

The Menace Of Terrorism : Lessons And Legislative Outcomes

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Synopsis

As a democracy India has a greater responsibility with respect to legislation used to combat terrorism. In responding to terrorism, a question often arises regarding the measures that a democratic state may legally apply in order to effectively protect its citizens and yet to continue human rights. 104

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This article examines the diverse lessons learnt from the anti terror laws of India and other countries we have seen that ordinary laws are unable to deal with the threat of terrorism. At present we do not have any anti terror law in India. A determination to overcome the problem of terrorism can only be effectively expressed through compressive counter terrorism legislation. Through the comparison of different provisions, we in India can formulate a new and an effective anti terror legislation. The article also discusses the role of the judiciary in the entire process.

Terrorist are not normal criminals, their goals. Their willingness to sacrifice innocent lives and their willingness to die in their attacks makes them extraordinary criminals, against whom extraordinary measures must be taken if security is to be achieved and maintained. The question always how much people are willing to sacrifice in order to achieve a greater security from terrorist attacks. For some people as long as the attack happens to “somebody else”, the sacrifice of rights to prevent terrorism will always seem too high a price. To others the prevention of terrorism will justify the loss of precious rights and freedoms. Governments in trying to strike a delicate balance between the need for its citizens to be secure and the need to ‘protect its citizens rights have an increasingly difficult task’.²

As a democracy India has a greater responsibility with respect to legislation used to combat terrorism. In responding to terrorism, a question often arises regarding the measures that a democratic state may legally apply in order to effectively protect its citizens and yet to continue human rights.³

Need For A Special Anti Terror Law

Once terrorism has escalated to a higher level a different response may be required.⁴if we look at the present scenario there are certain problems, which need to be addressed. Firstly there is no special law against terror. Secondly if there is a law , it is likely to be branded as a law against minorities, and the investigation against

² CindyC. Combs, Terrorism in the 21st century, pp.203-204,215.

³ Jothan Crebinar, “Responding to Terrorism: How must a democracy do it? A comparison of Israel and American Law” Fortham Urban Law Journal, Vol.31,2003.

⁴ Raphel Perl, “Combating Terrorism: The challenge of measuring Effectiveness”, November 23,2005.

terrorist are labeled as a measure against minorities and there was no willing witnesses against the terrorists.

A determination to overcome the problem of terrorism can only be effectively expressed through comprehensive counter terrorism legislation. The law should be able to state to deny operating space to terrorist and their supporters, deter from them from carrying out terrorist acts to ensure the basic rights of the people and uphold the fundamental rights enshrined in the constitution.⁵

The founders of the constitution dealt with every aspect of the problems relating to India and also included provisions regarding unforeseen situations. We have a plethora of legislation trying to curb crime in the country, but with the rise of the new problem or terrorism, the normal laws to combat this crime have proved to be insufficient.

The Indian Penal code enacted by the British some 146 years back is very comprehensive and takes within the purview of all kinds of offences. The Indian Evidence Act, which is giant about 134 years old is recognized among the ideal laws on the subject along with the Code of Criminal Procedure. These laws were based on the laws prevailing in England at that time. However many reforms have taken place in these laws in England, but the same has not been true for India. Thus these 19th century laws are proving to be inadequate in the face of new diversity. They are not even sufficient to tackle the ordinary crimes. They obviously lack the teeth to deal with an extremely dangerous international crime like terrorism.

Since Independent several laws have been enacted which directly confront the crisis of terrorism., These include the Unlawful activities Act 1967; the maintenance of internal Security Act 1971; the National Security Act 1980; the terrorist and disruptive activities Act, 1985 and the prevention Act, 2001.

These laws have always led to controversies because of their stringent provisions. Nevertheless they were necessary to tackle the threat or terrorism. At the present moment however, we have no law in comprehensive legislation, it has been an uphill task for the police and the prosecution to prove every legal provision drawn

⁵ Wilson John and P.V. Ramana, "Effective legislation Critical for Frightening Terror". October 7, 2006.

from the different Acts, to arrest such hardened criminals and to bring changes on terrorist arrested, often after nation wide effort. It would now be foolish not to have any anti terror law in the country specially after learnt so much from our experience In dealing with these anti terror laws. Infact, wisdom lies in learning from our mistakes, incorporation provisions, which are needed and doing away with those with lend themselves to misuse. In this exercise we have a lot to learn from the laws of the other democratic countries like Unites States and United Kingdom. Their experience with terrorism has resulted in the passing of different anti terror laws, which in many ways has resulted in protecting citizen of these countries. A good example of the effort of Britain was its ability to foil the terrorist attempt to target their international airport. Also it's been sometime that these countries have had to face the threat of such terror attacks. It's their policy, their law and the co ordinate efforts of the various enforcement agencies of these countries which have improved the situations in USA and UK.

