

Constitutional Rights and National Security: Some Issues in India

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Introduction

The question of constitutional rights, understood as the fundamental rights and liberties that citizens enjoy by their right as citizens, comes into conflict with the obligations of the state and inevitably the dominant language of this debate takes the right of the nations as inviolable; the collective over the individual. This language is used to justify special legislation or temporary ordinances that curtail, suspend or violate the very rights that are considered as fundamental and held to be unique characteristics of a democratic system. Democratic systems have used these special legislation to restrict and curtail the very freedoms they seek to protect and in doing so they evoke the same sense of crisis that we can find in repressive systems of government. Their means of ensuring acquiesce is grounded in the increasing specialised nature of the legislation and the rhetoric of threat and danger to our normal lives. The creation of the enemy through the media and the educational system is a vital component of the process of building an informed citizenry that will support state policies. State policies while crafted through a political process that owes as much to party interests as to the “national needs” are then projected as the collective wish.

Enactment of special legislation around the world after September 11 to counter threats to their security, legislation that gives wider powers and allows for a pro-active policy to perceived threat as well as the projection of terrorism and rogue states as the international enemy is just the latest example of this process.. As in the movie, crimes can now be tackled before they are committed. The statements coming from the United States, whether Bush or Colin Powell, reinforce the argument that a nation can take any measures to protect itself from a threat or perceived threat. It can do this both within its borders, by using special legislation as well as outside its border, where it can use methods ranging from an appeal to legal processes to air strikes and even war.

A counter current that flows against this discourse of the states is that of the people. Its history can be traced to earlier civil rights movements that sought to break the sanctity of the state and its machinery and force governments to justify and explain the rationale of its policies. Similarly outside the boundaries of the nation trans-national movements sought to check state sanctioned practices: for example, the anti-slavery movement, revolutionary movements that sought to establish a political order based on the will of the people, or national liberation

struggles. All of them, however, confronted the dilemma of ends and means. The Gandhi emphasis on non-violence was a clear stand on this issue but while it has been influential the problem has not been resolved.

The absolute inviolability of the nation state has also been eroded in a variety of ways. The movement of people, the explosion in the speed and rate of diffusion of ideas have given immediacy to events and allowed people from disparate corners of the globe to come together around a common cause. These bonds of affinity interact with national and regional ties in complex ways and influence the way national security is debated.

In the period of imperial expansion the ideological agenda sought to enforce global standards both in the material world as well as in other spheres of private and public life. Civilisation was measured by the approximation to a European ideal. In the post WWII world this legacy continues to play a role as does the emergence of alternative visions that often are regressive and authoritarian

The language of politics whether framed within the nation-state perspective or expressed in the language of civilisation allows for the denial of individual rights in the interest of the nation. These state-centric arguments carry the force of authority backed as they are by a wider dissemination and greater claims on legitimacy.

India: The Legal Machinery to Maintain Security and Public Order

This is the context within which each individual situation needs to be understood. Indian legal codes, in many cases, have continued colonial laws and have added their own variations to deal with new problems. The early legislation to control insurgency began under the Nehru government when it passed the Northeast (Armed Forces Special Powers Act (1958) to quell Naga militancy. This act, amended in 1972, allowed arbitrary arrest and search without warrant giving a free hand to the authorities for the exercise of arbitrary power. The declaration of Emergency by Indira Gandhi was a major milestone as was the legislation (TADA) to control militancy in Punjab and later the National Security Act (1980) However, there were a host of other legislation such as : The Unlawful Activities (Prevention) Act (1967), the Prevention of Seditious Meetings Act of 1911, the Religious Institutions (Prevention of Misuse) Ordinance, the Anti-Hijacking Act (1982), the Suppression Unlawful Acts against safety of Civil Aviation Act (1982) and Disturbed Areas Special Courts Act (1976), the Indian Telegraph Act and the Information Technology Act (2000) and the Prevention of Terrorism Ordinance reintroduced in March 2002 (an earlier version introduced October 2001 had met with opposition). These are just the national legislation, the states have their own specific legislation that mirror and build on these acts.

The National Security Act of 1980 (NSA) is to prevent individuals acting against the interests of the state (national security, public order, maintenance of essential supplies, industrial unrest etc but these are nowhere defined) and provides for detention for up to a year without charge or trial. It is valid in all states except Jammu and Kashmir (there the Jammu and Kashmir Public Safety Act of 1978 is applicable). Between 1984-1988 there have been five amendments to increase the power to act without judicial supervision.

