Law, Terrorism & Human Rights

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Good Morning to all of You.

I feel elevated to be a part of this sesquicentennial celebrations of Calcutta High Court, which has a glorified history and proud of the Indian Judiciary. Without taking much time in recalling the golden moments of this High Court, I take this opportunity to begin with the thoughtful expression of Mahatma Gandhi:-

"The spirit of democracy cannot be established in the midst of terrorism. Justice will come when it is deserved or being and feeling strong. Terrorism and deception are weapons not of the strong, but, of the weak."

MAHATMA GANDHI

Supreme Court of India has profoundly enunciated the insight of today's topic chosen for discussion, "Law, Terrorism & Human Rights" in the year 2004 in a very lucid expression in People's Union for Civil Liberties v. Union of India (2004) 9 SCC 580 at page 596 as under:-

"The protection and promotion of human rights under the rule of law is essential in the prevention of terrorism. Here comes the role of law and court's responsibility. If human rights are violated in the process of combating terrorism, it will be self-defeating. Terrorism often thrives where human rights are violated, which adds to the need to strengthen action to combat violations of human rights. The lack of hope for justice provides breeding grounds for terrorism. Terrorism

itself should also be understood as an assault on basic rights. In all cases, the fight against terrorism must be respectful to the human rights. Our Constitution laid down clear limitations on State actions within the context of the fight against terrorism. To maintain this delicate balance by protecting "core" human rights is the responsibility of court in a matter like this."

Meaning thereby the Apex Court of our country has propounded its views in unequivocal terms that a Law related to Terrorism should be to safeguard Human Rights, strengthen Democracy and to uphold Rule of Law. Thus, it is a great challenge for laws to strike a just balance between ensuring the security and integrity of the country and safeguarding the human rights of the people to eliminate "Terrorism" and to ensure "Justice"

In the recent past the terrorist acts including the last month Boston Marathon Bomb Blast (15th April, 2013), attacks on World Trade Centre, New York (11th September, 2001), attacks on the Indian Parliament (13th December, 2001), Mumbai attack (26th November, 2008), the Malegaon blasts or the Serial Blasts in Delhi, Ahmadabad, Surat, Mumbai Local Trains, Guwahati and many more has come to threaten the very foundation of modern civilization society and these acts assumed new dimensions. India has been a long time sufferer of terrorism be it in the North east, Punjab or Jammu and Kashmir but now terrorism has dangerously spread to other parts of the country with help of International

agencies and groups actively participating in terrorism in increasing proportion. The Supreme Court of India took a note of it in **Kartar Singh versus State of Punjab** [(1994) 3 SCC 569] where it was observed that the country has been in the firm grip of spiraling terrorist violence and is caught between deadly pangs of disruptive activities.

Today, terrorism has become a concern of world community and there has been measures taken at the international level by the so-called 12 Universal UN Conventions, which have become a matter of huge debate over the years.

As yet there is no universally acceptable definition although various definitions have been propounded tracing from the year 1795, when the term terrorism was used to describe the actions of Jacobin Club in their rule of post-Revolutionary **France**, which was based on the Latin verb *terrere* (to cause to tremble). In India the Terrorists activities take place under the guise of Naxalism, Insurgency, militancy, Extremism. In Jharkhand out of 24 districts, 18 districts are said to have been badly affected apart from Bihar, Chhattisgarh, Odisha, West Bengal and other States of the country. The Unlawful Activities Prevention Act, 1967, as amended in 2008, has defined terrorist in detail vide Section 15 of the Act.

Supreme Court of India as far back as in 1994 dwelt at

length on it and drew a distinction between a merely criminal act and terrorist act in its judgment *Hitendra Vishnu Thakur v*.

State of Maharashtra [(1994) 4 SCC 602] and in short, I may quote: -

QUOTE

"......It may be possible to describe it (Terrorism) as use of violence with a view to disturb even tempo, peace and tranquility of the society and create a sense of fear and insecurity."

