

SPECIAL COMMENT

TERRORISM: MEASURES TO COMBAT IT, WITH FOCUS ON HUMAN RIGHT REQUIREMENTS/OBLIGATIONS

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One of the problems in discussing terrorism is the absence of a general acceptance of its precise definition. Terrorism has been the subject of a huge debate over the years but as yet there is no universally accepted definition as to what this phenomenon that we are all against is. It reminds one of the lament of Justice Stewart of the United States Supreme Court who frankly confessed that he had difficulty in defining obscenity but recognised it when he saw it.¹

Similarly, despite definitional problems we can recognise terrorism in action. It is recourse to indiscriminate violence irrespective of the age, sex, race or religion of the victims in order to destabilise a state or impair its sovereignty for achieving political or ideological objectives. We must recognise terrorism for what it really is. Terrorism is not merely a heinous criminal act. It is more than mere criminality. It is a frontal assault on the most basic human rights namely, life and liberty, by faceless enemies whose sole creed is to kill and maim human beings, even if they are young children or innocent, elderly men and women. India witnessed the most despicable manifestation of terrorism in the dastardly attack on innocent persons, especially children, praying in the Swami Narayana temple in Ahmedabad.

India has been the victim of an undeclared war by epicentres of terrorism with the aid of well-knit and resourceful terrorist organisations engaged in terrorist activities ranging from Jammu and Kashmir to north-east India, to West Bengal, to Maharashtra and Gujarat. The year 2002 witnessed 4038 terrorist related violent incidents in Jammu and Kashmir in which 1008 civilians and 453 security forces personnel were killed. There was a terrorist attack at Nadimarg in Pulwama District of Jammu and Kashmir on the night of March 23 - 24, 2003 in which 24 Kashmiri pandits were killed. Earlier, there was a terrorist attack on the Jammu and Kashmir Assembly in Srinagar on October 1, 2001. The climax of terrorist activities was the attack on December 13, 2001 on the Indian Parliament, the sovereign law making body of the country. It was indeed an attack on the sovereignty of the nation.

Terrorism has global repercussions. This was recognised by the House of Lords in the case of *Secretary of State for the Home Department v. Rehman*.² The House of Lords, *inter alia*, observed as follows:

“... In contemporary world conditions, action against a foreign state might be capable indirectly of affecting the security of the United Kingdom. ... The sophistication of means available, the speed of movement of persons and goods, and the speed of modern communication are all factors which may have to be taken into account in

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¹ Mr. Justice Stewart, concurring in *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

² [2003] 1 A.C. 153.

deciding whether there is a real possibility that the national security of the United Kingdom may immediately or subsequently be put at risk by the actions of others.”

Various United Nations resolutions and statements by the Secretary-General are unequivocal in their condemnation of terrorism whatever be its motivation. In the Security Council Resolution 1377 adopted on November 12, 2001, the Security Council has reaffirmed “its unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed.”

The Sub-Commission on Human Rights passed a unanimous resolution in August 2002 in Geneva whereby terrorism, in all its forms and manifestations, wherever and by whomsoever committed and killing of persons by indiscriminate and random acts of violence was condemned.

It is true that disillusion with a society where there is exploitation and massive inequalities and whose systems fail to provide any hope for justice is a fertile breeding ground for terrorism. Terrorism often thrives in environments where human rights are violated by state and non-state actors with impunity. There can be no objection to a study of the root causes of terrorism if it is to remove the causes and thereby, exterminate terrorism but certainly not to justify or legitimise it.

The bottom line is that laudability of the end cannot justify recourse to terrorist acts. The end cannot justify the means. That was the constant message of Mahatma Gandhi, the Father of the Indian Nation.

Let us also be clear that there can be no alibis or justification for terrorism under the spurious slogans of self-determination and struggle for liberation. As Senator Jackson has aptly stated: “The idea that one person’s ‘terrorist’ is another’s ‘freedom fighter’ cannot be sanctioned. Freedom fighters or revolutionaries don’t blow up buses containing non-combatants; terrorist murderers do. Freedom fighters don’t set out to capture and slaughter school children; terrorist murderers do. ... It is a disgrace that democracies would allow the treasured word ‘freedom’ to be associated with acts of terrorists.”

The next question, and a vexed one, is how do or should democratic States which adhere to the rule of law and respect basic human rights deal with this menace?

It must be realised that the fundamental rationale of anti-terrorism measures is to protect human rights and democracy. Counter terrorism measures should therefore not undermine democratic values, violate human rights or subvert the rule of law. Consequently, the battle against terrorism should be carried out in keeping with international human rights obligations and the basic tenets of the rule of law. No doubt “the war on terrorism” has to be relentlessly waged but that should be done without going over-board and in effect declaring war on the civil liberties of the people. It is imperative that the essential safeguards of due process and fair trial are not jettisoned. Counter-terrorism or anti-terrorism legislation must conform to international human rights obligations.

