

**EIGHT ANNUAL MEETING OF APF  
BRIEF PRESENTATION BY THE NHRC, INDIA  
SESSION ON “BALANCING HUMAN RIGHTS PROTECTIONS AND  
SECURITY CONCERNS: REGIONAL PERSPECTIVES”  
[18 February 2004]**

Terrorism poses a serious threat to national and international security. India has been a victim of terrorist attacks since 1980s. In the recent years, vicious terrorist attacks have occurred against democratic institutions, army camps, places of worship and facilities used by the civilians. By way of illustration, in the State of Jammu & Kashmir alone, terrorist attacks occurred in the Raghunath Mandir, in Jammu, on 30 March 2002, when 30 persons were killed and 17 injured; in Rajiv Nagar, Jammu, on 13 July 2002, when 28 persons were killed and 27 injured; in the Nunwan Camp in Anantnag on 6 August 2002, when 9 Amarnath pilgrims were killed and 3 others injured; and in Nadimarg, Pulwama district, when 24 Kashmiri Pandits were killed. In the State of Gujarat, an outrageous terrorist attack occurred on 24-25 September 2002, in the Akshardham Temple in Gandhinagar, taking the lives of 28 civilians; in addition, two security personnel lost their lives and six others were injured in seeking to protect the civilians and flush out the terrorists.

These incidents brought into sharp focus the need to combat and triumph over the evil of terrorism. India’s lonely fight against terrorism for many years is now joined by other countries after recent instances of international terrorism. The National Human Rights Commission of India examined the issues both of terrorism as a factor that inhibits the enjoyment of human rights as also adherence to human rights standards in the fight against terrorism, on several occasions.

Terrorists are the sworn enemies of human rights and there can be no equivocation on this matter. The National Human Rights Commission of India is of the firm view that terrorism must be fought and defeated. This is essential for the protection of human rights themselves, for the right to life — itself a target of terrorists — is the most basic right, without which human beings can exercise no other right.

The question that arises, however, is in relation to the means to be adopted to achieve this goal. The United Nations General Assembly Resolution 56/160 of 19 December 2001, adopted some eleven weeks after Security Council Resolution 1373, is quite clear on this matter when, in operative paragraph 6, it:

**‘Calls upon States to take all necessary and effective measures, in accordance with relevant provisions of international law, including international human rights standards, to prevent, combat and eliminate terrorism in all its forms and manifestations, wherever and by whomever it is committed, and also calls upon States to strengthen, where appropriate, legislation to combat terrorism in all its forms and manifestations’.**

While an acceptable definition of terrorism still eludes the international community, the Supreme Court of India, as far back as in 1994, in a Bench in which I was a Member, dwelt at length on it and also drew a distinction between a criminal act and a terrorist act. In the Judgment in *Hitendra Vishnu Thakur v. State of Maharashtra* [(1994) 4 SCC 602], which has been used extensively in the work of UN and other international organizations, the Supreme Court of India said:

“... .. It may be possible to describe it (Terrorism) as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. There may be death, injury, or destruction of property or even deprivation of individual liberty in the process but the extent and reach of the intended terrorist activity travels beyond the effect of any ordinary crime capable of being punished under the ordinary penal law of the land and its main objective is to overawe the Government or disturb harmony of the society or “terrorise” people and the society and not only those directly assaulted, with a view to disturb even tempo, peace and tranquility of the society and create a sense of fear and insecurity. A ‘terrorist’ activity does not merely arise by causing disturbance of law and order or of public order. The fall out of the intended activity must be such that it travels beyond the capacity of the ordinary law enforcement agencies to tackle it under the ordinary penal law. Experience has shown us that ‘terrorism’ is generally an attempt to acquire helplessness in the minds of the people at large or any section thereof and is a totally abnormal phenomenon. What distinguishes ‘terrorism’ from other forms of violence, therefore, appears to be the deliberate and systematic use of coercive intimidation. ... ..”

In an opinion dated 14 July 2000, the Commission dwelt at length on various provisions of the Prevention of Terrorism Bill 2000 (proposed by the Law Commission in its 173<sup>rd</sup> Report and introduced in Parliament), and opposed that Bill, *inter alia*, because it did not conform to international human rights standards. In that opinion, the Commission had observed that there were now twelve global treaties pertaining to the subject of international terrorism. However, despite this array of international instruments, the Commission noted that it remained essential, both to the cause of human rights and to the fight against terrorism, that the measures required to be taken under each of these Conventions were fully and meticulously under-taken, both in terms of appropriate legislation, where this may still be needed, and in terms of other practical arrangements essential to the effective implementation of these Conventions. The Commission had accordingly urged the Government of India to do so and, in particular, to enact a suitable law to deal with the financing of terrorism.

In that same opinion, the Commission had also stated that

“...consistent with the view that it took in respect of TADA, the Commission is now unanimously of the considered view that there is no need to enact a law based on the Draft Prevention of Terrorism Bill, 2000 and the needed solution can be found under existing laws if properly enforced and implemented, and amended, if necessary. The proposed Bill, if enacted, would have the ill-effect of providing unintentionally a strong weapon capable of gross misuse and violation of human rights which must be avoided particularly in view of the experience of the misuse in the recent past of TADA and earlier of MISA in the emergency days.”