UNQUOTE

In the backdrop broadly speaking terrorism is recognized as an assault on a civilized society and law required is to entrust the law enforcing agencies with extraordinary powers to meet what is genuinely perceived as an extra ordinary situation of crime (terrorism) and further, at the same time law is to ensure Human Rights at three distinguished stages to take measures to combat terrorism by Protection of Human Rights, Preservation of Human Rights and Promotion of Human Rights:-

- (a) <u>Protection of Human rights</u> of the victims innocent people who are brutally killed or victimized in a terrorist act;
- (b) <u>Preservation of Human rights</u> of terrorists in legal and judicial proceedings beginning from cordon/search operation, encounters, firing in crowded areas, registration of case, detention, interrogation,

investigation, charge-sheet ,trial ,punishment etc.

(c) <u>Promotion of Human Rights</u> to eliminate the root cause of terrorism by ensuring basic human rights including liberty, dignity, education, health, employment, i.e., "inclusive growth" i.e. participation of every and each citizen of the country in the progress and development of country.

In Democratic Societies, fundamental human rights and freedoms are put under the guarantee of law and, therefore, their protection, preservation and promotion becomes obligation of those, who are entrusted with the task of their protection, i.e., Legislative, Executive and Judiciary. The concept of human rights is universal, resting on the principle that they are sacrosanct bundle of human rights vested in human beings so that they can live a dignified life not by chance or choice but by being human, and inherently entitled simply because he or she is a human being.

India being a diverse country with its multi-cultural and multi-ethnic and multi-religious population, the protection of human rights is the *sine qua non* for peaceful existence. It is indeed impossible to give an inclusive definition of human rights, however, the legislators have tried their hands in defining human rights as "the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the

international covenants and enforceable by Courts in India" under the **Human Rights Act**, 1993.

Apart from Universal Declaration of Human Rights, 1948, there are other some important international normative framework relating to human rights, best practices are international covenant on civil and political rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; Convention on the Rights of the Child, 1989; United Nations Code of Conduct for Law Enforcement Officials.

The aforesaid international provisions are similar to National Human Rights Norms as enshrined in Constitution of India, the Protection of Human Rights Act, 1993, Code of Conduct for the Police in India issued by Ministry of Home Affairs, Government of India. For example, the Article 14 of the Constitution of India which is a direction to the State not to deny equality before law, an equal protection of the laws to all persons which includes even non-citizens and which is the first and foremost Fundamental Right and is identified as an element of basic structure of the Constitution, which cannot be amended, even by the Parliament as declared by the Supreme Court in *Keshwanandan Bharati*, *AIR* 1973 SC 1461.

The Constitution of India in its preamble, laid pragmatic panorama of constitutional philosophy to usher in the egalitarian

social order under Rule of Law. The State, drawn from the will of the people, has been vested with power and duty to bring about united and integrated nation through human rights as instrumentality to achieve the cherished goal of social, economic and political justice, equality of opportunity, status and dignity to all people. And in order to make them meaningful and to translate them into reality, the certainty of human rights is woven around the right to education, health, shelter, congenial environment, without discrimination as basics to unity and fraternity among the people, civil and political rights, social, economic and cultural rights have been elaborated to feed and give content to the human rights.

The conception of human rights is of central importance in the development of modern democracy under the Rule of Law. A terrorism free society could be reality only when human rights, rich in its content, is ensured justly and fairly, which are necessary for social integration in an inclusive democracy so that the full potential of all individuals benefits the nation.

Now we discuss all the three stages of Human Rights one by one.

Human Rights of Innocent Citizens in the Terrorist act

There has been a growing consciousness amongst citizens all over the world against violation of human rights. Strong national

and international movements have emerged. It goes without saying that human rights of citizens are concomitant and non-negotiable. No compromise with violations of the same is permissible in any civilized society, irrespective of religion, race, caste sex, language, or economic level of living. It is a reality that cult of terrorism strikes at the very root of human rights of innocent people and terrorism and human rights are natural enemies with no possibility of their co-existence. The ruthless, barbaric, inhuman killing of innocent people is carried out by the terrorist with a view not only to challenge the authority of the Government, but, also to put the security and sovereignty of the country in jeopardy and bring trauma and perpetual grief to the families who suffer from such killings whether they are innocent young children, elderly men or women. The very right to life of the innocent people is the target of terrorism.

The World Conference in Viana 1993 was a significant landmark in recognizing terrorism as a threat to human rights. It stated that:

"The acts methods and practice of terrorism in all its forms and manifestations.....are activities aimed at the destruction of human rights.... The international community should take the necessary steps to enhance cooperation to prevent and combat terrorism."

