'LAW, TERRORISM AND HUMAN RIGHTS'

Lecture by

Gopal Subramanium, Senior Advocate
Former Solicitor General of India
Former Chairman, Bar Council of India

On the Occasion of
Sesquicentennial Celebrations
of the Calcutta High Court

Delivered on May 5, 2013

at

Town Hall, Kolkata

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> *"Democracy should not commit suicide in order to protect the human rights of its citizens. Democracy should protect itself and fight for its existence and values. But this protection and this war should be carried out in a manner that does not deprive us of our democratic nature."*
>
> *-Ahron Barak*

I. INTRODUCTION

Perhaps no other chain of events in the recent past, which are described as "acts of terror", have had a more direct and substantial impact on the life of human

beings across the world. The magnitude and deleterious effect of these acts of terror has not only affected our lives, but has also allowed the State to 'intrude' in our lives like never before. Seemingly, the acts of terror by themselves may affect the life of the victims, it has substantially changed the perception even of those not directly and physically hurt by acts of terror. Since the security of the individual is a basic human right (and a fundamental condition of the social contract that has put the society together), the protection of individuals is a fundamental obligation of the State. There is an implicit promise in any form of government to ensure that thephysical security of the individuals constituting the society is protected by taking positive measures against all forms of violence, including the threat of terrorist acts and to bring the perpetrators of such acts to justice, and also to protect the people from its own excesses.

In view of the dualism of the impact of terrorism, the State has catapulted mechanisms to deal with it. Whilst some of them areConstitutional,others only have the moral authority arising out of public sentiment. My endeavour in this technical session is to attempt to outline a mechanism to draw the boundaries of the law and executive action in the framework of human rights law with a view to combat terrorism. It is important for the State to ensure that all its measures are constitutionally compatible not only with the Constitution as we see it, but also the international covenants which are built into to the Constitution as a reflection of constitutional values.

II. STATE RESPONSIBILITY AND RESPECTING HUMAN RIGHTS

The State has an obligation to intervene and adopt counter terrorism measures[1]. In recent years, however, the measures adopted by States to counter terrorism have themselves been, alleged to be and sometimes have been even found wanting in terms of compliance with human rights norms. The means and methods adopted by the State haveposed serious

[1]The phraseology of 'counter' terrorism is capable of being a euphemism for all sorts of executive action that could violate the fundamental constitutional guarantees, and therefore the use of the phrase in this lecture (as also by other scholars) has to be rather critical.

challenges to human rights and the rule of law, and often this is on account of the zeal of the law enforcement agencies to give a "commensurate response" to the terrorist.

We are not unaware of States that have engaged in torture and otherforcible measures to counter terrorism,overshadowing the independent legal structures. On account of the trial being overshadowed by emotions and media, the independence of the judiciary could also be undermined.[2] It is judiciary which is the sole bastion which can preserve the rule of law and the scope of emotion and the media, though sometimes even errors of judgment can invariably take place. At times, the media also assists in "labeling" of persons

Irrespective of the consequences, the State cannot legitimately intervene by resorting to a

[2] Some scholars argue that creation of special courts may be a legitimate aim by itself but may also have an impact on the fairness of the manner in which trial is perceived, and in the long run may denude the effectiveness of regular court systems.

mechanism that over-step the limits of the law. Thus, a reason why it is important for the State to ensure that none of its measures transgress the limits of the law is because all its actions have to be within the framework of the Constitution, and any oversight or transgression by the State may have the effect of eroding legitimacy and the rule of law, only fomenting further unrest and also erosion of faith in the Constitution.

In the name of counter terrorist activities, repressive measures are also used to stifle the voices of human rights activists, advocates, minorities, indigenous groups, journalists and civil society.

There is another dimension: by being able to build a perception of threat, the State may be able to claim legitimacy in channeling the funds normally allocated to social programs towardsstrengthening of police and armed personnel. Because many things are justified "in the name of" terrorism, it is also necessary to understand the meaning of terrorism.

III. PRINCIPLE OF LEGALITY

Before stepping into the discussion whether the terrorism can justify extreme measures by the State, it is necessary to examine whether there exists certainty of the definition of terrorism. This is because unless terrorism forms a definite concept, any edifice of extreme measures standing upon a vague idea would always be susceptible to causing colossal damage to democracy. Mr. Sorabjee has also referred to the principle of proportionality, and the necessity of judicial review of many aspects of executive actions by referring to the case of Fred Korematsu from the United State of America.

A. DEFINING TERRORISM

Respect for human rights and the rule of law must be the foundation stone of the fight against terrorism. This necessarily means that there is a need to devise and develop counter-terrorism strategies that seek to prevent acts of terrorism, prosecute those responsible for such criminal acts, and promote and protect human rights and the rule of law , in the manner that is consistent with Article 14 of the Constitution of India, and other values on which the edifice of our democracy stands.

It is widely known, to those familiar with the topic, that whether a particular act of violence should constitute terrorism or not is a rather all-contentious issue. In order, to properly understand and assess, if there exists a basis of intrusion into the ordinary lives of the citizens, it is necessary to first consider the distinction between ordinary crimes and acts of terror, and the "special nature" of terrorism must be understood before considering if it merits a special response.

Terrorism is commonly understood to refer to acts of violence that target civilians in the pursuit of political or ideological aims. While the international community is yet to adopt a comprehensive definition of terrorism, existing declarations, resolutions and regional treaties relating to specific aspects of terrorism define certain acts and core elements which may be

used as a guiding compass in determining what acts constitution "terrorism". The distinction is also necessary to ensure that the'ordinary' does not get entangled in an 'extraordinary' measure becausethe State may devise special laws and courts to deal with the latter with extraordinary vigor.

In 1994, the United NationsGeneral Assembly's *Declaration on Measures to Eliminate International Terrorism*, set out in its Resolution 49/60, statedthat:

> *"Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them;"*

In 2004, the UN Security Council, in its resolution 1566 (2004), in the context of terrorism resolved that:

> *"criminal acts, including against civilians, committed with theintent to cause death or serious bodily injury, or taking of hostages, with the purposeto provoke a state of terror in the general public or in a group of persons orparticular persons, intimidate a population or compel a government or aninternational organization to do or to abstain from doing any act, which constituteoffences within the scope of and as defined in the international conventions andprotocols relating to terrorism, are under no circumstances justifiable byconsiderations of a political, philosophical, ideological, racial, ethnic, religious orother similar nature".*

While, the struggle of the national and international community to reach a consensus on the definition of terrorism that would pass the test of principle of legality continues, most countries including India seem to have devised a working definition.

