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PRESERVING INTERNAL SECURITY AND PROTECTING HUMAN

RIGHTS THROUGH EFFICACIOUS CRIMINAL JUSTICE

I feel honoured to have been requested to give the 20th Intelligence Bureau Centenary Lecture. Seeing the galaxy of persons who have given the previous lectures shows that it is one of the prestigious lecture series and the subject taken for discussion is of national importance.

Today before this august assembly, I would like to share my thoughts on the subject “Preserving Internal Security and Protecting Human Rights Through Efficacious Criminal Justice”. Criminal justice in this country was borrowed from the British system and major enactments, namely, The Code of Criminal Procedure, The Indian Penal Code, The Evidence Act, etc. were all passed by the British Parliament and came into existence much before our independence. We usefully continued the system and I must say that the system has worked well for this country. Various

countries faced different challenges which were not very common about two decades back. Today, there is not a single country in the world which is not under the threat of terrorism. There is an allegation of widespread violation of human rights in the many parts of the world. It is in this background we have to appreciate how far our laws and criminal justice system preserve the internal security and protect the human rights of the people.

There is also a widespread allegation that the sovereign powers and institutions of the State tend to undermine the most basic human rights. This takes us to Semayne's case, [(1603) 5 Coke's Rep. 91a : 77 ER 194 (KB)] decided in 1603 where it was laid down that :

“Every man's house is his castle.”

One of the most forceful expressions of the above maxim was that of William Pitt in the British Parliament in 1763. He said :-

“The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail – its roof may shake – the

wind may blow through it – the storm may enter, the rain may enter – *but the King of England cannot enter* – all his force dare not cross the threshold of the ruined tenement.”

This was the perception the history showed us. But, now we get a totally different picture where many violations of human rights are swept under the carpet and the violations are not really brought to book or punished. Though each system of criminal justice dispensation has its own discreet frame of reference against which we can measure appropriateness of behavior, in the Indian context, the need is to develop a system that retains an inherent respect for a minimum standard of protection of human rights, while ensuring that our house remains in order from within.

The 1993 Bangkok Declaration of the governments of the Asia-Pacific region noted that,

“States have the primary responsibility for the promotion and recognition of human rights through the appropriate infrastructure and mechanisms, and also recognizes that remedies must be sought and provided primarily through such mechanisms and procedures”.

The protection of internal security is essential for our nation's governance. In the words of our former President, Dr. Abdul Kalam, during his address at the 150th year of the Chennai Metropolitan Police,

“Internal security is the foundation for the peace and development of the nation.”

An absence of lawfulness would only lead to anarchy, and decay and destruction of the social order. However, the responsibility of maintaining internal security goes hand-on-glove with the task of promotion and protection of human rights. Without symmetry between these two duties, peace and development would only reduce to a teasing illusion. A social order based on respect for human values forms the foundation of our constitutional democracy, where the rule of law is the guiding light for good governance. It is thus imperative to devise a system, or improvise existing mechanisms, particularly in criminal justice that address human rights and strive to protect internal security at the same time. It is often argued that human rights must give way for the larger consideration of internal security since they unduly hinder effective executive action to counter the forces

that cause internal disturbances. This argument is untenable in our rights-based system. Rather, an effective criminal justice mechanism has a pivotal role in integrating human rights with security, guarantee peace and safety of all rule abiding citizens, and strengthen the nation from within.

The need for such an effort has gained significance, particularly in recent times. The state security agencies and legislative bodies, all over the world, have come under increasing public scrutiny and criticism, for their alleged non-adherence to human rights principles, and adoption of a “wolf-in-sheep-skin” approach where, disguised as “anti-terror” or “internal security” laws, human rights are supplanted with draconian legislation, all in the name of security. Often, such laws contain inherent mechanisms of justice dispensation through tribunals, which are often kept beyond the scrutiny of the courts, judicial review, or even legal aid. Through such hasty reactions to internal strife, which immediately remove individual human rights, the state becomes an unsuspecting contributor to discord within the nation. These attempts of law making bodies to act upon a wave of public emotion, incited through unjustified acts of terror, often leave the judiciary to deal with human rights issues at a much later stage, where the damage may already have been done. Such an approach to internal security protection

is intrinsically flawed and is an antithesis to the rule of law and fundamental rights enshrined in our Constitution. It would be pertinent to refer to the judgment of Lord Hoffman of the House of Lords, in the case of *A. v. Secretary of State for the Home Department* ([2004] UKHL 56 at 97). According to Lord Hoffman,

“The real threat to the life of a nation, in the sense of a people living accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory”.