There is indeed a clear and emphatic relationship between national security and freedom of the individuals, who comprise the State. The Supreme Court comprehending the "terrorist act" under Section 15 of the Unlawful Activities (Prevention) Act, 1967 in *Md. Ajmal Amir Kasab's* case [(2012) 9 SCC 1] held that: "a terrorist act" and an act of "waging war against the Government of India" may have some overlapping features.

International Terrorism is a modern form of warfare against legal democracies and goal of these terrorists is to destroy the fabric of democracy and it would be wrong for any democratic state to consider international terrorism to be some one else's problem, rather, it is a collective problem and we must unite to condemn and combat it. As USA Senator, Jackson aptly stated

The idea that one person's 'terrorist' is another's 'freedom fighter' cannot be sanctioned. Freedom fighters or revolutionaries don't bow up buses containing non-combatants; as terrorist murderers do. Freedom fighters don't set out to capture and slaughter school children; terrorist murderers do... It is a disgrace that democracies would allow the treasured word 'freedom' to be associated with acts of terrorists".

It is a strange paradox that while on one hand, higher and better international human rights and humanitarian standards have evolved over the past five or six decades, on the other hand conflict and newer forms of terrorism which threatens human rights of the people across the world are on the rise and becoming more and more dangerous. One also finds resort to the use of more and more deadlier and lethal weapons, deliberate targeting of innocent civilians, forced starvation of civilians and resort to rape

and other sexual assaults, besides taking hostages etc. Scientific and technological development are being flagrantly exploited by the terrorists. What is a matter of serious concern is the existence of trans-national networks of terrorist organizations, which have a nexus with arms and drug traffickers and crime syndicates.

Neglect of Human Rights: A Fertile Ground For Breeding Terrorism

When we go to the root cause of terrorism, we find that systematic human rights violations for long periods of time are often the cause of conflicts and terrorism. Terrorism vis-à-vis Human Rights on the face of it appears to be directly across each other, but, in fact terrorism, the ugliest form of mankind (Human Behaviour), is the outcome of deprivation of civil and political rights and manifestation of Social, Economic and Political injustice. Thus, when there is tyranny and wide spread neglect of human rights and people are denied hope of their better future, it becomes a fertile ground for breeding terrorism.

Democratic States, in counter terrorist efforts, to adhere to Rule of Law and respect basic human rights to deal with the menace of terrorist acts:

The counter terrorism efforts of a State should, under any circumstances, stand with Rule of Law, Human Rights and procedure established by law. It may also true that terrorists and

terrorist groups, which are, without any doubt, always guilty of gross human rights abuses, and may not be the security forces (barring exceptional cases), which are often maligned by gullible media and motivated activists. As a former *US Senater*, *Henry Jackson* wrote, ".....It is a disgrace that democracies would allow the treasured word 'freedom' to be associated with acts of terrorists.

Human Rights violations by the state and its agencies may be identified at various stages such as during cordon and operations, during encounters, during detention and interrogations, during prosecution in judicial proceedings. Speedy trial is an important objective to achieve to ensure that the guilty are punished on time and the innocent are not left awaiting justice.

Some of the important legislations that have been used for regulating terrorism and concerned activities such as Terrorist and Disruptive Activities (Prevention) Act, 1985 (commonly known as TADA 1985 – repealed), Terrorist and Disruptive Activities (Prevention) Act, 1987 (commonly known as TADA 1987 – repealed); Prevention of Terrorist Act, 2002 (commonly known as POTA – repealed), the Maharashtra Control of Organised Crime Act, 1999 (State Law); apart from the present existing law, Unlawful Activities (Prevention) Act, 1967 and National Security Act, 1980. The Human Rights Violations committed under Anti