The definitions under the Terrorist and Disruptive Activities Act, 1985 ("**TADA**"), and the Prevention of Terrorist Act, 2002 ("**POTA**") have both been recognized to have given an imprecise definition as to what constitutes an act of terror. In ***Mohd. Iqbal***

M. Shaikh v. State of Maharashtra[3], the Hon'ble Supreme Court has held that:

> *"7. In view of the rival submissions at the Bar, the first question that arises for our consideration is whether the activities can be held to be "terrorist activities" so as to bring them within the purview of TADA. The expression "terrorist act" has not been defined and, on the other hand, Section 2(h) stipulates that it would have the same meaning as has been assigned to it in sub-section (1) of Section 3. The expression "terrorism" has not been defined under the Act and as has been held by this Court, in the case of Hitendra Vishnu Thakur v. State of Maharashtra [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087]* ***it is not possible to give a precise definition of terrorism or to lay down what constitutes terrorism****. But the Court has indicated in the aforesaid decision that it may be possible to describe it 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. It has also been stated in the aforesaid decision that if the object of the activity is to disturb harmony of the society or to terrorize people and the society with a view to disturb even the tempo, tranquility of the society, and a sense of fear and insecurity is*

[3](1998) 4 SCC 494 (at 503)

> *created in the minds of a section of the society or society at large, then it will, undoubtedly, be held to be a terrorist act. The question, therefore, does not really boil down to an examination as to whether for the activities, under the normal criminal law, the accused persons can be punished but to examine the real impact of such gruesome and atrocious activities on the society at large or at least on a section of the society."* (emphasis added)

Therefore, for the purposes of the session today, it suffices to state that as a precise definition of terrorism is not possible, utmost care, needs to be taken so that ordinary criminals do not have to go through the rigours of specialized law that is meant to deal with specific offences. Also, as a precise definition of terrorism is yet to be devised, the matter of truncation of human rights is then *"a path where angels fear to tread"*, and we need to be very careful.

There are popular cases of misapplication of POTA, such as that during the time of the Gujarat riots in 2002. Clearly, going perhaps by the plain meaning of the words used, it is may be possible to argue that charges under POTA could be sustained in respect of alleged rioters but those familiar with the subject know

that POTA cannot be invoked. Ultimately, it took years of pendency and the decision of the High Court to exculpate those alleged rioters from the charges under POTA. [4] There are many unheard voices that still languish in high security prisons elsewhere, awaiting their trial, which may actually not conclude in their lifetime.

At the same time, it cannot be denied that terrorism is not an ordinary crime, because unlike an ordinary crime, the object that it seeks to achieve is neither momentary nor is it limited to identified persons. It is a crime, which does not discriminate, and is generally motivated not with a specific objective to limits its damage to an individual.

[4] "*Godhra attack not a terror act, can't use POTA: HC*", Indian Express, February 13, 2009, accessed at http://www.indianexpress.com/news/godhra-attack-not-a-terror-act-cant-use-pota-hc/422988/ on May 2, 2013.

B. Hallmarks of an anti-terrorism legislation

In an essay by W. Wesley Pue, titled "*Protecting* Constitutionalism *in Treacherous Times: Why 'Rights' Don't Matter*", we have been reminded that Lon Fuller in his classic work 'Morality of Law' offered a compelling account of the minimum conditions of legality, from which guidance can be taken to guide human conduct by means of rules. In the work, Fuller explains through a parable '*eight routes to disaster*' which are:-

a. A failure to achieve rules at all, so that every issue must be decided on an *ad hoc* basis;

b. A failure to publicise or at least to make available to the affected party, the rules he is expected to observe;

c. The abuse of retroactive legislation, which not only itself guide action, but

undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change;

d. A failure to make rules understandable;

e. The enactment of contradictory rules;

f. Rules that require conduct beyond the powers of the affected party;

g. Introducing such frequent changes in the rules that the subject cannot orient his action by them; and

h. A failure of congruence between the rules as announced and their actual administration.

The aforesaid principles are widely considered to embody the essence of the rule of law popularly known to lawyers through the maxim *nullepoenesinelege*. It is difficult to imagine but it is true that some of the aforesaid principles are found lacking in governmental action including legislations and delegated law with respect to terrorism and often even in judgments on the issue. As we have discussed earlier, a precise definition of terrorism is not possible or at least at the present moment has not been precisely defined. That being the case, it is evident that the principle of legality and definition of terrorism are presently not synchronised.[5] The term 'terrorism' is invoked for its rhetorical power and denunciatory effect rather than analytical coherence. 'Terrorist' actions are invariably prohibited under ordinary criminal prohibitions and therefore, raising certain crimes to a higher pedestal of being terrorist acts involves a great measure of legislative acumen and social reality to be stitched into law. However, merely because terrorists, naxalites and the like are people whose faith in the

[5] While I was working on the Verma Committee, we had received a number of suggestions which equated the violence perpetrated on Nirbhaya with 'acts of terror' and the accused with 'terrorists' and then suggesting for stronger punishment. This suggests that public perception of special offences, aggravated offences and offences generally may be blurred.

Constitution has eroded – that by itself does not mean that those people are disentitled from protections under the Constitution.[6]Such an argument is nothing but only rhetorical.

An important aspect of rhetoric is that, anti – terrorism measures are generally projected as being only temporary measures. "*The problem is that these 'temporary' special measures tend to leave a permanent residue. As the threat from particular groups rarely ends at a clear and defined point in time, and new threats from other groups invariably emerge, some elements of emergency legislation become embedded in the conventional criminal law framework. This can result in a gradual and often unchallenged expansion in the coercive power of the state, which again can generate fear, resentment and radicalization amongst those most exposed and vulnerable to the exercise of this power.*"[7]

As all of you are aware, the Special Powers Act,enacted in 1950 has still not been repealed and inspite of the fact that recommendations of two Committees (Justice B.P. Jeevan Reddy Committee and Justice J.S. Verma Committee) have been widely applauded but precious little has been done to repeal the application of these laws. It is only if you live in those state and you hear the silent shrieks of the people whose human rights are transgressed that one can understand what is the effect of the application of that law.