The Debate over Special Powers

There are a number of problems associated with these acts: are they necessary or are there existing provisions that serve the same purpose, are these acts being implemented arbitrarily, and so forth. For instance, a common complaint is that these measures are used more in areas where there is no insurgency. More importantly, as Ryan Goodman points out, the courts have developed little in the way of preconditions for the executive's subjective satisfaction so that judicial oversight is limited e.g. one judgement reads "The Court cannot substitute its own opinion for that of the detaining authority by applying an objective test to decide the necessity of detention for a specified purpose". (Ryan Goodman p.21) As with other laws they are also open to abuse and transgression. Between 1980-1990 over two-thirds of the 16,000 detentions under this law were deemed invalid. (Ryan p.22) Since 1990 the number of detentions has risen and, as one example out of many, to show the scale of the problem: out of 3,783 detained under NSA in Maharashtra in 1993, 483 were released after scrutiny by the state, 1,332 by the advisory board, and 932 by the court. (Ryan p.23). Again there is no correlation between levels of violence and detentions under the Act. Detainees are held because of political or ideological differences or suspected criminals, the former a gross violation of the fundamental rights and the latter unnecessary.

The NSA is often used to deal with large strikes e.g. thus the leader of a campaign against the location of a steel plant was detained under the NSA in 1996. Again here such examples can be multiplied and instances from across the country can be cited. In its use against criminal acts, which while illegal can hardly be seen as a threat to national security points to the necessity to distinguish between public order and law and order. A Supreme Court judgement has suggested three concentric circles: the largest is law and order, the middle public order and the smallest security of state so that an act can affect law and order but not public order or security of state. A clear definition is not available and this is perhaps one area that needs to be worked on to limit arbitrary use of such legislation.

The question of national security has an emotive appeal and it is argued that the existing laws are inadequate, the judicial machinery too slow allowing known terrorists the freedom to

operate with impunity. An influential police official K.P.S.Gill argues that today given the resources and technology that is available to terrorist organisations the arid formalism of the justice system cannot cope and what is needed is “real time legislative response”. He suggests that weak laws far from being merely ineffective create situations where power is exercised arbitrarily so that they create dangers and that there can be no freedom and no rights unless there is security of life and property. In fact he argues that social activists who only look at the issue from the point of the culprits should understand that today we have a terrorised society. How can this society be freed from this terror is what has to be answered.

But the National Human Rights Commission of India (NHRC) rejects these arguments and says that the Criminal Procedure Code (CrPc) and Indian Penal Code (IPC) are adequate. The provisions of POTA are similar to that available in the existing criminal codes. There is also a contradiction for while the government statistics show a reduction of incidents in Jammu and Kashmir, a decline in killings and an increase in militants killed they argue for the necessity of anti-terrorist legislation to counter the threat of increasing terrorism.

The conviction rates under these laws is remarkably low, for instance under TADA ever since the law came into force the rate has been 0.84%. For example, in 1994 of 67,000 detained since the beginning only 8,000 cases were even tried and just 725 were convicted. This means that 59,509 were detained needlessly (Chakma p.30) The fear that these acts are being misused to target political opponents, minority groups is not misplaced as innumerable examples attest. Provisions in POTO make the law much more repressive and easily open to abuse. Its definitions of terrorism, terrorist activity, membership of a terrorist organisation, and other key terms are vague and unclear.

The effectiveness of such legislation is a moot question. There have been cases where it is the political willingness to address the issues from both sides that has led to a solution such as with the Mizo Peace Accord but there are examples where political settlements have not worked.

The debate on national security of course is not confined to the question of terrorism but includes other areas of life. The educational policies are a crucial element in building and sustaining a climate of crisis by inculcating a closed and one-sided view of history. Today, in India, government policy with regard to textbooks and the content of textbooks is of crucial importance and is being actively debated. Similarly the recent clampdown on internet cafes in Kashmir because militant groups were using them reflects the need to evolve mechanisms to address such issues. Control over information has been exercised by the state through censorship or through a monopoly over television and broadcast systems. Censorship has been exercised in limited ways and today with private broadcasters and satellite television, as well as

the internet, many of these controls have been diluted. Yet, as the example of many countries does show, it's possible to block sites on the net, even if these controls can be circumvented.

