insufficient. Current provisions look upon the riot as an individual transgression. There is no legal instrument available to contain the processes of violent religious mobilisation and engineered mass riots. Worse, where political and state collusion are a fact - as they inevitably have been in most recent cases of mass rioting - there must be some overriding legislation that initiates mandatory processes of prosecution and extraordinary penalties. ,,

Border management and the illegal movement of populations across international borders is another problem that has been neglected for decades in search of a 'consensus' that will never be found. In the interim, the demographic destabilization that has taken place, particularly in India's Northeast, has already resulted in enormous violence, and threatens to acquire proportions that are far more dangerous to the nation's security and integrity than any existing threat.

This is, again, an area that demands immediate legislative attention and the imposition of statutory obligations on governments to prevent and punish such illegal movements of populations.

Legislative provisions and statutory penalties are necessary to ensure that judicial and government officers who fail to meet their constitutional obligations under threat or fear are penalized and removed from their positions, and that the institutions of civil governance do not systematically collapse at the first signs of personal risk to the privileged cadres of these instrumentalities of the state.

Judicial Reform: There is an imperative need to introduce immediate judicial reforms so that the judicial action will have a deterrent impact, specially on the hardened cadres of terrorists and organized crime groupings. The present judicial system which is under so much of stress and strain because of the every mounting number of cases, that it find extremely difficult to deliver speedy justice. These results in long delays which boost the morale of the terrorists and persons engaged in organized crimes. If decisions would be fast, and conviction rate high, situation will certainly change for the better. The Judiciary has done a commendable job inspite of great pressure of work load. Still there is long way to go as there is much need to be done in the paradigm of judicial reforms.

A proposal to establish a Central Law Enforcement Agency has been languishing with government for some time now, once again, in search of the 'elusive consensuses. It must be recognized that state governments do not have either the resources or the powers to tackle contemporary patterns of terrorism and crime, and the intervention of a national agency is becoming an increasing and urgent imperative.

Clearly, police reforms, the strengthening of the law enforcement, investigative and intelligence structures, and enormous investment in internal security are now necessary. It is time to abandon the idea that such investments constitute 'non-productive expenditure'. There is a peace dividend that comes with good law and order administration, and this is reflected in higher productivity in every other sphere of economic activity. The national budget and various economic policies should take these factors into consideration at the time when allocations for policing are taken up.

Much has already been stated above about existing Human Rights practices and processes. It requires a simple reiteration here to underline the need for a review of these practices and processes to restrict the existing and enormous potential of abuse by unscrupulous and criminalized elements.

Non-governmental organizations in India have been passionate advocates of 'transparency' in governance, and equally passionate opponents of transparency in their own activities. There is now mounting evidence of NGO malfeasance and collusion with terrorist and subversive organizations in various theatres of conflict in India, and it is high time statutory obligations of transparency were imposed on these entities.

The bureaucracies of the 19th and early 20th Century continue to dominate our internal security and law enforcement apparatus into the 21st Century, and have now become obstacles to the fundamental objectives of efficient law enforcement. The decision-making processes at the highest levels are oriented to a diffusion of responsibility and a complete failure to understand the time-frames of contemporary crisis management. There is an urgent need to create new and responsive structures of administration and accountability that are geared to the time-frames imposed by modern technologies, and to radically transform existing command, control, communication and information systems, both internally within specific agencies, and in the multi-force scenarios that are becoming increasingly common. Since initiatives for appropriate change have not emerged from the executive – which has strong vested interests in the perpetuation of the existing system – such initiatives must be legislatively imposed.