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[6] *See* AnupSurendernath, "SUCCUMBING TO THE BOGEY OF FEAR", published in *The Hindu* on April 26, 2013 (New Delhi): "*A belief in the values protected in the Indian Constitution is not a condition precedent to invoking the protections contained therein. Nor is an active denial of the legitimacy of the Constitution a ground for denying constitutional guarantees. It is the very basis for a rule of law society and a Constitution would be meaningless if it were to be otherwise....*"

[7] Colm O' Cinneide, "STRAPPED TO THE MAST: THE SIREN SONG OF DREADFUL NECESSITY, THE UNITED KINGDOM HUMAN RIGHTS ACT AND THE TERRORIST THREAT, published in MirianGani& Penelope Mathew Eds., Fresh Perspectives on the 'War on Terror', ANU (2008).

C. Branding as 'Terrorist'

Given the large number of people who are arrested after terrorist attacks merely on account of their affiliation to a particular faith reflects that there is a profound absence of judicious application of executive discretion arising out of rational, constitutional principles and the executive actions seem to be nurtured by social settings in which we find ourselves today.[8] In short, there is a deliberate structural failure of congruence between rules as announced and their actual administration.

There is as I said earlier, a profound duty on lawyers as officers of the Court and agents of justice to

[8] See THE MUSLIM QUESTION: STORIES OF FALSE TERROR, published on Tehelka.com on March 25, 2013 ("*..young Muslim boys have been arrested as a cynical default mode, prejudged and condemned by the media, public and security establishment even before trials could begin. The poisonous idea that "Every Muslim is not a terrorist but every terrorist is a Muslim" had seeped into the country's consciousness. No one was interested in the facts.*") See also the literature concerning IshratJahan fake encounter case. See also: Ajay Gondane, "LESSONS FROM INDIA: CONFRONTING THE SOCIOLOGICAL CAUSES OF TERRORISM", paper published by Henry L. Stimson Center (2006).

ensure that the cardinal principle of presumption of innocence is respected. Conscious endeavour must always be to ensure that an innocent must not be prosecuted much less proved guilty. In making the said statement, I have raised the level of the principle of "presumption of innocence" from punishing an innocent which has been the traditional principle to another level i.e. prosecution of an innocent. The traditional principle would have been more applicable if the judicial system in this country was able to ascertain the truth in a reasonable period of time and that too without impacting the lives of those individuals who live around the accused. Since neither the Constitution nor the Courts and not even the society is able to ensure that even after acquittal, a person integrates 'normally' with the society, the law enforcing agencies need to be extremely careful.

It is our duty as prosecutors, as defenders and as adjudicators to see that an innocent is not even prosecuted for a crime which he could not have committed. I understand that this is a rather high expectation from our profession; but at this juncture I would like remind of what Chief Justice J.S. Verma had

told me about a week before he left us. During my conversation with him about the quality of lawyers, Judges and respect for the profession and traditions of the Bar, Chief Justice Verma reminded me Addison's quote that "*To be perfectly just is an attribute of the divine nature; to be so to the utmost of our abilities, is the glory of man.*" We must aspire to follow these high ideals, especially in testing times such as these.

D. Justification of Special Measures

As a U.N. member state, India 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*"[9] and by the Universal Declaration of Human Rights, 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.*"Both the European Convention for Protection

[9]Article 1(3) of the Charter of the United Nations.

of Human Rights (**ECHR**) and the International Covenant on Civil and Political Rights (**ICCPR**) permit derogation from certain rights enshrined in these instruments. [10] As set out above, international conventions do allow derogation albeit 'to the extent strictly required by the exigency of the situation'. Evidently, the exception comes with a great degree of subjectivity. This has been construed under international law as express reference to the principle of proportionality. Manfred Nowak has noted:-

> *"The degree of interference and the scope of the measure (both territorially and temporally) must stand in reasonable relation to what is actually necessary to combat an emergency threatening the life of the nation. The principle of proportionality requires that the necessity of derogation measures be reviewed at regular*

[10]*See*See ICCPR, art. 4 (permitting derogation from some provisions, including articles 9 and 10, in the event of "public emergency which threatens the life of the nation and the existence of which is officially proclaimed"); UDHR, art. 29(2) (recognizing that laws limiting fundamental rights may be enacted "solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in the democratic society"); U.N. Office of the High Commissioner for Human Rights, Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights While Countering Terrorism 18-25 (2003).

intervals by independent national organs, in particular, by the legislative and judicial branches."[11]

Article 15 (1) of the ECHR reads:

> *"In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations under international law."*

Article 4 (1) of the ICCPR reads:

> *"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."*

[11] Manfred Nowak, COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY (N.P. Engel, 1993) 84.

One of the Directive Principles of State Policyin the Constitution embodies that the government "shall endeavour to foster respect for international law and treaty obligations in the dealings of organized people with one another"[12].

Thus, given the nature of offence and its wide reaching consequence, it is permissible for the State toresort to certain special measures that are commensurate with the purpose sought to be achieved, provided that the limits of derogation are strongly defined. Such special measures may include:

1. *Pretrial Investigation and Detention Procedures:*
2. *Admissibility of Confessions to Police Officers*
3. *Special Courts and Procedural Rules*
4. *Adverse Inferences and Presumptions of Guilt*

[12] Article 51 of the Constitution of India.

5. *Judicial and Administrative Oversight*

6. *Official Immunity*

The requirement from Constitutional and human rights perspective isthat the aforesaid measures must be proportionate, and of course it cannot invert the fundamentals of criminal law. We are all familiar with TADA and POTA regime providing for the aforesaid special measures.

IV. Means and End: Deploying Proportionality

A profound question that stares not only the legislature and executive in the face, but also the courts of law, is regarding the extent to which measures purported to combat terrorism could be justified within the parameters of the law. The debate on the relationship of means and end is an unending one, and unfortunately is not capable of a precise scientific answer to help us here.

However, it may be possible to devise a framework in which assessment can be made whether and to what extent is abridgment of rights justified in order to overcome, contain and combat terrorism. The methods that are deployed by their very nature impinge and intrude upon certain fundamental human rights. The task of the courts, and that of the lawyers is even more intensified and barricaded with obstacles when the law abridging human rights are passed by the legislature without any debate and properly conducting the exercise by which the abridgment could be morally justified and more so when the Government and opposition a consensus.

