

S. Easwarya Memorial Lecture

5th January, 2008 at Kochi

**Inaugural Address by Hon'ble Mr. K.G. Balakrishnan,
Chief Justice of India on Civil Liberties and National Security
with reference to laws in India, Canada, the United States and
the United Kingdom**

Distinguished Guests, Ladies and Gentlemen,

I am profusely thankful to Rt. Hon. Beverley McLachlin, Chief Justice of Canada for having agreed to give Shri S. Easwara Iyer Memorial Lecture for 2007. Shri S. Easwara Iyer, a stalwart in the legal profession, was conversant with all branches of law, namely, civil, criminal and constitutional. He appeared as a lawyer in many important cases in the High Court of Kerala and in various other courts in India. As a young lawyer, I had an occasion to watch his forensic skills when he appeared as a defending Counsel in a famous murder case before the Sessions Court at Kottayam. He was active in politics for some time and was a Member of Parliament for more than one terms. I am glad that the Hon'ble Chief Justice of Canada has kindly agreed to give the oration on a very important topic which would be an intellectual feast to the members of the legal fraternity in Cochin.

India is a democratic sovereign republic and the Preamble of our Constitution starts with the words:

“WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens JUSTICE, LIBERTY and EQUALITY.”

The expanded definitions of these basic values have also been adumbrated in the Preamble. Though, at the initial stage, the Preamble was not given much importance in interpreting the Constitution, the 13-Judge Bench in ***Kesavanand Bharati Vs. State of Kerala*** held that the Preamble to the Constitution is the guiding spirit in interpreting the Constitution.

The fundamental rights guaranteed in Part III of the Constitution ensure that the citizens of this country are given basic human rights such as equality before law and equal protection before law. Article 19 states that all citizens shall have the right to freedom of speech and expression and other rights. Article 21

states that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Article 21 has been given a very expansive interpretation and the right to life under Article 21 ensures the citizens a decent life and protection of laws, a healthy environment and a host of other rights closely connected with meaningful life of the citizens of this country.

The various provisions in the Constitution and the laws enacted in this country protect the civil liberties of the citizens. While in many of the countries in our neighbourhood freedom of speech and expression and independence of judiciary are in peril, whereas the citizens of this country enjoy the freedom of speech and expression and all basic rights. Sometimes we feel that the freedom enjoyed by the citizens of this country is of far reaching significance and has made inroads into the rights of others especially their right to privacy. India was under colonial rule for a long period. The Indians suffered the draconian laws of the British regime for a very long period. The provisions of the penal code were extensively used to ruthlessly suppress the freedom movement. The provisions relating to “the conspiracy and waging war against the country” had been used against the Indian citizens who were connected with the freedom movement and many had to

become victim of such illegal prosecutions. The country craved for freedom for long and that probably paved the way for making provision for larger fundamental rights to the citizens of the free India. Though most of the draconian laws of the British regime were repealed, yet we had to retain some of the provisions to prevent the abuse of law. Preventive Detention Act is one such piece of legislation which remains on the statute book after the independence. Though we had given vast freedom to the citizens of this country through provisions of the Constitution, the duties of the citizens were incorporated in the Constitution only belatedly by the 42nd Constitutional amendment in 1976.

India's criminal justice system is almost on par with British system. The various enactments of criminal law are also based on internationally accepted rules of criminal justice. Indian democracy has survived for the 57 years but now we see the Indian security at threat at least on some fronts.

Commenting on the necessity to take a serious re-look at the country's security mechanisms, the Padmanabhaiah Committee (of the year 2000) observed that,

“Internal security is an important element of national security. It would be prudent for the policy makers to realize that the present-day challenges to internal security, especially those posed by covert designs...are of such a nature that to meet them squarely, meaningfully and effectively, the society and the country need a highly motivated, professionally skilled, infrastructurally self sufficient and sophisticatedly trained police force.”

However, mere policing, albeit efficient, cannot lead to complete peace in society. An impartial, efficacious and rights-based criminal justice mechanism is an essential ingredient for a harmonious social order. The mechanisms, both preventive and deterrent, present in the criminal justice system need to be revamped and infused with the spirit of human rights values, in order to strike a balance between the concerns of the security agencies and protection of the constitutional liberties of the people. To this end, it is also necessary to look at international practices, and encourage the contribution and cooperation of non state players such as NGOs, citizens' groups and other associations. This is vital, in order to ensure effective public participation towards the maintenance of our internal security and also arrive at

a system of rules that are effective in maintaining national harmony within the limits of the Constitution. Ultimately, the manner in which our judicial systems and state agencies function forms the benchmark for gauging society's respect for civil liberty. Fareed Zakaria, in his book, *The Future of Freedom*, reminds us that there is an inherent distinction between democracy and freedom, and it requires different endeavors to infuse these two values in society. Furthermore, to manage their inherent tensions requires strict adherence to a set of principles that limit excesses and arbitrary actions, and the stipulated means of enforcing them. This makes such a system an arbitrator for society, that ensures that the requirements of maintaining a democratic nation, one of them being security, is fulfilled, and the needs of society, that is, respect for human rights, are kept in balance. It was observed by the Second Administrative Reforms Commission, in its Fifth Report in June 2007, that,

“When ethnic identity, religious fundamentalism and extra -territorial sponsorship of violence and terror fuel violence and disorder, the challenge becomes particularly grave. Such threats to national security need to be addressed by concerted and consistent state action,

backed by swift justice by competent governance and democratic legitimacy.”