It should also be noted that the government spends massive amounts on national security, by one calculation 22% of its total expenditure. Aside from the expenditure on the armed forces (22,500 crores) there is large outlay on paramilitary forces. The MHA plans to raise 209 battalions by 2004-05 or about 200,000 because of an increased threat perception. The cost of one battalion is around 26 crore and costs for maintaining it so that this would mean an extra expenditure of 2,000 crores per annum. The aim is to remove the army from internal security where as much as 50% of it is deployed today.

National Security and the International Context

The debate on national security is also framed within an international context and that context is one where the United States and the Western powers have exercised varying degrees of control over the globe. In the case of India, the links that the United States has had with Pakistan have shaped her foreign policy. Pakistani support for militancy in the Kashmir valley and its funding of training camps as well as financial and other support has shaped the debate. It is not an academic matter but rather seen as affecting the integrity and stability of the country. This confrontation is seen by many as one between a secular India, where all religions are equal and a theocratic Pakistan. This is the unfinished agenda of partition. The Hindu right frames it to counterpoise a tolerant Hindu civilisation against an aggressive and intolerant Islam.

In the international context the role of news media, non-governmental organisations such as Amnesty International (established 1961) or Helsinki Watch (1975) and other more humanitarian organisations have created a space for civil action across state boundaries. These powerful pacific weapons (in the words of Hardt and Negri) use the language of human rights to prepare the ground for Western domination. The argument that nations are operating in different conditions and should be allowed to operate on their own principles goes back to the state's indivisible claims of sovereignty.

The landmark European Convention on Human Rights, a charter to enforce security arrangements in post war Europe that established the European Court of Human Rights in Strasbourg in 1953 marked the beginning of what has developed into a global human rights movement. It allowed dissidents in East Europe, such as Jiri Hajek, Czech Foreign Minister under Dubcek, on the basis of the human rights clauses in the Helsinki Act (1975) to argue that it was illegal for governments to dismiss or jail people for their political beliefs. Hajek went on to found Charter 77, the major Czech human rights group.

Important as these groups have been they have constraints and limitations: largely elite organisations with no mass following, supported by foundations (Ford, MacArthur) and working often worked closely with the U.S government. What has become important in the last decades is that it is no longer just the strong repressive states that have become the target of intervention but so-called rogue or collapsing states where increasingly large scale intervention is carried out to “save” entire populations. The attack on Afghanistan to eliminate the Taliban have brought to the fore the argument that to protect national security a state can attack another state. There are historical examples of such arguments but these questions need to be addressed in a global context. The dilemma of supporting military intervention to save a population or the alliances generated by the ‘ war on terror’ that have removed the activities of repressive regimes (Russia, China, Pakistan) from the international agenda indicate the questions that are being generated.

The realisation of individual and community rights has been supported by global networks that often work to support small, marginal groups in their struggle against the state. The nation-state, particularly in regional alliances still has an effective role as a bulwark against global powers. This has resulted in the formation of a national arena for debating rights but this arena overlaps the global arena so that there are points of commonality. The demands of a global standard, not just in the specifications of machinery or in statistics but also in the way business is conducted is also being fought for in areas such as work conditions and political life. If capital can have the right to invest anywhere in the world then workers can also be entitled to demand a global wage standard. What is national security or constitutional rights in this context. The absolute value of national security can then be debated from positions that lie outside narrow national self interest as defined by those in power□

Conclusion

In conclusion I would like to note that, in the case of India, the expansion of the legal and policing machinery in the name of national security coupled with a policy to impute all problems as caused by cross border terrorism has given anti-democratic forces a very strong handle to selectively apply its special powers to curtail civil rights. In the case of Gujarat, the central government took an inordinately long time to wake up to the problem and did nothing to curb the state sponsored terrorism against the Muslim population and still continues its provocative policy of encouraging decisions within the state. The use of extraordinary powers, which give virtual immunity from prosecution, robs the citizens of their rights. This also diminishes the role of civil police and erodes the democratic functioning of the state. India prides itself on being a democratic society with an effective press, impartial judiciary and an

active civil rights movement yet all these are put in jeopardy if the rights of people are eroded. Political problems need to be addressed politically and not blamed solely on outside intervention. Today it would seem that struggle in many societies is not to enact legislation to guarantee rights but to act to prevent legislation that would curtail civil liberties in the name of the guaranteed life and liberty.