What is even more difficult is the covert trust reposed by the legislature on the executive in assessment of the quality and extent of threat, and the means that may be necessary to justify intrusion upon fundamental rights. Thus, any exercise to assess whether abridgement of fundamental rights is necessary is to be assessed keeping in mind both the *nature*as well as *quality* of terrorist threats.

The application of the doctrine of proportionality generally requires that there is a reasonable relationship between the means employed and the aims sought to be achieved. The central theme, therefore, is to determine whether a measure of interference, which, whenpresented as being aimed at promoting a legitimate public policy (i.e. control or combat terrorism), is either unacceptably broad in its application or has imposed an excessive or unreasonable burden on certain individuals. A decision that takes into account proportionality principles should only impair the right in question as little as possible, be carefully designed to meet the objectives in question, and not be arbitrary, unfair or based on irrational considerations, and this test would also be true in assessing all cases that would come up before the courts of law.

In order to establish whether counter-terrorism laws and measures meet the objectives in question, it is imperative to identify clearly what these objectives are, and it is necessary to ensure that they are not imaginary or are based on any irrational grounds. India has witnessed that during a particular period terrorism has been linked to people of a particular community, which has (and had in the past) lead to a situation where the mere presence of a person having a particular physical trait (say turban or beard) is linked to terrorism raising alarm. This clearly, is neither supported by the Constitution nor by the doctrine of proportionality.[13]

A well thought out approach to deal with terrorism within the human rights framework would involve engagement with the communities that are perceived to produce terrorist because distinction between faith and terrorism requires an active engagement in an ideological battle rather than a passive identification of a neat sociological distinction between moderates and extremists. There may also be a need to recognize the whole spectrum of event ranging from ordinary crime to extreme violence of terrorism, with naxalism being somewhere closer to terrorism. In fact, the problem, especially in India, has exacerbated because governance structures have resulted in

[13] Such an approach is often discernable by means of statistics and not by any written orders.
See Report by AshishKhetan on www.gulail.com

unification of agenda between naxalites, terrorist and 'anti-national' persons.

The administration of justice reaches a tipping point when the State profiles the protestors or the persons who may be ideologically (and non-violently) aligned to the political ideology underlining the acts of terror. While, I am of the firm belief no ideology or theorization could ever be invoked in support of violence against innocents, the question that discomforts me is that manner in which the State handles dissent. We are not unaware of the cases of leaders who while espousing the cause of tribals in Chhatisgarhhavebeen perceived by the State as waging war against the country and have been put behind bars.

More often, and in the international experience, terrorism is couched in the language of nationalism. That is to say, those acts which are against the State could be regarded as terrorism. Such a loose definition, if deployed, could result in serious prejudice to the freedom of speech and expression. This could even be used by the State to silence protests and also the protestors.

The objective of anti-terrorism laws is, in most cases, the *reduction* of the threat of terrorist attacks or activities. Thus it is logically necessary for a thorough proportionality analysis to consider and assess the quality and nature of the threat. Any proportionality analysis to determine the extent and justification of intrusion upon fundamental rights has to be firstly supported by the actuality of the threat. It should be a part of the anti-terrorist operation to ensure that conditions that give rise to extremism or those that compel the youths to resort to armed resistance are adequately dealt with, and that alienation of the people from the State is lessened.

One of the methods to lessen the alienation of the people from the State is of course participation of the people in decision making process, whether directly or through indirect methods. As the protests in New Delhi after the Nirbhaya incident testify, India's own people have to resort to large scale protests and

demonstration in order to set its own democratically elected government in action. Certainly, this is symptomatic of alienation and disconnect between the people and the State, and the State seems to be progressing with its own agenda without caring for the people who have brought it to power.

Though, it will be argued, and as has been argued even at the time of emergency that the executive has (what the European Convention of Human Rights calls) "*margin of appreciation*"[14], it is however the duty of lawyers and the courts to consistently remind themselves that the Constitution obliges to judicially review the material on which the perception of threat is based, and the threat itself must not form the starting point of the judicial inquiry.One can understand that there may be constraints which disallow the State to share such information with the people, but certainly

[14]*See also* Christopher Michaelsen, THE PROPORTIONALITY PRINCIPLE IN THE CONTEXT OF ANTI-TERRORISM LAWS: AN INQUIRY INTO THE BOUNDARIES BETWEEN HUMAN RIGHTS LAW AND PUBLIC POLICY, published in MirianGani& Penelope Mathew Eds., Fresh Perspectives on the 'War on Terror' , ANU (2008).

the same can be shown to the court to exercise its judicial discretion. Theoretically speaking, this power of the judiciary to review such confidential and privileged material is in fact a power in the nature of trust. The people of India, whose rights can be abridged by the State as per the Constitution, have reposed a faith and constructed an edifice of duty upon the court that requires the courts to exercise such people keeping in mind the 'teeming' millions of India who cannot speak for themselves in the corridors of power.

I will pause here for amoment, and raise a point for your consideration: Do we live in unfortunate times? I say this because while the courts are consistently faced with criminal appeals and bail applications concerning accused of terrorist attacks, but despite various abridgements of rights, there is very little litigation that concerns actual abridgment of rights. Unlike the position in western countries, by far, the courts in India have not found themselves in a position where they have to apply proportionality say in the realm of human rights of privacy, of freedom of movement, freedom of identity, access to housing etc. Does it mean that people in India have acceded to the

various incursions that the Government makes on fundamental rights and justifies it in the name of extremism and terrorism?

It may also be that the State does not value bodily integrity of its citizens and regards them as expendable.

As Foucault has suggested, power has been exercised in quite different ways: not by the punishment of bodies, but through the disciplining of minds; not through dramatic acts that destroy us utterly, but through tiny daily pressures that encourage us to conform; not in a public square and periodically, but every day in homes, schools, factories, work places and other institutions. Thus, while talking about governmental incursion on fundamental rights, our perspective must not be limited only to the extreme harsh measures that the government may adopt, but we must also look at the methods in which the Government makes these daily incursions on our rights in the name of combating terrorism.