Security agencies must necessarily revolve around strong public confidence. This will also lead to civic acceptance of security legislation and ensure faith in the legal system. A loss of public confidence has immense implications for the nation, and threatens the very existence of our democratic social order. The upholding of the rule of law and human rights in the face of an internal security crisis is a test of the inner strength and moral fabric of the nation and its people. In such times, the faith of the citizens in the fundamental rights and the Constitution which enshrine

human rights guarantees that some of these rights can not and should not, face suspension by the government. That the people of India have faced crises, both internal and external, ever since the inception of the Indian state, and yet have stood by their solemn resolve and relentless affirmation to uphold the tenets of the law stands testament to our strength, even when threatened with the greats of dangers. The National Human Rights Commission, commenting on the Godhra riots in Gujarat in 2002, observed as follows:

“There is no doubt, in the opinion of this Commission, that there was a comprehensive failure on the part of the State Government to control the persistent violation of the rights to life, liberty, equality and dignity of the people of the State. It is, of course, essential to heal the wounds and to look to a future of peace and harmony. But the pursuit of these high objectives must be based on justice and the upholding of the values of the Constitution of the Republic and the laws of the land. That is why it remains of fundamental importance that the measures that require to be taken to being the violators of human rights to book are indeed taken.”

An unwavering application of the rule of law protects innocent citizens from possible infringement of their fundamental rights, while ensuring that those responsible for disrupting peace and harmony in society are dealt with an iron fist and a heavy hand. The judiciary plays an integral role in preserving these rights, whenever there is an attempt to abridge them arbitrarily. The strength of legal institutions is a form of insurance for the rule of law and for the observance of human rights.

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 last year, there were as many as 269 bombings across India and the State of Jammu & Kashmir topped the list with 78. But this year, 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.

While examining the gamut of international law that exists to preserve internal security while confining itself to the framework of human rights, a number of international instruments emerge. However, many of these instruments remain paper tigers only, due to non implementation or inaction by member states. The General Assembly has been considering the topic of international terrorism and organized crime since decades, but has achieved little success yet, and has only been able to give general guidelines. Fundamentally speaking, India, as a member of the United Nations, is bound by the U.N. Charter, which pledges member states to "promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion", and by the Universal Declaration of Human Rights (UDHR), which protects the rights to liberty, freedom of expression and opinion, peaceful assembly,

an effective remedy for acts violating fundamental rights, and a "fair and public hearing by an independent and impartial tribunal" (U.N. Charter Articles 1(3), 55-56 and UDHR Articles 19, 21). The International Covenant on Civil and Political Rights (ICCPR), in Articles 6 and 9, also protects the rights to life, liberty and security of the person, and freedom from arbitrary arrest or detention. The ICCPR also recognizes in cases of extreme emergency, such as an imminent threat of terrorism, some human rights may have to be suspended. However, as it states in Article 4(1), the derogation must be "strictly required by the exigencies of the situation," not "inconsistent with other obligations under international law". In Article 4(3), the ICCPR stipulates that the state party must notify other parties of the specific provisions from which it has derogated and why.

Security Laws in India

Previously, the Government of India Acts of 1919 and 1935 entrusted the Governor-General with emergency ordinance-making authority to ensure the security of India. The British had also enacted special legislations during the two World Wars (Defence of India Act of 1915 and Defence of India Act 1939), to authorize security agencies to detain or impose other

restraints on personal liberty on "reasonable grounds". Special tribunals to adjudicate violations of the Acts were also set up. The British period is one when extensive security laws were enacted without any regard to human rights. It is notable that a regulation of Bengal, of as early as 1818, which granted the authorities the authority to place individuals "under personal restraint" to prevent "internal commotion" remained in effect even for several years after independence, before being superseded by new legislation. After independence, we passed the Preventive Detention Act, 1950 which authorized detention for up to 12 months, but lapsed in 1969. However, the Maintenance of Internal Security Act, largely restored the provisions of the Preventive Detention Act, 1950. The National Security Act, 1980, in the words of Granville Austin, in "Working a Democratic Constitution: The Indian Experience", "presaged years of new repressive legislation". It is such laws which we must abhor, since they are against the Rule of Law and human rights.

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 Supreme Court of India, in *Kartar Singh v. State of Punjab* [(1994 3 SCC 569)], expressed concern regarding the "sheer misuse and abuse of the Act by the police" and made an attempt to infuse human rights safeguards by devising guidelines to ensure that confessions obtained during pre-indictment interrogations is in conformity with human rights principles, which the court went on to elucidate. Later, in *Shaheen Welfare Association v. Union of India* [1996(2) SCC 616], the Supreme Court further elaborated on the need of ensuring that Article 21 rights be adhered to by security agencies. Observing the at times, innocent people had to languish in jail for long periods due to stringent bail requirements, the court stated that it causes irreparable damage to innocent persons who have been wrongly accused of crimes and are ultimately acquitted but have to remain in jail for sustained periods due to stringent bail provisions in TADA.

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.