Terrorism Law have been brought to the forefront both by the

Judiciary and National Human Rights Commission (NHRC). The constitutionality of TADA 1987 in Kartar Singh versus State of Punjab [(1994) 3 SCC 569] where the Apex Court proceeded to tamper certain provisions of TADA 1987 so as to bring them within reasonable bounds and to introduce requisite safeguards against abuse. The offence of abatement of Terrorist Act under the then existing law would require the ingredient of intention or knowledge. The offence of possession of specified arms and ammunitions was found to be harsh and in order to save it from arbitrariness, the Court held that it shall be invoked only where possession was "connected with the use thereof" although the entire statute was not held ultravires to the Constitution on the assumption that those entrusted with such draconic statutory powers would act in good faith and for the public good. The Supreme Court also observed that the Parliament is competent to enact the said Act under Article 248 r/w List I Entry 97 and not by List II Entry 1 of Schedule 7 to the Constitution of India. After Kartar Singh, validity of TADA was again challenged in R.M. Tiwari versus State [(1996) 2 SCC 610] and in spite of close monitoring of the use of TADA, 1987 by the Court, the Review Committee complained of its gross abuse continued to be raised by various quarters, where under the circumstances of the case, the Court upheld the

constitutionality of TADA, 1987.

Over a period of time, India continues to face the score-age of terrorism. Accordingly, the Prevention of Terrorism Act, 2002 (commonly called as POTA) was enacted to make the provisions for the Prevention of and for dealing with terrorist activities in the face of multifarious challenges in the management of internal security of the country and cross border terrorist activities and insurgent groups. Again the validity of some of the provisions of POTA was challenged in *People's Union for Civil Liberties and Another versus Union of India* [(2004) 9 SCC 580] and under circumstances of the case, the Apex Court discussed the validity of POTA 2002 and observed that the Court has to maintain the delicate balance between the State Acts and Human Rights upholding the constitutional validity of the Act.

In *Devendra Pal Singh versus N.C.T.* of *Delhi* [(2002)5 SCC 234] where 9 persons had died and several others injured on account of terrorist act and the Apex Court under the circumstances of the case said that such terrorist have no respect for human life and they should be given death sentence. In a much talked about case of *Sanjay Dutt versus State of Maharashtra through C.B.I.* [JT 2013 (5) SC 1] the Supreme Court recently upheld the conviction for possessing the arms and ammunitions under the Arms Act 1959 and not under Section 5 of the TADA.

Further in the case of Vaiko versus Union of India [Madras High Court], Vaiko was arrested under Section 21 of POTA (offence relating to support to a terrorist organization) on the basis of certain remarks. Later on the trial proceedings at Chennai was challenged on the ground that the Central POTA Review Committee had found that no case was made out against them. The Madras High Court upheld that it was for the public prosecutor to independently apply his mind to the matter and take a decision to withdraw the case on the basis of the report of the Central POTA Review Committee and, accordingly, dismissed the writ petition seeking a direction to TN Government to withdraw the case. At present a Criminal Appeal against the order of the Madras High Court is pending before the Apex Court.

When we go through the provisions of the Anti Terrorism Law of other countries, we find that **British Law** has an exclusive chapter on banning terrorist organizations and after banning a terrorist organization, membership of a terrorist organization, ipso facto, becomes a punishable act.

Some of the important provisions of the POTA, viz. Section 4 (possession of certain unauthorized arms), Section 7 (powers of investigating officers), Section 21 (Offences relating to support given to a terrorist organization), Section 22 (fund raising for a terrorist organization to be an offence), Section 27 (powers to direct

samples etc.), Section 32 (certain confessions made to Police Officers taken into consideration), Section 45 (admissibility of evidence collected through the interception of commission; bail provision etc.) has been a matter of analyzing their compatibility with respect to basic tenets of human rights in implementing these provisions of the Act by Supreme Court in a number of cases such as S. Srinivas versus M/s Deccan Petroleum Ltd. [2001 Cr. L.J. 659], Devendra Pal Singh versus N.C.T. of Delhi [(2002) 5 SCC 234], State (N.C.T. of Delhi) versus Navjot Sandhu @ Afsan Guru (popularly known as Afsal Guru Case) [(2005) 11 SCC 600] and the fundamental principles of criminal jurisprudence have been preserved by the Court even in the Trial of cases under the Special Acts enacted for the offences of terrorism.