While we are discussing terrorism, we must not lose sight of the experience of the Indian democracy, where the democratically elected leaders have proved to be more despotic than dictators. During the times of emergency, despite a vibrant legal profession, only a few lawyers stood by the 'voice of dissent' which was sought to be silenced by preventive detention laws, and the atmosphere was so charged with suspicion that even fellow lawyers attempted to disassociate with those appearing or espousing the cause of the detainee. As Mr. Sorabjee recollects, in the time of emergency, even the members of the Bar would look at counsel who appeared for the detenue with a certain degree of circumspection. Mr. Tarkunde, a former Judge of the Bombay High Court, who was then practising in the Supreme Court, in those days would walk alone to his car and would drive his car without anyone even walking up to him because such was the tale of terror. This experience shows that in trying times, even the independence of the Bar, and also of the bench could be compromised by subtle means.

The problem becomes more profound when we find advocates at logger heads with the judicial system

rather than as those assisting the judicial system in retaining its sanctity and grace. In ***A.S. Mohammad Rafi v. State of Tamil Nadu***[15], Justice MarkandeyKatju took the opportunity *"to comment upon a matter of great legal and constitutional importance which has caused deep distress...."* In this case, the Bar Association of Coimbatore had passed a resolution that no member of the Coimbatore Bar will defend the accused policemen in the criminal case against them. This apparently was a case against policemen for assaulting lawyers in one of the many clashes between the police and the bar.

Taking judicial notice of the fact that *"several Bar Associations all over India... have passed resolutions that they will not defend a particular person or persons in a particular criminal case... Sometimes the Bar Associations pass a resolution that they will not defend a person who is alleged to be a terrorist or a person accused of a brutal or heinous crime or involved in a rape case..."*, the Supreme Court held that *"such resolutions are wholly illegal, against all traditions of the bar, and against professional ethics. Every person, however, wicked, depraved, vile, degenerate, vicious or repulsive he may be regarded by society has a right to be defended in a court of law and correspondingly it is the duty of the lawyer to defend him."*

[15]AIR 2011 SC 308.

On account of the ubiquitous development, where lawyers appearing on behalf of the alleged terrorists are beaten, the courts now appoint *amicus curiae* to defend the accused persons who are unable to find lawyers. However, since social and political pressure continues to exist, it remains to be seen in individual cases whether the *amicus curiae* so appointed has been able to discharge his duties as required by the law and expected of him by the traditions which the profession zealously guards.

A. Balancing Approach: Balancing Apples and Oranges?

Much of the debate post September 11, 2001, about expansion of State power to combat terrorism has been framed as striking a balance between security and

liberty. Quite routinely in India, as elsewhere the 'balance' metaphor is routinely employed by scholars, lawyers, judges, and politicians alike.

Having appeared as prosecutor in the Parliament Attack Case and AjmalKasab Case, and having also appeared for human rights organisations, I find that the rhetoric of balance is unsuitable for reconciling respect for civil liberties and human rights with the (alleged) imperatives of national security.

As Jeremy Waldron in his article titled "SECURITY AND LIBERTY: THE IMAGE OF BALANCE" (2003, Journal of Political Philosophy) points out that the concept of balancing must be subjected to careful analytical and empirical scrutiny in the context of counter terrorism measures. The "balancing approach" where rights are pitted against one another has not found universal favour, and we, as lawyers must always avoid pitting rights against one another – for each right is equally important.

Prof Simon Bronit of Australian National University has analysed[16] the responses to terrorism in Australia and says that:

> *"I feel that there is almost a new genus of law: post 9/11 law. Although 9/11 has become a significant force in justifying these laws, the truth is that there is an element of opportunism (by some law enforcement and state agencies) behind these claims of necessity for new powers and offences.*
>
> *.. I remain sceptical about the legislative schemes of impunity under controlled operations – that law enforcement agents and their informers can apply for prospective immunity for crimes that may need to be committed during such operations"*

It is not that the framers of constitutions across the world were not alive to the possibility that there would be threats and challenges that may require an exception to be crafted into the Constitution. In fact, every society has witnessed some form of extreme

[16] See Simon Bronit, "CONSTITUTIONAL RHETORIC VERSUS CRIMINAL JUSTICE REALITIES: UNBALANCED RESPONSES TO TERRORISM" [2003] 14(2) Public Law Review 76.

behavior calling for extra-ordinary response. However, despite such possibility the Constitution framers, not only in India, but globally have devised for only minimal deviations, resort to which is further guarded by clauses and sub-clauses. Thus, limitation clauses are central to the understanding of constitutional democracy, and they are either express or implicit in the Constitution. For instance, in Canada, limitation clause is entrenched in Art. 1 of the Canadian Charter of Rights and Freedoms, which determines that

> *"[t]he Canadian Charter of Rights and Freedoms guarantees the Rights and Freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"*

As Justice Ahron Barak, now a Professor at Yale Law School has also pointed out, a similar limitation expressly exists also under the Israeli Law in Israel's Basic Law: Human Dignity and Freedom:

> *"There shall be no violation of freedom of occupation except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express authorisation in such law."*

The balancing approach has weak foundations for many reasons. As Lucia Zedner argues, in the 'balancing' approach, there is no indication of the relative weight that should be attached to the competing interests, and she suggests[17]:

> *"Typically, conflicting interests are said to be 'balanced' as if there were a self-evident weighting of or priority among them. Yet rarely are the particular interests spelt out, priorities made explicitly, or the process by which a weight is achieved made clear. Balancing is presented as a zero-sum game in which more of one necessarily means less of the other ... Although beloved of constitutional lawyers and political theorists, the experience of criminal justice is that balancing is a politically dangerous metaphor unless careful regard is given to what is at stake*

Further, a simple balancing approach (often and routinely undertaken by courts in India) does not give adequate consideration to the philosophical and

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[17] Lucia Zedner, 'SECURING LIBERTY IN THE FACE OF TERROR: REFLECTIONS FROM CRIMINAL JUSTICE' (2005) 32 *Journal of Law and Society* 510.

conceptual underpinnings of the notions of liberty and security. Since liberty is a precondition of and closely interrelated with security, they are incapable of being pitted against each other in order to balance them.

Another limitation on the balancing exercise arises on account of balancing individual rights against community rights; and this is especially problematic because inherent in the rhetoric of community rights is the tendency of majoritarianism to get past the threshold of non-arbitrariness.