The Law Commission, in its 173rd Report tried to deter police misconduct by recommending provisions for their prosecution, which were even adopted in POTA, strangely, the amendments to the Unlawful Activities (Prevention) Act, 1967 do not have these provisions, though immunity has been granted under Section 49(a) to government officials for good faith actions, which are difficult to prove to the contrary. This effectively hinders meaningful remedy. Moreover, the fact that several states have suggested that they will enact new laws similar to POTA raises serious human rights concerns. Such legislations may conflict with India's obligations under the ICCPR. It is also important to prevent communalization or politicization of such laws. The essential question that arises while considering the efficacy of such special laws is whether they are required at all, and if, in the alternate, we can reinforce our criminal justice mechanism to include prevention of the acts for which these special laws are enacted?

The outcry against the Armed Forces (Special Powers) Act, 1958, especially in north eastern states like Manipur, prompted the government to review this legislation through a commission under the Chairmanship of Justice Jeevan Reddy. The Commission, in its Terms of Reference, was to reformulate the Act to

“Bring it in consonance with the obligations of the Government towards human rights or to replace the Act by a more humane Act.”

The committee concluded that the Act ought to be repealed and suggested incorporating appropriate provisions in the Unlawful Activities (Prevention) Act, 1967, which would address both the internal security concerns as well as human rights.

What all such legislations lack is an effective coordination mechanism which oversees the implementation a whole gamut of internal security laws, including terrorism, organized crime, money laundering arms and drug smuggling and the like, and addresses human rights at the same time. It is imperative that the criminal justice system be revamped to address these concerns.

Organized Crime

The term “organized crime” is vast, and includes a plethora of activities, all of which endanger internal security. Moreover, the emerging nexus of terror groups with organized crime gangs makes it necessary to address this issue. The California Control of Profits Organized Crime Act, 1982 defines organized crime as the crime “which is of a conspiratorial nature and that is either of an organized nature and which seeks to supply illegal goods and services such as narcotics, prostitution, loan sharking, gambling, and pornography, or that, through planning and coordination of individual efforts, seeks to conduct the illegal activities of arson for profit, hijacking, insurance fraud, smuggling, operating vehicle theft rings, or systematically encumbering the assets of a business for the purpose of defrauding creditors.” In the United Kingdom, Sir David Phillips, Chief Constable of Kent, blames the archaic criminal justice system for often allowing criminals to go free merely on technical grounds. Sensing the gravity of the situation, the General Assembly, through Convention 53/111 of 1998, established an Ad Hoc Committee; open to all states, for formulating a Convention against transnational organized crime and additional protocols. The convention was

adopted at the turn of the century, and is a major step in combating this menace. However, though the Convention suggests various means by which organized crime can be dealt with, it does so in a manner that recognized the existence of human rights. India became a signatory to the Convention in 2002. Resolution 1373, the mandatory antiterrorism resolution adopted after the September 11, 2001 terrorist attacks by the U.N. Security Council under Chapter VII of the U.N. Charter is also a landmark instrument but one which is not invoked frequently. The United Nations and its Counter-Terrorism Committee have not been sufficiently attentive to human rights concerns in Resolution 1373 or subsequent efforts.

As was observed by the Malimath Committee Report on Criminal Justice Reforms in 2003, the Code of Criminal Procedure, 1973, does not contain a specific provision prescribing the procedure for the restraint and confiscation of illegally acquired properties on the same liens as TADA or NDPS, and this hinders investigating agencies. The Report thus recommends the insertion of a new section in the Code to provide for this void, and it is notable to mention that the proposed section considers the human rights of the people while also giving adequate powers to law

enforcement agencies. Another recommendation that the Malimath Committee, Padmanabhaiah Committee on Police Reforms as well as the recent Madhav Menon Committee on Criminal Justice Reform have stressed on is the need to designate certain crimes as “Federal Crimes”, so as to make security agencies more effective, improve sustained international cooperation between agencies, as well as ensuring that no violations of human rights take place. The Malimath Committee states that the

“Time has come when the Country has to give deep thought for a system of federal law and federal investigating agency with an all-India Charter. It would have within its ambit crimes that effect national security and activities aimed at destabilizing the country politically and economically.”

Provisions relating to prosecute police officers for violation of human rights remain few and far between, and those that do exist are rarely implemented. The time taken for cases in court also hinders effective remedy of those whose rights stand violated. Reforms are urgently needed to hold erring police officials responsible for human rights violations, in

order to fulfill the obligation with Article 2 of ICCPR to provide meaningful and effective remedies for rights violations.