Ultimately, on September 17, 2004 controversial Anti Terrorism Act – POTA, 2002 was repealed and consequently, the Unlawful Activities Prevention Act, 1967 was amended where, inter alia, definition of unlawful association has been expanded to also to include any association, which has for its object any activity which is punishable under Section 153A of the Indian Penal Code, or which encourages or aids persons to undertake any such activity, or of which the members undertake any such activity. Section 153A of the Indian Penal Code is about promoting enmity between different groups on grounds of religion, race, place of

work, residence, language etc.

As regards the laws pertaining to terrorism in India apart from the most significant piece of legislation [TADA, POTA and UAPA Act], the critics of India's policy towards combating terrorism state that Indian Penal Code probably the oldest legislation prevailing in India and one of the most fundamental offences has in all like waging, attempting or conspiring to wage war against the Government, aiding the escape of state prisoner or a prisoner of war or insighting others to rebel against the State, sedation etc.,

Dr. A.S. Anand in *Hitendra Vishnu Thakur* [(1994) 4 SCC 602] once said that "every terrorist may be criminal, but, every criminal cannot be given the level of a terrorist only to set in motion the more stringent provisions of TADA.

In *Kartar Singh versus State of Punjab* the Supreme Court expressed serious concern about the sheer misuse and abuse of the act by the police and made an attempt to infuse human rights by devising certain guidelines to ensure that confessions obtained during pre-indictment interrogations is in conformity with human rights principles, which the Court went on to elucidate the same in the case of *Shaheen Welfare Association versus Union of India* [(1996) 2 SCC 616], where the Supreme Court opined that a more independent and objective scrutiny of TADA cases by a Committee headed by a retired Judge is obviously necessary. Such

observation shows that the Apex Court has been always eager to preserve the human rights in combating terrorism.

The Universal Declaration of Human Rights, 1948, inter alia, provide categorical provisions for the preservation of basic human rights to be followed in the administration of criminal justice vide Article 10 and Article 11.

There has been consistent calls for more laws to combat the terrorism, even though there is already a plethora of laws in India including the general and traditional law Indian Penal Code, The Unlawful Activities Prevention Act, 1967; The Criminal Law (Amendment) Act; The National Securities Act, 1980; State enacted laws, like The Maharashtra Control of Organised Crime Act, 1999 etc.

The only need is to implement these provisions effectively, humanly and scientifically to contain the terrorism.

Further domestic and international human rights, non-governmental organizations and useful interventions by the Supreme Court of India, various High Courts, the National Human Rights Commission and State Human Rights Commissions are there to contain the human rights abuses, if any, committed by Law Enforcement Officials under these provisions of law.

The USA Patriot Act in America by providing appropriate tools require to intercept and obstruct acts of terrorism enacted

after 9/11 (11th September, 2001 World Trade Centre attack, New York City, U.S.A.) can be an important piece of legislation to take cue from.

If we have a look on the data available to us then we found that under the Terrorist and Disruptive Activities (Prevention) Act, 1987, the total number of detainees was around 76,000. Of these, 25% were dropped by the police without charges; trials were completed in only 35% of the cases and 95% of these trials ended in acquittals. The conviction rate was less than 1.5% and there were reports of human rights violations committed by the police abusing their excessive powers under the Act. This law was allowed to lapse in 1995 after pressure from national and international civil society groups, as well as the UN Human Rights Committee which monitors countries' compliance with the International Covenant on Civil and Political Rights.

Therefore, the present scenario of increasing terrorist designs, demands that there has to be a well formulated plan to defeat the ever increasing threats about the existence of an individual.

It is true that terrorist threats that we are facing are now on an unprecedented global scale. Recently, the Boston Marathon Bomb Blast has once again shaken the confidence and trust of the people choosing to lead a peaceful and lawful life. War against terrorism, therefore, to be firm and relentless, but, it must be remembered that fundamental rationale of anti-terrorism measures has to be to protect human rights and democracy. We need only to recall the caution administered by the Supreme Court of India in **D.K. Basu vs. State of West Bengal** [JT 1997 (1) SC 1] which reads thus: -

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

The fight against terrorism requires close cooperation of all countries both at Law Enforcement and Judicial Levels in order to put an end to illegal trafficking, which feeds terrorist networks. To clip the wings of terrorism, the international communities must target the roots of frustration as well as the feeling of injustice, but, the approach should be humane, rational and secular. A suitable balance between the need and the remedy requires respect for the doctrine of necessity and proportionality.