A connected significant problem in attempting to balance the rights is in relation to conceiving security as an individual right to the distributive character of the measures curtailing liberty themselves. For instance, the dependence of travel on holding a government issued ID card has itself had an adverse impact on the freedom of movement, and has also made such people, our own fellow Indians, vulnerable. '*Aadhar*' likewise poses certain other challenges.

The question that begs for an answer is whether a diminution of liberty actually enhances security or whether one is trading-off civil liberties for symbolic gains and psychological comfort.[18] We are not unaware that in certain areas use of extreme measures has resulted in increased incidences of violence rather than reduction of terrorism. Very little effort is usually made to enquire whether counter-terrorism measures that impair human rights and civil liberties diminish the terrorist threat or whether other, less repressive, measures are available to reach the objective at hand. Trigger friendly leaders, executives, police personnel and even lawyers perhaps find themselves more comforted in use of extreme measures rather than expending time and energy in attempting to find a less repressive measure. There is a deficit of political and executive will.

B. Proportionality: The alternative paradigm?

The central purpose of proportionality is to render one capable to determine "*whether a measure of interference which isaimed at promoting a legitimate public policy objective is neither unacceptably broad in*

[18] See Christopher Michaelsen, "REFORMING AUSTRALIA'S NATIONAL SECURITY LAWS: THE CASE FOR A PROPORTIONALITY-BASED APPROACH", [2010] UTasLawRw 2.

its application nor imposes an excessive or unreasonable burden on certain individuals". Much as we would like to have it, an analysis based on the principle of proportionality which is only an analytical procedure does not, by itself, produce substantive outcomes or answers to legal and policy problems.

The doctrine of proportionality requires that the decision-making procedure and its framework deal with tensions between two pleaded legal or political values and/or public policy goals. Proportionality analysis, then, is a framework which has 'emerged and then diffused as an unwritten, general principle of law through judicial recognition and choice' [19]. Proportionality, however, is not only a judicial doctrine for courts to apply in reviewing the legality of government action. It is also a legislative doctrine for the political institutions to observe in their decision-making functions, and it is clearly evident

[19] Alec Stone Sweet and Jud Mathews, "PROPORTIONALITY BALANCING AND GLOBAL CONSTITUTIONALISM" (2008) 47 *Columbia Journal of Transnational Law* 75; and MattiasKumm, "CONSTITUTIONAL RIGHTS AS PRINCIPLES: ON THE STRUCTURE AND DOMAIN OF CONSTITUTIONAL JUSTICE", (2004) 2 *International Journal of Constitutional Law* 574.

from various judicial decisions in India wherein the "*test of rational nexus with the object sought to be achieved has been read into Article 14*". Thus, constitutionally speaking we are not far from applying full blown proportionality analysis.

The legitimization process of using counter-terrorism measures are crafted in the language of public policy, and therefore it is necessary to take into account the principle of proportionality which are conscientiously designed to meet the objectives in question and not be arbitrary, unfair or based on irrational considerations. The Constitutional mandate is that such measures should impair human rights and civil liberties as little as possible and provide adequate mechanisms of review.

Within the parameters of the proportionality framework, Justice Ahron Barak explains:

> "*Proportionality examines the relationship between the object and the means for realizing it. Both the object and the means must be proper. The relationship between them is an integral part of the proportionality... In practice, the main importance of the object has been in examining the means for realizing it; the main role of the object has been as a*

mechanism for examining the constitutionality of the means. That is regrettable. The object component should be given an independent and central role in examining constitutionality, without linking it solely with the means for realizing it. Indeed, not every object is proper from the constitutional perspective. This is not an expression of a lack of confidence in thelegislature; rather, it is an expression of the status of human rights. True, an object may advance the general social interest. In certain circumstances, however, the advancing of that general interest might not justify limitation of a human right."[20]

Justice Barak further adds that:

"Determining the proper object of a statute is difficult. A statute usually has a number of objects, at different levels of abstraction. How is the level of abstraction for the purposes of constitutional examination determined? Is the statute's object determined according to the (subjective) intent of the legislators, or does it include an objective aspect? These are all difficult questions that have yet to be examined in depth."[21]

[20] Barak, Aharon, "Proportional Effect: The Israeli Experience" (2007).Faculty Scholarship Series Paper 3695.

[21] Id.

I must also tell you that there exists a great deal of literature dissecting the judicial administration of these three steps, and therefore, the process is much more nuanced. As a part of this technical session, I must also share with you the manner in which Justice Ahron Barak guides us to apply the proportionality principle applies which is discussed below:

(1) First Step: Finding Rational Connection

The first step is to locate the element of truthfulness in the assertion that the required means is actually going to achieve the end which it purports to achieve. The enquiry at this stage is limited to the finding of whether the means has a rational nexus with the object sought to be achieved. The Constitutional of India is not oblivious to the requirement that whenever an exercise in fixation of rule, criteria, qualification, eligibility and method is done by the State, it must have rational nexus with the object that is sought to be achieved. Therefore, this first step of proportionality analysis which is required to be done in considering the legality of abridgement of fundamental rights can be located within the four corners of Articles 14 and 21 of the Constitution. In this step obviously, it will have to

be assessed that the purported rational nexus in fact exists. Simple as it may appear, this step raises difficult and complex problems, for example, it may even involve determination of probability whether the means employed by the statute or executive order will realize the object and whether the probability is of an appropriate level which justifies curtailment of rights. The problem is even more complex when it involves consideration of polycentric disputes. Evidently in this step, it is obligatory upon the courts to examine the threats and their basis independently, and not to blindly accept the measures that are veiled under "security threats". There must not be connubiality between the judiciary and the executive.

(2) Second Step: Choosing the least drastic means

The second step which involves identification of whether the means employed is the least drastic one has been identified to be of considerable importance in Germany, Canada, Israel and European Court of Human Rights. While the objective in this step is to identify whether the means applied are least drastic, the exercise has to be rather precise; this is because means deployed which are unable to precisely reach the outcome or objective which the legislation or the executive order seeks to achieve or is only partially able to achieve that objective will be of no use. Of course, in this step one is entitled to take into account marginal variations. Thus, the ability of this step to be able to protect human rights lies in the correct identification of both the objective and the means, and the relative correlation between them. Having said that, given the complexity of the problem at hand, one statute may seek to achieve several objectives; rendering the dispute a polycentric one - the exercise may be much more nuanced.