The Prevention of Terrorism Act (POTA) was the last law enacted in India to combat terrorism. The reason which precipitated matters for the enactment of the law were the hijacking of the Indian Airlines Flight IC 814 and the terrorist attack on the Indian Parliament in December, 2001. The Act was however repealed by UPA Government in 2004. Thereafter we have had no specific law in the country, which deals with such a crime. Looking at the current scenario in India. The first of these was on 13 may in Jaipur. The series of nine blasts over a span of 15 minutes claimed 63 lives and 216 injured.⁶ The second series of nine bomb blasts took place on 25 July in Bangalore and claimed two lives while injuring 20⁷ The next day on 26 July in Ahemdabad, a spurt of 21 blasts killed 56 people. New Delhi was bombed through a series of blasts on the 13th of September 2008 killing 30 people⁸. This exercise attempts to analyze the effectiveness of different provisions of the anti terror laws in

⁶ World Condemns blasts, promises support in fight against terror", The Economic Times, 15 may 2008.

⁷ "6 blast rock Bangalore, 2 killed 20 wounded", the Hindu, 28 July , 2009.

⁸ "13th September 2008 Delhi Bombings" The Hindu.

India and other countries. A new Law can consequently be adopted by India keeping in view these parameters.

Lessons From Comparison Of Provisions Of The Anti Terror Laws In India And Other Countries

Like India the USA and the UK have had various laws to curtail the menace. The USA after the 9/11 attacks on the world trade center enacted the uniting and strengthening America by providing appropriate tools required to intercept and obstruct terrorism Act of 2001 (PATRIOT Act). The UK enacted the Anti terrorism , Crime, Security Act, 2001. A comparison of the laws of others countries as well as our own will help us finding a suitable solution. Since it is difficult to deal with all issues here, only some have been analyzed.

Issue of definition

The first issue, which comes up is regarding definition. The USA PATRIOT Act, like POTA defines terrorism crime broadly, but POTA's definition was slightly less precise⁹ POTA defined a terrorist act as "any act done by any means whatsoever, with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in any section of the people". POTA therefore defined terrorist acts in generalized terms that encompassed ordinary cases of murder, robbery, theft and comparable offences. This wide definition raised concerns about the discriminatory enforcement of the Act. In comparison the UK anti terror law contains a more precise definition of the term terrorism¹⁰

In any future anti terror law, a narrowing of the definition of terrorism is recommended. A simple definition might be "the deliberate creation and exploitation of fear through violence or the threat of violence in the pursuit of political change."¹¹. Although concise, this definition easily enables political bias to

⁹ 18 U.S.C section 2331(5)

¹⁰ The Anti terrorism, crime and security Act,2001 defines terrorism as: 1(1)(b) the use or threat is designed to influence the government or to intimidate the public or a section of public and (c) the use or threat is made for the purpose of advancing a political, religious.

¹¹ Bruce Hoffman, Inside Terrorism, (Indigo, London, 1999), p.43.

effect enforcement and adjudication¹². In contrast, listing specific acts would help to curb such abuses of discretion. In this regard, India had done more to delineate terrorist offences than the USA or the UK.¹³ POTA specified the prohibition of violent and destructive acts that involve weapons, explosives, inflammable substances, gases, chemical and other legal weapons.; At the same time, However, POTA undermined any benefits of specificity by following its list with the words “or by any other means whatsoever” which rendered the definition overboard and again invited abuse.¹⁴

Also POTA defined the perpetrator’s intent far more explicitly than several other countries.¹⁵ Under POTA a terrorist act required “intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people...”

Delineating terrorist acts with greater specificity and explicitly requiring intent as an element of all terrorist offences could limit discretion and stave off abuse.

Issue Of Interception Of Information

The terrorist of today are able to attack national targets like the New York World Trade Center and the Indian Parliament because of the technology at their disposal. With the facilities of the internet, electronic mail, instant electronic messaging , mobile phone and satellite links, the job of the terrorist has been made easier and gives them desired amount of anonymity. These developments also suggest a need for a 21st century law dealing with such electronic surveillance. The challenge is to craft a law, which deals and cover these aspects appropriately.