ROLE OF JUDICIARY

Fundamentally, the basic motive of all the three wings of the democratic government, namely, the executive, the legislative and the judiciary revolves around the protection of human rights. They strive together and separately to uphold the human rights of the people of the country. It is the duty of the Judges to enforce the human rights for the betterment of the society. The Judiciary with no doubt has played a vital role in the protection of human rights over the decades. Some of the most unpleasant violations of human rights, like Sati, Child Marriage, Honour Killings, Slavery, Child Labour have been abolished and strict implementation measures have been taken by the Judiciary. The Speedy Trial of Criminal Cases, Legal Aid to the Poor and Weaker Sections of the Society, Access to Justice have also been taken into account and given the status of fundamental rights under the Constitution of India to be enforced by the Courts as the status of human rights is fairly high under the Constitution of India as provided in the fundamental rights and the Supreme Court of India and High Courts exercise their extraordinary jurisdiction to enforce it. Equally important is the fact that India is a signatory to International Conventions on economic, social, cultural, civil and political rights with certain conditions, these rights are partly contained in Part III and Part IV of the Constitution of India.

The Indian Judiciary with its widest interpretation in observance of human rights has contributed to the progress of the nation and to the goal of creating India as a vibrant State. The Power of Judicial Review of Constitutional Courts (Supreme Court and High Courts) through PIL is an excellent example to deal with

a number of injustices including legal aid and access to justice in the process of delivering justice including rights of under trial prisoners, practice of using hand cuffs and fetters on the prisoners so on and so forth.

One of the main objectives of the Human Rights Act, 1993 is to establish the Human Rights Courts at every district level. Section 30 of the Act enables the State Government to specify for each district a Court of Sessions to be a Human Rights Court after the due concurrence with the Chief Justice of the respective High Courts. The motive behind the provision is to provide speedy trial of offences arising out of violation of human rights. The creation of Human Rights Courts at the District Level has a great potential to protect and realize human rights at the grass root level. It is pertinent to mention that Calcutta High Court was the first to set up Human Rights Courts in all the Districts of the State to ensure speedy disposal of cases concerning Human Rights. These Courts function from the District Head Quarters under the Principal District & Sessions Judges.

The role of Judiciary is very important to contain the terrorism by ensuring the right of Access to Justice to each and every person, which is basic to the human rights and unless the basic tenets of human rights are preserved, the threat of terrorism cannot be contained.

Society's Obligation

The facts leading to violation of human rights is the ever growing terrorism based on hatred policy – be that of rival political groups, fundamentalists or enemy agents. Society's response to such type of terrorism has to be clear and effective. Indifference of the society to such acts encourages fundamentalist – loud and positive condemnation of their activities by the Society is bound to discourage them.

Equality and human treatment of all sections of the population is an essential component of justice. Human Development, together with ensuring and enjoyment of human rights, would be the surest way to contain terrorism. Law is a social engineering to help the citizen. Unless they improve their thinking, human rights and human rights culture, casting aside the caste, communal, regional, linguistic or religious bitterness and distrust in favour of ushering in a just and humane governance in participatory democracy, counter terrorism efforts will remain a pious attitude. Distributive justice must be a part of inclusive democracy for human governance.

Today the vast majority of fatal incidents through terrorism are caused by attacks on unarmed civilians who are going around about their peaceful and lawful business. What more fundamental attack on human rights can there be than to deprive the innocent

people of their "Right to Life"?

In the backdrop the ultimate object of Law, terrorism and the Human Rights is reflected in the book, **The Idea of Justice by Amartya Sen** to ensure Justice which **Sustains Society**, maintains **Social order** and guarantees **progress and development** of society and our Constitutional vision envisages:

"Justice, being violated, destroys;

Justice, being preserved, preserves;

Therefore justice must not be violated;

Lest violated justice destroy us"

I, from the bottom of my heart, congratulate the Calcutta High Court, which under the guidance of Brother Chief Justice Arun Mishra took extraordinary efforts to organize such sesquicentennial celebrations (150 years) of this High Court to develop a national dialogue of emerging challenges and also to contribute towards the excellence of judicial system. With conviction, I can say that such dialogues will facilitate in achieving our goal easily.

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