(3) Third Step: Considering the Proportional effect

In the third step, the proportionality analysis aims to determine:-

> *".....A proportionality between the effects of the measure which are responsible for limiting the charter right or freedom, and the objective which has been identified as of sufficient importance..... Even if an objective is of sufficient importance and the first two elements of the proportionality test are satisfied, it is still*

possible that, because of the severity of deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effect of a measure, the more important the objective must be……"

Evidently, this step examines the proper ratio between the benefit stemming from the attainment of the object and deleterious effect upon the human right. Whereas as suggested by Justice Barak, the rational connection test and the least harmful measure test are essentially determined against the background of proper objective, and are derived from the need to realize it, the test of *strictosensu*proportionality examines whether the realization of this proper objective is commensurate with the deleterious effect upon human right. It is a principle of balancing.

The difference between proportionality analysis and balancing *simpliciter* is that in the proportionality analysis, rights are not balanced against one another but the objective is measured *qua* the deleterious effect upon the human right. Proportionality framework places "*colliding values*" and interests side by side and balances them according to their weight.

The advantage of applying the extended proportionality framework rather than balancing *simpliciter* is in the fact that in the former the nature of right and the scope of limitation upon it is properly examined; which means the more basic the right that is being limited the greater the weight would be required to justify that limitation.

Despite the overarching rhetoric of public interest, the inherent value of liberty must also be viewed as an important public interest. An example of the above analysis is reflected in the case of ***BeitSourik Village Council v. Israel***[22] as described by Justice Barak in the following words:-

"The State of Israel decided upon the erection of a separation fence. Most of it is located in the West Bank. Its purpose is to prevent infiltration for purposes of terrorist activity from the West Bank into Israel or into Israeli settlements in the West Bank. The object of the fence – so ruled the Supreme Court – is a security object, not a political one: it is

[22] H.C. 2056/04 (2006) 2 *Judgments of the Israel Supreme Court: Fighting Terrorism with the Law* 7 (BeitSourik)

intended to prevent suicide bombings. In the BeitSourik case we determined that this security object is a proper one. We further ruled that the construction of the separation fence in the area of the village of BeitSourik was decided on in order to achieve a proper security objective. A rational connection was proven between the construction of the fence in that place and the achievement of the security objective. It was held that there was no other route that would harm human rights less but still achieve the proper objective in full. Notwithstanding this, it was decided that the route of the fence was unlawful. This was because the security objective achieved by the route of the fence, as determined by the military commander, was not commensurate with the serious infringement upon the human rights of the residents of BeitSourik. We held in that case that 'a proportionate correlation between the degree of harm to the local inhabitants and the security benefit arising from the construction of the separation fence according to the route determined by the military commander does not exist.

We pointed out that we had been shown alternative routes that would also provide security for Israel, albeit to a lesser degree than the route that the military commander chose, while impinge upon the human rights of the local inhabitants to a far lesser degree."

As we saw, the Judge had taken upon himself the task of ascertaining if there exists a less drastic measure to achieve the same or similar objective. Immediate argument at this juncture in the Indian context would be that it is not the domain of judiciary to intervene in the executive determination of what is most suitable measure to combat terrorism. Attractive as it may seem, such an argument is only an attempt to keep the executive acts away from judicial review. In a country like India, such an exercise may demand much more from Judges; and therefore it is of utmost importance for the lawyers to appropriately assist the judiciary in arriving at the correct determination notwithstanding their briefs. The duty of a lawyer is to the Court, where the Constitution reigns supreme and it is the collaborative duty of all the actors in a courtroom to protect the spirit and the faith of the Constitution. Limitations can be placed upon human rights, but there must be limits to the limitations. The role of a Judge in a democracy is to preserve both of these limitations. They owe as much to the State, and the Constitution as they owe to the human rights.

V. Human Well-being & Terrorism: Co-relationship between Socio Economic Rights and Terrorism

Any exercise on combat of terrorism must have within its fold the measures to eliminate the conditions conducive to the spread of terrorism, including

a) the lack of rule of law and violations of human rights;

b) ethnic, national and religious discrimination, political exclusion, and socio-economic marginalization;

c) to foster the active participation and leadership of civil society; to condemn human rights violations, prohibit them in national law, promptly investigate and prosecute them, and prevent them; and

d) to give due attention to the rights of victims of human rights violations, for instance through restitution and compensation.

It could also be that the State has resorted to the very same practices against which it has the duty to protect its citizens. In fact, the State goes even a step further. It disregards all objections in respect of the acts that are stated to be against the Constitutional morality. For instance, the Government of India, ignoring the determination on the invitation of the accused by the Apex Court upholding that he was liable to be tried for certain charges in the TADA Court in Mumbai, went ahead and waived certain criminal charges confronting the said accused pursuant to an arrangement with the Government of Portugal. Such an act, in addition to being contrary to the Doctrine of Constitutional Morality, is also contrary to the international law, and renders the State vulnerable to challenges on the ground of legitimacy.

A relevant example would be that of Maoism and SalwaJudum. Following description from the literature of Campaign for Justice and Peace in Chhatisgarh is quite insightful:

> *"Since June 2005, the Government of Chhattisgarh, with the support of the Home Ministry has been waging a counter-insurgency operation against the Naxalites in the guise of*

a 'spontaneous', 'self-initiated',' peaceful', 'people's movement' named the SalwaJudum in Dantewada district of Chhattisgarh. The district administration claims that upset with the Maoist strike call on collecting tendu leaves and opposition to development works like road construction and grain levies, people in some 200 villages began mobilizing against the Maoists, going on processions and holding meetings.

However the fact is that the SalwaJudum is being actively supported by the Chhattisgarh Government. Far from being a peaceful campaign, SalwaJudum 'activists' are armed with guns, lathis, axes, bows and arrows. Up to January 2007, 4048 "Special Police Officers" (SPOs) had been appointed by the Government under the Chhattisgarh Police Regulations. They actively participate in the SalwaJudum and are given military and weapons training by the security forces as part of an official plan to create a civil vigilante structure parallel to that of the Naxalites....

The Government's only response to Maoist insurgency has been to militatrise; step up police operations and to pit civilians, in the name of SalwaJudum, against Maoists and against each other. By resorting to such measures, the government has seriously challenged the efficacy of democratic and constitutional means of finding solutions to people's problems. It has completely failed to address the root of the discontent, the deprivation and alienation of Adivasis, which form basis of the Maoist foothold in Dantewara."