The Commission accordingly expressed

"its inability to agree with the opinion of the Law Commission in its 173<sup>rd</sup> Report" and recommended "that a new law based on the Draft Prevention of Terrorism Bill, 2000 be not enacted."

Such a course, the Commission stated, was

"consistent with our country's determination to combat and triumph over terrorism in a manner also consistent with the promotion and protection of human rights."

It reacted similarly on 19 November 2001 when, at the height of the fever occasioned by the 'global war against terrorism,' the Commission opposed the Prevention of Terrorism Ordinance, 2001 which had been promulgated on 24 October 2001. In its Opinion of 19 November 2001, the Commission, while balancing security with Human Rights considerations, expressed its opinion thus:

'Undoubtedly national security is of primary importance. Without protecting the safety and security of the nation, individual rights cannot be protected. However, the worth of a nation is the worth of the individuals constituting it. Article 21 [of the Constitution], which guarantees a life with dignity, is non-derogable. Both national integrity as well as individual dignity are core values in the Constitution, and are compatible and not inconsistent. The need is to balance the two. Any law for combating terrorism should be consistent with the Constitution, the relevant international instruments and treaties, and respect the principles of necessity and proportionality.'

The Commission is of the firm view that a proper observance of human rights is not a hindrance to the promotion of peace and security. Rather, it is an essential element in any worthwhile strategy to preserve peace and security and to defeat terrorism. The purpose of anti-terrorism measures must therefore be to protect democracy and human rights, which are fundamental values of our society and the core values of the Constitution.

In the face of terrorism, there can be no doubt that the State has not only the right, but also the duty, to protect itself and its people against terrorist acts and to bring to justice those who perpetrate such acts. The manner in which a State acts to exercise this right and to perform this duty must be in accordance with the Rule of Law. The Supreme Court of India has, in DK Basu vs. State of West Bengal, cautioned that the

"Challenge of terrorism must be met with innovative ideas and approach. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to terrorism: that would be bad for the State, the community and above all for the rule of law. The State must, therefore, ensure that the various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves."

The consistent position developed by the Commission in respect of anti-terrorism legislation has been elaborated in greatest detail in the Opinions that it wrote on 14 July 2000 and 19 November 2001, in respect of the Draft Prevention of Terrorism Bill, 2000 and the subsequent Prevention of Terrorism Ordinance, 2001, both of which it opposed, as it had, in February 1985, opposed the continuance of the Terrorist & Disruptive Activities Act (TADA). The full text of the Opinions of the Commission has been placed on its web-site [www.nhrc.nic.in](http://www.nhrc.nic.in).

On 26 March 2002, the Prevention of Terrorism (Second) Ordinance, 2001 was enacted into a Law following a Joint Session of Parliament. The Commission therefore took the position that it respects the constitutional process leading to the adoption of this Act, even though it had made known its opposition to the contents of the Act before it was enacted. The Commission retains the responsibility under its own Statute to ensure that the Act is not implemented in a manner that is violative of human rights, the Constitution, the laws of the land and the treaty obligations of the country.

The Prevention of Terrorism Act, 2002 defines terrorism in far greater detail. It seeks to deprive the beneficiaries of the proceeds of terrorism. It contains some safeguards against the possibility of abuse. There are severe penalties attached to the abuse of the process of law and malicious prosecution by police. Specific safeguards are provided for, in the Act with a view to prevent the possibility of the misuse of the special powers given to the investigating authorities and address the concern of violation of human rights. The Act raises the ban on the admissibility of confessions obtained in police lock ups and sanctions penalties for police officers found guilty of invoking the law against citizens on malafide grounds. Act essentially has limited application and extends to acts, which threaten the unity, security, integrity or sovereignty of India. Special Courts can take cognizance of an offence under the Act only after the sanction of State Government or the Central Government; investigation of an offence under the Ordinance can be done by an officer not below the rank of Deputy Superintendent of Police; confession made before a police officer to be recorded before a magistrate within 48 hours; information of arrest of the accused to be given to a family member after arrest

and this fact to be recorded by the police officer and allows presence of counsel during the interrogation of the accused.

India has a well-established judicial system, which has been consistently alive to the need to uphold fundamental rights of individuals in light of the constitutional provisions as well as human rights. On 16 December 2003, the Supreme Court of India in the People's Union for Civil Liberties & Another. Vs. Union of India (2003 (10) SCALE 967), while dismissing petitions challenging constitutional validity of the Prevention of Terrorism Act, 2002, however held that mere support to banned terrorist organization is not sufficient for prosecution under POTA. Criminal intention must be proved. The Supreme Court has moderated Section 21 of POTA, which deals with offences relating to the support given to terrorist organization, which was cast in a manner that virtually invited gross abuse. Similarly, it reduced the rigour of Section 49(7) of the Act by holding that an accused under the POTA could seek bail even before the expiry of one-year period.