Both the US PATRIOT Act and the Indian POTA enlarged the power of the executive in the field of conducting searches and electronic surveillance. POTA, in fact was the first law in India to make phone and emails intercepts admissible as evidence. These provision give wide powers to enforcement agencies with the possibility of misuse

¹² Susan Tiefenbrun, A Semiotic Approach to a legal Definition of terrorism, 9 ILSA J. Int’l Comp L. 357,365 (2003) : Law commission of India, section IV, pp. 74-82.

¹³ 18 U.S.C section 2331(5) (2003); Tiefbrun, note 12, at p.369.

¹⁴ Ibid; Tiefbrun, note11, at p.365.

¹⁵ Ibid; see Thakur, note 8.

not being ruled out. However in comparison the Indian law did not contain some safeguards.

Section 213¹⁶ of the PATRIOT Act legitimizes “sneak and peak” searches where “providing immediate notification may have an adverse result”. This means that the U.S. law enforcement officials have the power to enter and search your home or office without notifying you of the execution of the search warrant until after the search has been completed. Moreover section 213 is not limited to terrorist investigation, but extends to every manner of criminal investigation.

Under section 216¹⁷ of the act courts are required to order the installation of a pen register and a trap and trace device¹⁸ to track both telephone and internet dialing routing, addressing and signaling information, anywhere within the US when the government attorney has certified that the information to be obtained is “relevant to an ongoing criminal investigation” provided however that such information shall not include the content of any communication. Therefore to get an order for interception of internet activity law enforcement must simply certify that the information is relevant to an ongoing investigation”. This implies a very low

¹⁶ Sec authority for delaying notice of the execution of a warrant. DELAY- With respect to the issuance of any warrant or court order under this section, or any other rule of law, to search for and seize any property or material that constitutes evidence of a criminal offense in violation of the laws of the United States, any notice required, or that may be required, to be given may be delayed if--` (1) the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result (as defined in section 2705);` (2) the warrant prohibits the seizure of any tangible property, any wire or electronic communication (as defined in section 2510), or, except as expressly provided in chapter 121, any stored wire or electronic information, except where the court finds reasonable necessity for the seizure; and` (3) the warrant provides for the giving of such notice within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown.'

¹⁷ Sec 216 Modification of authorities relating to the use of pen register and trap and trace devices (2) STATE INVESTIGATIVE OR LAW ENFORCEMENT OFFICER- Upon an application made under section 3122(a)(2), the court shall enter an ex parte order authorizing the installation and use of a pen register or trap and trace device within the jurisdiction of the court, if the court finds that the State law enforcement or investigative officer has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation.

¹⁸ Pen register record telephone number of outgoing calls. Trap and trace devices record telephone numbers from which incoming calls originate.

threshold of proof, far less than probable cause. Further the PATRIOT extends this beyond the mere “trapping and tracing” of telephone numbers, to tracing email and internet activity which far more revealing than numbers dialed on a telephone.¹⁹

POTA is regarded as having a slight edge over the PATRIOT. Under the PATRIOT vast and permanent powers have been given to the executive regarding surveillance. However the exercise of these powers is insulated from meaningful judicial and congressional review. In comparison POTA incorporated certain checks on the power of the executive. Section 38²⁰ of POTA provided that an application for an order allowing the interception of wire, oral or electronic communications may be made before an executive authority designated by the government. The application

¹⁹ Unlike telephone communication where the provision of dialing information does not run the risk of revealing content, email messages move together in packets that include both address and content information.

²⁰ . Application for authorization of interception of wire, electronic or oral communication.-(1) A police officer not below the rank of Superintendent of Police supervising the investigation of any terrorist act under this Act may submit an application in writing to the Competent Authority for an order authorizing or approving the interception of wire, electronic or oral communication by the investigating officer when he believes that such interception may provide, or has provided evidence of any offence involving a terrorist act.(2) Each application shall include the following information: – (a) the identity of the investigating officer making the application, and the head of the department authorizing the application;(b) a statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued, including – (i) details as to the offence of terrorist act that has been, is being, or is about to be committed;(ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted;(iii) a particular description of the type of communications sought to be intercepted; and(iv) the identity of the person, if known, committing the terrorist act whose communications are to be intercepted(c) a statement of the period of time for which the interception is required to be maintained, if the nature of the enquiry is such that the authorisation of interception should not automatically terminate after the described type of communication has been first obtained;(d) a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter; and(e) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.(3) The Competent Authority may require the applicant to furnish additional oral or documentary evidence in support of the application.

must disclose “probable cause” for the belief that such interception may provide “evidence of any offence involving a terrorist act”. Further the investigating officer must specify the period which such interception is to be authorized, which may not in any event exceed sixty days.²¹

Also every order passed by the competent authority is subject to review by a committee set up under the Act for this purpose. If the review committee disapproves the order, the interception commenced shall be discontinued and any, intercepted communication already gathered shall be inadmissible as evidence.²²

While there is no provision in the Act which shows the progress in the case at certain intervals, any application for extension of an order under section 38(2)(3) must be supported by a statement setting forth the results thus far obtained, or an explanation of the failure to obtain such results.

