Apt judicial reminder in era of over-criminalisation

The criminal justice system needs to take note of the Delhi High Court's recent judgment on 'defining terrorism'

FAIZAN MUSTAFA

The criminal justice system is an instrument of state and a key index of the state of democracy. Every punishment which does not arise from absolute necessity is tyrannical, said French jurist Montesquieu. In fact criminal law should be used only as a 'last resort' (ultima ratio) and only for the 'most reprehensible wrongs'. Unfortunately, 'crimes' originate in government policy and, therefore, criminal law reflects the idea of 'power' rather than 'justice'. Should civil society activists, students, intellectuals and protesters be charged for the crime of terrorism? Is every criminal a terrorist and every violent crime a terrorist activity? Did Parliament in enacting the Terrorist and Disruptive Activities (Prevention) Act, (TADA) and the Unlawful Activities (Prevention) Act, 1967 (UAPA) intend to punish ordinary criminals under these anti-terror special laws?

Example of misuse

In the period 2015-2019, as many as 7,840 persons were arrested under the draconian UAPA but only 155 were convicted by the trial courts. Most would eventually be acquitted by the higher courts. Even Congress governments misused TADA (enacted in 1985 and amended in 1987). Till 1994, though 67,000 people were detained, just 725 were convicted in spite of confessions made to police officers being made admissible. In *Kartar Singh* (1994), the Supreme Court of India had observed that in many cases, the prosecution had unjustifiably invoked provisions of TADA 'with an oblique motive of depriving the accused persons from getting bail'. It added that such an invocation of TADA was 'nothing but the sheer misuse and abuse of the Act by the police'.

UAPA's experience has been worse than TADA. UAPA has also been equally used and abused. The recent 133 page bail order of the Delhi High Court in *Asif Iqbal Tanha* (June 15, 2021), that led to the release of three student activists, has come as a bolt from the blue for the Delhi police. At the heart of the controversy is the meaning of the term 'terrorism' and when UAPA can justifiably be invoked.

No consensus on definition

Though there are more than 100 definitions of terrorism available globally, there is no universal definition of the term 'terrorism' either in India or at the international level. The UN General Assembly had given this task to a committee, but in almost 50 years or so there has been no consensus on the meaning of terrorism. The fight against foreign occupation is to be kept out of terrorism as today's terrorist may be tomorrow's freedom fighter. Accordingly, neither TADA nor UAPA has a definition of the crucial terms 'terror' and 'terrorism'. Section 15 of UAPA merely defines a terrorist act in extremely wide and vague words: 'as any act with intent to threaten or likely to threaten the unity, integrity, security, or sovereignty of India or with intent to strike terror or likely to strike terror in the people....'

How is such a terrorist act committed? UAPA says 'by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases ... or by any other means of whatever nature to cause or likely to cause death or injuries...,' What is the meaning of the expression 'by any other means'? When a general word is used in any statute after specific words, it is to be interpreted in the context of specific words. Thus, the Citizenship (Amendment) Act (CAA) protests cannot be covered by this expression.

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In *Yaqoob Abdul Razzak Memon* (2013), the Supreme Court said that terrorist acts can range from threats to actual assassinations, kidnappings, airline hijacking, car bombs, explosions, mailing of dangerous materials, use of chemical, biological, nuclear weapons etc. Since the three student activists did not do any of these things, Justices Anup Jairam Bhambhani and Siddharth Mridul could not be convinced of their involvement in any terrorist act. Through an authoritative and enlightened bail order entirely based on the apex court judgments, Justice Bhambani reminded the Delhi police of the true meaning of a terrorist act.

Other judgments

In *Hitendra Vishnu Thakur* (1994), the Supreme Court had defined terrorism as the '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 ... on the society as a whole'. Its main objective is to overawe the government or disturb the harmony of society or 'terrorise' people...'. Thus, what 'distinguishes 'terrorism' from other forms of violence is the deliberate and systematic use of coercive intimidation'. In *Kartar Singh* (1994), the Supreme Court held that a mere disturbance of public order that disturbs even the tempo of the life of community of any particular locality is not a terrorist act. By this interpretation, the CAA protests in a few localities of Delhi cannot be termed as terrorist activity. Even in the Rajiv Gandhi assassination case, the Supreme Court, in *Nalini and 25 Others* (1999) held that none of the accused had intent to overawe the government or strike terror among people, and therefore the killing of Rajiv Gandhi and 15 others was not held to be a terrorist act or disruptive activity under Section 3 of TADA.

In *Ram Manohar Lohia* (1966), the apex court explained the distinction between 'law and order', 'public order' and 'security of state'. Law and order represents the largest circle within which is the next circle representing 'public order', and the smallest circle represents the 'security of state'. Accordingly, an act may affect 'law and order' but not 'public order'. Similarly, an act may adversely affect 'public order' but not the 'security of state.' In most UAPA cases, the police have failed to understand these distinctions and unnecessarily clamped UAPA charges for simple violations of law and order.

In the historic PUCL judgment (2003) where the constitutionality of the Prevention of Terrorism Act (POTA) was under challenge, the Supreme Court had highlighted another vital dimension of terrorist act by including within its meaning amongst other things the 'razing of constitutional principles that we hold dear', 'tearing apart of the secular fabric' and 'promotion of prejudice and bigotry'.

Justice Bhambhani reiterated the first principle of criminal law, i.e., criminal provisions are to be given the narrowest possible meaning. It is a sad commentary on our criminal justice system that even the mention of this rule of thumb is being considered as a breeze of fresh air in an atmosphere of curtailment of liberties and democracy tilting towards authoritarianism.

Relying on A.K. Roy (1982) where the constitutionality of the National Security Act (NSA) was challenged, Justice Bhambhani concluded that to ensure that a person who was not within the parliamentary intendment does not get roped into a penal provision, more stringent a penal provision, it must be more strictly construed. The apex court itself had held that while construing preventive detention laws such as the NSA, care must be taken to restrict their application to as few situations as possible. In *Sanjay Dutt* (1994) as well, the Supreme Court had held that those whom the law did not intend to punish are not to be roped in by stretching the penal provisions. In recent times, the Allahabad High Court had to quash 94 of 120 cases in which NSA has been invoked.

Accordingly, the Delhi High Court concluded that since the definition of a 'terrorist act' in UAPA is wide and somewhat vague, it cannot be casually applied to ordinary conventional crimes, and the act of the accused must reflect the essential character of terrorism. Indeed, the CAA protests were not terrorist acts. Defining terrorism may be difficult but does not everyone know when an act of terror is really committed?

What must be done

One hopes that, henceforth, our police will be far more cautious in charging people under black laws such as UAPA, the NSA, etc. In any case, no anti-terror law, howsoever stringent, can really end the problem of terrorism. Pushing a civilised state to state terrorism is the tried and tested strategy of all terrorists. Let us not fall in their trap.

Radicalisation generally succeeds only with those who have been subjected to real or perceived injustices. Let us remove injustice to combat terrorism. The creation of a truly just, egalitarian and non-oppressive society would be far more effective in combating terrorism.

Faizan Mustafa is Vice-Chancellor, NALSAR University of Law, Hyderabad. The views expressed are personal