Fundamental Rights and Criminal Justice

In *D.K. Basu v. State of West Bengal* [A.I.R. 1997 S.C. 610], the Supreme Court extended the Constitution's procedural guarantees further by requiring the police to follow detailed guidelines for arrest and interrogation. Moreover, furthering Article 22(2) of the Constitution, the Supreme Court in *M.H. Hoskot v. State of Maharashtra*, [(1978) 3 S.C.C. 544] held that legal assistance must be provided to indigent defendants at the expense of the state. The Court also has recognized a constitutional right to a fair criminal trial. Other attempts to infuse human rights within criminal justice include appearance before a magistrate in a maximum of 24 hours after detention, limiting the admissibility of statements given to the police and the like.

In order to infuse human rights in the criminal justice system, the entire process needs reconsideration, particularly at the stages of investigation, prosecution, and adjudication. In particular, the special provisions related to the questioning of women and children under 15 years of age, as stipulated

in the Code of Criminal Procedure (Cr.P.C.), in Section 160(1) should be strictly adhered. The Supreme Court of India added another safeguard to this provision, by holding, in the case of *Sheela Barse v. State of Maharashtra* [(1983) 2 SCC 96], that if the person being questioned is female, a female police officer must necessarily be present. Lie detector tests cannot be forced to be taken. The authorities must also allow the accused to consult a lawyer of his choice, a right crystallized by the Supreme Court through the case of *Nandini Satpathy v. P.L.Dhani* AIR 1978 SC 1075. The law also strictly prohibits torture during interrogation, and any evidence adduced through these methods is inadmissible. Use of torture for detenus, physical or mental, is prohibited. Article 7 of the ICCPR and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment explicitly bar such practices. The Supreme Court of India, in *Sunil Batra v. Delhi Administration (I)* [1979 SCR (1) 392], ordered prosecution of police officers responsible for such crimes. The NHRC has also attempted to reduce instances of custodial torture by issuing guidelines that any custodial death must be informed to them within 24 hours of occurrence. The courts have also held that preventive detention should be exercised rarely, and even then Article 22(4) and 22(5) of the Constitution of India, and Section 50 of Cr.P.C.

should be borne in mind. Through various cases such as *Jayanarayan Sukul v. State of West Bengal* [1970 SCR (3) 225] and *A.K. Roy v. Union of India* [1982 SCR (3) 769], the Supreme Court has provided for extensive rights to detainees. Furthermore, even excessive interrogation amounts to a violation of human rights, and the authorities must ensure that interrogations must be humane, and not continuous.

In our adversarial system, adopted from the British, all accused persons are presumed innocent until proved guilty. Thus, during trials, all accused persons should be given a fair opportunity to be heard. This is a fundamental right available to all citizens. The Supreme Court held in the case of *A.R. Antulay v. R.S. Nayak* [1992 (1) SCC 225] that the requirement of swift justice applies to all stages of the criminal justice process-investigation, inquiry, trial, appeal, revision and retrial. The Cr.P.C. also requires that the accused be present at the trial, that he is informed of the offences he has been charged with and is also protected with the right against double jeopardy and self incrimination.

The ultimate aim of a criminal justice mechanism is to protect the personal liberty of the citizens. It is a necessary tool for good governance, and

prescribes rules of conduct for all. Only then can the people realize their rights under Article 21. Any invasion of this right creates an imperative obligation on the state to take preventive measures for the maintenance of peace and tranquility.

Even in the United Kingdom, the Intelligence and Security Committee Report into the London Terrorist Attacks on 7 July 2005 observed, quoting a previous report, that even intelligence gathering had its limitations of human rights, in the following words,

The Agencies cannot know everything about everyone, nor can they intercept and read every communication (which in any event would be a gross violation of human rights). There will always be gaps in the Agencies' knowledge.

Later, the Home Secretary, adducing evidence before the Committee, stated that,

... to create a structure which stimulates certain forms of action on the basis of intelligence we do not have is a very, very difficult thing to do... it is

better to use the intelligence we do have to inform our judgements insofar as we can.

The Committee observed that there was confusion in the system which prevented security agencies from proper coordination and functioning. It stated that,

There must be clarity of the various systems and levels, and a shared understanding of both design and purpose among users of the system....

The Committee further observed that,

More needs to be done to improve the way that the Security Service and Special Branches come together in a combined and coherent way to tackle the 'home-grown' threat. We welcome steps that are now being taken to achieve this although, given that the 'home-grown' threat had clearly already been recognised, we are concerned that more was not done sooner.

The British parliament has also enacted the Human Rights Act, 1998, which requires all courts to interpret English laws in conformity with the European convention on Human Rights as interpreted by the European Court of Human Rights.

In the United States, the Sixth Amendment guarantees right to a speedy and public trial by jury and also the right of the accused to be informed of the charges against him. However, the United States has been severely criticized for detaining prisoners in Guantanamo Bay, in which prisoners are not accorded “prisoner-of-war” status. Moreover, since they were not on U.S. soil, they were not accorded the liberties guaranteed under the U.S. constitution. In contrast, the attitude of our Courts and justice system has been more humane and rights-based.