Therefore it is clear that POTA at a minimum level did lay the ground for judicial review of every interception order, and established a probable cause standard for authorizing interceptions. Moreover, POTA’s context was limited to terrorism investigations, and did not encompass regular criminal investigations and did not encompass regular criminal investigations as does the PATRIOT.²³

Terrorism today uses all the techniques available in terms of sophisticated technology. POTA therefore was a step in the right direction as it allowed as admissible evidence intercepts of wire, oral and electronic communications. This certainly equipped the law enforcement officers with the much needed tools to preempt terrorist activities, which is not available under the ordinary criminal law of the country.

Issue Of Banking Terrorist Organizations

The third issue deals with the validity of the method of conclusion of an organization in to the list of banned organization under the PATRIOT Act the term “terrorist organization” is no longer limited to organization that have been officially

²¹ Sheetal Asrani, “Security versus Liberty: striking the bright balance. A comparison of Anti Terror provisions of in India and the USA, 3 German law journal No.9, 1st September, 2002.

²² Section 46(4), Prevention of Terrorism Act, 2002.

²³ Sheetal Asrani, note 20.

designated as terrorist. Section 411²⁴ includes As “terrorist organization” groups that have never been designated as terrorist, if they fall under the loose criteria of “two or more individuals, whether organized or not” which engage in specified terrorist activities. After the PATRIOT Act was enacted, the secretary of state Colin Powell made a list of organizations and individuals considered to be terrorist with virtual no Congressional or judicial oversights. Under the Act, the secretary of state has sole authority to add individuals or organizations to the list of suspected terrorist.²⁵ Further section 411 of the Act which deals with immigrants stretches the term of encompass any crime that involves the use of a “weapon or dangerous device”. This section has immense ramifications as it widens the class of non US citizens that can now be deported from the US on the ground of terrorism.

Like the United States and the UK the Indian POTA also designated a list of proscribed organizations.²⁶ The Government could add to this list if it believed that organization to be involved in terrorism. Section 18(4) said that an organization is deemed to be involved in terrorism if (a) it commits or participates in acts of terrorism, or (b) prepares for terrorism or, (c) promotes or encourages terrorism, or (d) is otherwise involved in terrorism. It is clear that this provision was too open ended and broad and was easily liable to misuse. However a positive point of POTA was that unlike the PATRIOT it put forth a system of effective checks and balances. Section 19 of POTA provided for the review of orders of banning terrorist organization by a committee headed by a judge of the High Court. Although the government’s power to ba terrorist organizations under the Act was broad, the Act did ensure the review of such orders.

Comparison With Earlier Anti-Terror Laws

Compared to the previous anti terror laws in India POTA was improvement as it provided certain safeguards. For example either party could appeal a bail ruling or

²⁴ Sec 411 includes under 411aa) a foreign terrorist organization, as designated by the secretary of state under section 219.

²⁵ For a list of proscribed terrorist organization , US department of state fact sheet dated march 27,2002.

²⁶ List of banned organizations available , 2nd march 2002.

verdict from special court to a bench of two judges of the High court of the same jurisdiction, a provision not available in earlier laws. On appeal a court could review both issue of fact and law²⁷, POTA also contained safeguards not provided in TADA, including immediate notification of family members of following arrest and restrictions on the use of confessions extracted by torture. It reduced the police by 60 days under TADA to 30 days and the period of judicial custody was halved from a year under a TADA to six month under POTA. Under TADA the person could appeal against the order of the trial court only to the supreme Court. Under POTA an appeal also lay the High Court.²⁸ Therefore the accused go t another channel to redress the grievance. There was also a dilution of the provisions relating to bail. This shows that our past mistakes provided certain lesson to us, which were helpful in dealing with the menace.

ROLE OF JUDICIARY:

The difficulty of recording individual liberties with national security during times of war has been put across very well by Chief Justice William H. Rehnquist, who in 1998, wrote a book on the subject. All the laws but one : civil liberties in Wartime. He has stated:” While we would not want to subscribe to full sweep of the Latin maxim *inter arma silent leges*- in times wars of the laws are silent-perhaps we can accept the proposition that though the laws are not silent in wartime, they speak with a muted voice.” The judiciary has extremely important role in dealing with the problem of terrorism their verdicts decide the fate of numerous innocent lives .