Several acts that have occurred in the past few years, particularly the attacks on Parliament (in 2001), Akshardham Temple (in 2002), Indian Institute of Science (in 2005), serial bomb blasts in Mumbai and Malegaon (in 2006) and massacre of laborers in Upper Assam (in 2007) demonstrate that the entire length and breadth of the nation is vulnerable. During the year 2006, there were as many as 269 bombings across India and the State of Jammu & Kashmir topped the list with 78. But in 2007, in Assam alone there were 60 explosions. In the Naxal-hit Chhattisgarh State there were 61 bombings last year. The violent activities have taken a toll of 7,000 dead, including 1,711 securitymen since 2004. The proponents of terror, armed with modern technology and assisted by a multitude of sleeper cells, have spread their influence even to areas hitherto inaccessible. The transnational links of terror organizations with drug and arms trafficking groups have also come to fore, making the problem more complex, with far reaching implications. However, the immense cohesion between security agencies, strong public support and our democratic values has greatly assisted us in

withstanding the onslaught of those who threaten internal security. The examples of the states of Mizoram and Punjab previously infested with insurgency, but now peaceful, are notable. The success of security forces in these states reflects the need for security agencies all over India to adopt a strategy that aims at securing the confidence and support of the local populace. Arbitrary high-handedness and human rights violations by security agencies greatly alienate the people, who then fall prey to those working against national interests. Though we require strong measures to counter anti national elements, respect for human rights needs to be maintained. For this, an appropriate legal framework, particularly in criminal justice, would go a long way in supporting law enforcement agencies, and making them legitimate in the eyes of the citizens. The fact that legislations such as The Terrorist and Disruptive Activities (Prevention) Act, 1985 and The Prevention of Terrorism Act, 2002 were allowed to lapse, or were repealed on grounds of misuse by security agencies stands testimony for the urgent need to envisage and enforce an effective criminal justice system that is capable of dealing with all these issues.

More recently, the Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA) was enacted for two years to tackle the extreme situation prevailing at the time in Punjab. There was considerable criticism of the legislation, especially by human rights groups and Commissions, like the National Human Rights Commission and Amnesty International, who charged security agencies with serious violations of human rights. It was alleged that often, innocent persons were being proceeded against, tortured and even killed, and that the security agencies preferred using provisions of TADA even when ordinary criminal laws were applicable. This underlines the necessity for establishing a human rights based system, in order to minimize such acts by security agencies.

The Prevention of Terrorism Act, 2002 (POTA) was the result of the Law Commission of India's 173rd Report on Prevention of Terrorism Bill, 2000. It became highly controversial for reasons not dissimilar to those cited while criticizing TADA. However, while repealing POTA, several of its provisions were inserted in the Unlawful Activities (Prevention) Act, 1967. In particular, the provisions dealing with the power of the government to designate "terrorist organizations" have been left as they were, with only two

changes. First, in Section 35(1) (b), any organization deemed as "terrorist organization" by the U.N. Security Council can be designated as such by the central government. Second, in Section 38(1), it is an express requirement for any individual who is held liable for offences relating to membership of a designated "terrorist organizations" to have the intention of abetting the organization in its activities. However, the absence of criteria for designation of organizations as "terrorist organizations", and no judicial review, severely restricts the application of human rights mechanisms. On the other hand, "unlawful associations" designated as per the Unlawful Activities (Prevention) Act, 1967 are made subject to a tribunal which is akin to a civil court. Substantive changes have also been made to provisions relating to special courts, drawing adverse inferences against the accused and limited judicial and administrative scrutiny but there still remain many lacunae and it is pointed out that many human rights stand subverted, which need to be addressed.

India is a multi-cultural society where cultural freedom is allowed to expand and is used for the well being of the society. Though there is intermingling of this cultural freedom, yet quite often a friction surfaces in some parts of the country. Cochin, I am

proud to say, is a city which has had no history of any communal violence or ethnic friction. It is because of the intermingling of this multiculturalism and the cultural freedom. The importance of cultural freedom has to be distinguished from the celebration of every form of cultural inheritance, irrespective of whether the person involved would choose those particular practices given the opportunity of critical scrutiny and an adequate knowledge of other options and of the choice that actually exists. On many occasions, the friction arises for small and silly reasons. We must guarantee the simultaneous flourishing of different cultures within the same country or region and the cultural diversity has to be enhanced if individuals have to be allowed and encouraged to live as they would value living (instead of being restrained by ongoing tradition). Fortunately, Kerala is a state where confrontation of cultural identity causes no problems of communal friction but we shall not forget that at times, undesirable happenings do occur and we shall have to safeguard against such happenings. The Prime Minister of India has observed that one-third of the country is under the stress of internal terrorism. There are many reasons for such state of affairs but poverty and the sense of injustice are said to be some of the basic reasons for such violence. This requires serious concern. Poverty, massive inequality are terrible enough

in themselves, and deserve priority even if they have no connection whatever with violence. Destitution can produce provocation for defying established laws and rules. Destitution can be accompanied not only by economic debility, but also by political helplessness. These are serious issues which require urgent consideration by the administrators when we consider internal security of the country.