The Commission has expressed its view that, when compared with TADA, the Prevention of Terrorism Act does contain some provisions that are aimed at providing safeguards against its possible misuse but emphasized that these safeguards are insufficient and more safeguards are required. It, therefore, continues to be the duty of the Commission to monitor the implementation of the Act with vigilance and to ensure that the provisions of the Act are not abused or human rights violated.

Section 60 of the Prevention of Terrorism Act, 2002 provides that the Central Government and each State Government shall, whenever necessary, constitute one or more Review Committees for the purposes mentioned in the Act. The Government took notice of the view of the Commission about the need of providing more safeguards and set up a Central Review Committee under Section 60 of the Act on 4 April 2003 under the Chairmanship of a former Chief Justice of the Punjab and Haryana High Court, with the following Terms of Reference:

- (i) the Review Committee shall take a comprehensive view of the use of the said Act in various States and shall be empowered to entertain complaints or grievances with regard to enforcement of the said Act and accordingly, give its findings and suggestions for removing the shortcomings, if any, in the implementation of the said Act; and
- (ii) the Review Committee shall suggest measures to ensure that the provisions of the said Act are invoked for combating terrorism only.

Since the recommendations or directions of the Review Committee except those explicitly provided in the said Act were not binding on the Central Government and the State Governments and were only advisory in nature under the existing provisions, the Parliament amended Section 60 of the Prevention of Terrorism Act, 2002 through the Prevention of Terrorism (Amendment) Ordinance, 2003 (Ord. 4 of 2003) which was promulgated on 27<sup>th</sup> October 2003 to remedy the lacuna. This step is in keeping with the concerns expressed by the Commission of providing more safeguards against misuse and abuse of the POTA and to protect Human Rights. According to new sub-sections which were inserted in Section 60 of this Act,

“(4) Without prejudice to the other provisions of this Act, any Review Committee constituted under sub-section (1) shall, on an application by any aggrieved person, review whether there is a *prima facie* case for proceeding against the accused under this Act and issue directions accordingly.

(5) Any direction issued under sub-section (4), --

- (i) by the Review Committee constituted by the Central Government, shall be **binding** on the Central Government, the State Government and the police officer investigating the offence; and
- (ii) by the Review Committee constituted by the State Government shall be **binding** on the State Government and the police officer investigating the offence.

(6) Where the reviews under sub-section (4) relating to the same practice under this Act, have been made by a Review Committee constituted by the Central Government and a Review Committee constituted by the State Government, under sub-section (1), any direction issued by the Review Committee constituted by the Central Government shall prevail.

(7) Where any Review Committee constituted under sub-section (1) is of opinion that there is no *prima facie* case for proceeding against the accused and issue directions under sub-section (4), **then, the proceedings**

**pending against the accused shall be deemed to have been withdrawn from the date of such direction.”**

The Ordinance was replaced by the Prevention of Terrorism (Amendment) Act, 2003. According to the Statement of Objects and Reasons of the Prevention of Terrorism (Amendment) Act, 2003, these amendments empower the Review Committee to review, “on an application by an aggrieved person, whether there is a *prima facie* case for proceedings against the accused under the Act and issue directions accordingly. The directions of the Review Committee shall be binding on the Central Government, the State Government and the police officer investigating the offence. Where the directions relating to the same offence under the said Act, have been made by a Review Committee constituted by the Central Government and the Review Committee constituted by the State Government, the directions of the Central Review Committee shall prevail over those of the State Review Committees.” The allegations of misuse and abuse of provisions of the Act are receiving attention of the Commission.

I may be permitted to conclude by quoting from a Lecture on ‘Terrorism – An affront to Human Rights : challenge for democracies’ delivered by me at the International Institute for Strategic Studies, London on 7 May 2002:

“Global awakening about human rights and the threat that terrorism has posed to human rights of the people all over the world is necessary. It is wrong to be selective about violation of human rights and the perpetrators of terrorism. Such selective approach leads to double standards, which make the motives of the protagonists of human rights suspect. It also indirectly lends support to terrorists and terrorism. All nations must, therefore, co-operate to relentlessly and without any compromise fight terrorism. The liberal democracies should unite to condemn and combat terrorism. Concerted steps at a global level will have to be taken to tackle terrorism and safeguard human rights. But let me emphasise that in doing so, the approach should be human, rational and secular. It must be consistent with democratic principles. Any kind of partisan and sectarian approach would be counter-productive. We need to strike a balance between the liberty of an individual and the requirements of security of state and sovereignty and integrity of the nation while keeping an open mind to fight terrorism. A limited approach may help eliminate some present terrorists but not the causes or the phenomenon of terrorism, which

produces terrorists; and that too at the cost of violation of human rights of many innocents. A proper balance between the need and the remedy requires respect for the principles of necessity and proportionality. We must avoid a descent into anarchy – in which the only rule is ‘might is right’ – combating terrorism should not be used as an excuse to suspend all the rules of international law and domestic civil liberties.”

(Emphasis added)

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