What will be the character of conflict and internal security challenges ten, or even twenty years from now? And what will be the nature of the responses that will be required to cope with these? Our answers to these questions will define the structure and composition of the Forces that we believe can help us cope with these future challenges. And the degree to which, and the detail in which, we are, in fact, able to correctly assess these future challenges, and to generate appropriate responses before they become an overwhelming threat to the existing order, will be the only measure of the success of the present leadership. This process of projection, moreover, must be continuous and will need to be institutionalized as part of the basic structures of law enforcement and internal security. In addition, there is a strong case for a Parliamentary advisory board & secretariat on internal security. The existing processes and official mechanisms of information dissemination among Parliamentarians are too slow, cumbersome, and partisan to serve as a adequate and quick source of information on rapidly transforming events. There is urgent need to create an institutional mechanism that would keep all parties and the Parliament continuously apprised of various aspects of the internal security situation, and to create an apparatus – under Parliamentary control – to secure data and information on, research and analyze various aspects of existing and emerging internal security crises. Indeed, the Parliamentary Committee on Internal

Security must also have a permanent research committee or consultancy attached to it to ensure that its deliberations go beyond the information provided by the government, on the one hand, and the popular media, on the other.

Finally, at the very heart of the problem, is the question of defining a coherent and comprehensive policy framework on internal security. In the absence of a coherent vision of the nation's larger strategy, specific initiatives, especially where they are fire-fighting responses to current crises, tend to cancel each other out and often, in fact, prove counterproductive.

The very first imperative of an effective policy on internal security, consequently, requires the definition of the basic principles on which all action and policy is to be constructed. No such principles are reflected in our present policies, and there is little evidence to suggest that they exist. Once defined, these principles must be strictly adhered to, circumscribing the range and content of actions and negotiations that any government or official may engage in with regard to, for instance, terrorists or organized crime syndicates, or in situations of crisis generated by the actions of such agents of disorder. Our responses to terrorism in the past have not been reality-based. The Indian state must start educating itself on how it is to tackle individuals and groups trying to destroy it. And it must learn how to arm and protect those who put their lives at stake in the defense of India's unity and integrity. This demands a massive and unprecedented effort, one that has to be exerted within a timeframe that grows shorter by the day if it is to have a hope of success.

Conclusion:

Any political system must change with the times and not stagnate. Legal means for redress must always remain open. Whereas conciliation amongst disparate sections of society is desirable, appeasement and compromise on principles is not. Neglect, persecution and exploitation are but some of the factors responsible for leading to a feeling of alienation amongst people. A situation of this kind provides an ideal breeding ground for anti-social elements that often hijack the ideology of the majority and manipulate it to suit their own sinister designs. The best way to defeat an insurgency or a terrorist grouping is to prevent it. Therefore the foremost duty of the government is to stamp out official indifference and callousness, provide opportunities, and inspire a sense of nation building and national integration and to resolve all disputes, especially those amongst States within a federal setup in an impartial manner. Actions such as these would go a long way in preventing the growth of the terrorist ideology amongst certain disaffected sections of the populace by ensuring that no effort is spared to eliminate the reasons leading up to this disaffection in the first place. Prevention is infinitely better than the cure, and this adage finds particular resonance in the opposing spheres of terror and counter-terror.

Moving beyond an elementary (albeit crucial), definitional pit stop, there are a number of other key issues that remain unsolved and are further complicated by the emergence of new forms of threats to national security. The challenge facing the nation is translating the statements and well elaborated declarations of condemnation of terrorism into concrete measures (legal, political, military) that can effectively address the very negative effects and consequences of terrorist activities. The ideas of democracy, freedom of expression, free trade and respect for human rights have after the end of the Cold War expanded and gained ground with a breathtaking speed. Some groups feel threatened by this challenge. The new threats have acted in what they perceive as a defensive mode and as a counter-attack. The selection of target has been calculated to have an optimal and symbolic effect. Freedom, democracy – respect for the dignity and worth of the human being, these are the values which are under attack. In this chapter, the authors of this paper purport to look at the various challenges that national security poses today. Given that it is a multidimensional issue, its constantly changing legal status is also dependant on the same. In order to not be reduced to a mere toothless tiger, a convention, while being drafted, would need to remember the fluidity that envelops the subject.

National Security Legislation is not just a question of definition of crimes or new patterns of criminal conduct and the prescription of penalties. It relates to the entire system, institutional structures and processes that are required to prevent and penalize such crimes, to preserve order, and secure the sphere of governance. The mounting failure on these counts is clear evidence that the system has deficiencies – and this should be sufficient grounds for a pragmatic and comprehensive reassessment.