Whenever the terrorism laws have been challenged in terms of the preventive detention provision the courts have always upheld their validity²⁹. One of the controversial provisions of these anti terror laws has been the admissibility of a confessional statement made to police office³⁰. On this point Justice shah has observed that “ in some advanced countries like UK, USA, Australia and Canada etc.

²⁷ Prevention of terrorism Act, section 34, at p.34.

²⁸ Section 32, Prevention of Terrorism, 2002.

²⁹ AK Gopalan v state of Madras, AIR 1950 SC 27; Menka Gandhi v Union of India AIR 1978 SC 597.

³⁰ Section 32, Prevention of Terrorism Act, 2002.

confession of an accused before the police is admissible and having regard to the legal competence of the legislature to make law prescribing a different mode of proof, the meaningful purpose and object of the legislation, the gravity of terror unleashed sovereignty and integrity of the nation but also the normal life of the citizen and the reluctance of even the victims as well as the public in coming forward at the risk of their life, to give evidence, the impugned section cannot be suffering from any voice of unconstitutionality³¹.

Even though the legislature made the confession admissible, it provided certain safeguards to check its abuse. These safeguards have been summed up very well by the court in *Simmranjit Singh Mann v. Union of India*.³²

Only an officer who is not below the rank of superintendent of Police can record the confession. It has to be recorded in writing or on any mechanical or electronic device like cassette, tape or sound track. Before recording the confession, the accused person has to be warned. The concerned person has to explain to the accuse in writing that "he is not bound to make confession and that if he does it may be used against him." Still further the confession has to be recorded in an atmosphere free from threat and inducement and "has to be in the same language in which the person makes it". The matter does not end here. There is further safeguard. The person making the confession has to be "produced before the court of a chief metropolitan magistrate or the court of the chief judicial magistrate along with the original statement of a confession written or recorded on electronic or mechanical device within 48 hrs." The magistrate has to be "record the statement made by the person so produced and get his signature or thumb impression" In case of any complaint of torture", the person has to be produced for medical examination before a Medical officer not lower than the rank an Assistant Civil Surgeon. The person has then to be sent to the judicial custody. It is clear that the provision provides enough protection to the person.

³¹ *Lal Singh v State of Gujarat* 2001 (3) SCC 22, para 21.

³² 2002 CrLJ 3368 at p. 3380.

It is evident from the above arguments that the time has come for a change in the old line of thinking. We need tougher laws to deal with tough crimes. India needs both an effective legislations as well as fast track courts to expedite terrorism related cases.

Conclusion

The right of life is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation. It is a right that is relevant to a number of different ways in the context of counter terrorism and which should not be interpreted narrowly. Within the international framework of human rights obligations, States have a duty to protect their population by taking measures to prevent terrorist attacks.

This obligations requires states to enact and implement effective anti terror terrorism legislations, which allows for detection, prevention of and punishment for terrorist acts and attempts which threaten the life and physical integrity of individuals within their jurisdiction. In some specific circumstances, this obligation may extend beyond this basic duty to imply ' a positive obligations on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.³³

The very fact that terrorist victims are innocent civilians is a sufficient condition for the democratic world to enact extraordinary laws. The global nature of the problem requires sovereign nations to learn from other experiences rather than waiting for similar tragedies to strike at home. Most countries have toughened their laws in response to the terrorist threat. In terms of an ongoing war against terrorism, to ignore the requirement for a special laws to curb terrorism is like waiting for a deadly disease to cure itself. It is a fact that the current criminal justice system is not equipped to deal with the heightened threat.

Existing laws in India do not define a terrorist attack or a terrorist organization. They also do not account for the issues related to the proceeds of the organization. They also do not account for the issues relating interception of the information being

³³ European Courts of Human rights , Osman v United Kingdom, 28 Oct 1998.

made admissible. India should enact a comprehensive permanent anti terror law at the earliest. It must further continue to define broad definitions of terrorist offences and guard against arbitrary detentions motivated by politics, prejudice, or haste. The Legislation should also dealt with issues regarding non disclosure of the identity of witnesses and their protection. For this a provision of audio visual aids can be introduced .

Terrorism itself presents an assault against human rights, peace and security. The International community has collectively condemned terrorism and called for steps to be taken against terrorism for the purpose of maintaining peace and security and preventing further abuses of human rights by terrorist. As such counter terrorism must be seen as a substantial objective of any society. What remains to be seen , However is whether the measures are adopted and implemented in proportionate manner.