In addressing the Security Council on January 18, 2002, the Secretary-General stated: “While we certainly need vigilance to prevent acts of terrorism, and firmness in condemning and punishing them, it will be self-defeating if we sacrifice other key priorities – such as human rights – in the process” [emphasis added]. We should emphasise that basic human rights must always be protected and are not to be derogated from. The independence of the judiciary and the existence of effective legal remedies are indispensable elements for the protection of fundamental human rights in all situations involving counter-terrorism measures.

Terrorism: Measures to Combat it

In short, the vital principle that the end does not justify the means is equally applicable to measures adopted to combat terrorism. We must be steadfast and not selective in applying that principle. The critical task is to strike a fair balance between legitimate national security concerns and fundamental freedoms. This is easier said than done.

History and recent experience testify that the rubric of counter-terrorism can be misused to justify acts in support of political agendas, such as the consolidation of political power, elimination of political opponents, inhibition of legitimate dissent. Labeling adversaries as terrorists is a notorious technique to delegitimise and demonise dissenters and political opponents. Therefore we should be cautious of offering, or being perceived as offering, a blanket endorsement of all measures taken in pursuance of counter-terrorism.

It must be remembered that the more anxious the times and more devastating the effects of international terrorism, the more likely will be the tendency to bend the rule of law to accommodate popular sentiment for harsh and draconian measures against suspected criminals. It is in such testing times that the courts must be seen as being able to vindicate the rule of law and protect the basic human rights of the people.

A vital safeguard to prevent abuse of counter-terrorism measures and to preserve the rule of law would be the guarantee of an independent judiciary and provision for effective legal remedies. These are essential requirements for the protection of fundamental human rights in all situations entailing counter-terrorism measures. Indeed the most serious violations of human rights occur during emergencies. Therefore, judicial protection is most needed during these times.

The spectre of danger to national security and public order is frequently invoked by the government to justify its actions. The so-called dangers are often far-fetched and also imaginary at times. Many sins have been and will continue to be committed under the umbrella of national security and public order. The case of Fred Korematsu is a classic one. Korematsu, a native born American citizen of Japanese ancestry, was convicted for being in a place from which all persons of Japanese ancestry were excluded pursuant to an Exclusion Order issued by the Commanding General, J.L. Dewitt. The constitutionality of the Order was upheld by the United States Supreme Court and Korematsu's conviction was affirmed. In 1984, Korematsu petitioned the United States District Court, N.D. California, for a writ of *coram nobis* to vacate his 1942 conviction on the grounds of governmental misconduct.³ During the hearing of the case before Judge Patel, some horrific facts were brought out.

It was established that the government had knowingly withheld information from the court when they were considering the critical question of military necessity and had also provided misleading information to the court. Judge Patel, who decided the case, memorably concludes:

"Korematsu ... stands as a constant caution that in times of war or declared military necessity, our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to

³ *Korematsu v. U.S.*, 584 F. Supp. 1406 (1984).

exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.”

This caution should always be uppermost in judicial minds when the court is confronted with formidable and imperious claims of national security.

In England, it has now been acknowledged that the majority of the Law Lords in deciding *Liversidge v. Anderson*,⁴ “were expediently and, at that time perhaps excusably, wrong and the dissenting speech of Lord Atkin was right.” *Liversidge’s* case is yet another example of how relief to a detainee can be denied by a court which is too deferential to the claims of the executive that detention of the person is imperative for reasons of national security.

Lord Woolf, Chief Justice of England and Wales, possibly had these instances in mind when he observed in the recent SIAC case in the Court of Appeal that in considering cases of detention under the Acts the mistakes which have been made in the past should not be forgotten.

May I mention the approach of the Indian Supreme Court projected in its decision in *D.K. Basu v. State of West Bengal*.⁵ The Supreme Court ruled that:

“the State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves. That the terrorist has violated human rights of innocent citizens may render him liable for punishment but it cannot justify the violation of his human rights except in the manner permitted by law.”

This approach is commendable and worthy of emulation by other courts and tribunals.

It must be recognised that democracy, with its assurances of fundamental rights to all individuals, has certain inherent disadvantages which authoritarian regimes do not suffer from. Though democracies may also impose harsh measures on individuals, there are limits to the means that they may employ. This dilemma was very aptly expressed by President Barak of the Israeli Supreme Court⁶ when he said that the destiny of a democracy is that:

“not all means are acceptable to it, and not all practices employed by its enemies are open before it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, to strengthen its spirit and to allow it to overcome its difficulties.”

I, for one, am sure that ultimately we shall overcome and extirpate the menace of terrorism if we do not falter in our determination and remain steadfast to our democratic values and adherence to the rule of law and discharge our human rights obligations.

⁴ [1942] A.C. 206. (Hereinafter “*Liversidge*”).

⁵ A.I.R. 1997 S.C. 610.

⁶ Decision arising out of two applications H.C. 5100/94 and H.C. 5188/96 brought by the Public Committee Against Torture in Israel and the Center for the Defence of the Individual respectively, delivered on September 6, 1999.