Since, there is some finding that terrorists are more likely to spring from countries that lack civil rights, if it holds up, is further support for the view that terrorism is a political, not an economic phenomenon.[23] Terrorism and other forms of extreme violence cannot be separate from economic situation. While terrorism may essentially spring from political causes, the fact remains that economic status of the people doesnot remain divorced from political situation for too long. If the State is negligent in discharging its duties, people have the tendency to align with a system which promises protection, however, dangerous it may be.

There are grim realities of existence as a tribal and a backward in this country, and the unfortunate aspect is that their unheard voice fail to make a din in

[23] See Alan B. Krueger, JitkaMaleckova, "EDUCATION, POVERTY AND TERRORISM: IS THERE A CAUSAL CONNECTION?" (2003) 17 Journal of Economic Perspectives 119-114.

the power corridors. From their perspective, it therefore, becomes necessary to use extremism, violence and terrorism as a means to attract attention of the State. It is also necessary to state that the Governments have been found non-responsive on peaceful protests, and in fact have come down heavily on peaceful protestors[24] as they also did at India Gate when they relentlessly beat up the women protesting in the aftermath of the Nirbhaya incident. Even the State turns a blind eye to the violence committed by the state actors, and private actors in connivance with State actors, which also has a psychological impact in motivating people to resort to extreme forms of violence.

It is evident that the State has misplaced priorities. The State does not seem to be aware of the abysmal conditions in which the tribals in Chhatisgarh live. The State does not seem to be aware that tribals in Madhya Pradesh eat the poisonous *kesaridal* which is reported to have a paralytic impact. The State also does not seem to be aware that tribal women, and even villagers in Maharashtra have to walk for miles before

[24] *Ramlila Maidan Incident, In Re*, (2012) 5 SCC 1.

they could get drinking water. Conditions like these not only build frustration, but also cause people themselves to justify extreme forms of violence.

In *Mahanadi Coal Fields Case*[25], the Supreme Court had taken strong exception to the manner in which in the Central Government and Mahanadi Coal Fields Limited had proceeded with the acquisition of lands of tribals in Sundargarh district of Odisha and had not compensated them even after twenty-three years of acquisition of their lands. More than two decades after dispossessing them from their lands, it in fact submitted that the land was *actually* not required! With said background, the Supreme Court observed, "*the whole issue of development appears to be so simple, logical and commonsensical. And yet, to millions of Indians, development is a dreadful and hateful word that is aimed at denying them even the source of their sustenance. It is cynically said that on the path of 'maldevelopment' almost every step that we take seems to give rise to insurgency and political extremism (which along with terrorism are supposed to be the*

[25] *Mahanadi Coalfields Ltd.* v. *Mathias Oram*, (2010) 11 SCC 269

three gravest threats to India's integrity and sovereignty).... The resistance with which the state's well meaning efforts at development and economic growth are met makes one to think about the reasons for such opposition to the state's endeavours for development. Why is the state's perception and vision of development at such great odds with the people it purports to develop? And why are their rights so dispensable?"

Little or no attention is paid to the true causes of resort to violent methods. It is as if the deafening sound of explosions and land-mines is used to attract attention of the State to existential realities. There are grim realities of existence as a tribal and a backward in this country, and the unfortunate aspect is that their unheard voices fail to make a din in the power corridors. From their perspective, it therefore, becomes necessary to use extremism, violence and terrorism as a means to attract attention of the State.

Having said the above by no stretch of imagination should I be taken to have legitimized violence against the innocents by invocation of factum of their oppression; I am only suggesting that oppression is one of the reasons of unrest, which may then express itself in various forms including violence.

VI. Conclusion

I firmly believe that law alone can act therapeutically to reduce terrorism and advance human rights.

We may aspire to have a peaceful society but this, given the human nature,does not seem possible. Therefore, at best, man can endeavour to minimize violence and at the same time encourage participation in activities reflecting liberty of thought, speech and expression – that differentiate a man from animals. We may attempt to truncate the human rights justifiably or otherwise in the name of terrorism, the fact is that so long as another human being exists there is a threat to the other. I would agree with Justice Ahron Barak that:

> *"Democracy and human rights cannot be maintained without taking risks..... Indeed every democracy is required to balance the need to preserve and protect the life and safety of citizens against the need to preserve and protect human rights. 'This simply means that in order to protect even human rights, we are required to take risks that may lead to innocent people being hurt. A society that wishes to*

> *protect its democratic values and that wishes to have a democratic system of government even in time of terrorism and war cannot prefer the right to life in every case where it conflicts with the preservation of human rights..... [t]he complex work of balancing..... by its very nature, includes elements of risks and elements of probability...."*

As persons of the law, it is our solemn duty to protect the Constitution and ensure the rights guaranteed therein are also practiced in fact. I have certain reservations on the *obiter dicta* expressed in ***Devinder Pal Singh Bhullar Case*** [26] wherein the Supreme Court has viewed with disapproval those who attempted to raise the human rights arguments on behalf of *Bhullar* in the following words:

> *"Many others join the bandwagon to espouse the cause of terrorists involved in gruesome killing and mass murder of innocent civilians and raise the bogey of human rights."* [27]

[26] *Devinder Pal Singh Bhullar v. State of NCT of Delhi*, Writ Petition (Criminal) No. 146 of 2011, judgment dated April 12, 2013.

[27] Id. paragraph 40.

Such an opposition to those raising flags for human rights is not new. Even when Prevention of Terrorism Ordinance was issued in 2001, certain political leaders had asserted that those [human right advocates] trying to block the Ordinance from becoming a law were in fact helping the terrorist.

In the words of Joseph Raz, "*The rule of law functions in modern democracies to ensure a fine balance between the power of a democratic legislature and the force of tradition-based doctrine. In guaranteeing this balance lies its value as an element in the doctrine of good government. In curtailing arbitrary power, and in securing a well ordered society, subject to accountable, principled government, lies the value of the rule of law.*"[28] Clearly, there is much room for rhetoric, which works against all attempts to ensure that rule of law is maintained even in these tough times confronted by the Indian democracy.

**** END ****

[28] Joseph Raz, "THE POLITICS OF THE RULE OF LAW", (2008) The Indian Journal of Constitutional Law 1.