

Note on 'The Karnataka Control of Organized Crimes (Amendment) Bill, 2009.

Introduction

Terrorism is one of the major concerns of modern states and a wide array of laws both on an international and national level have been made in response to this security concern. These laws have been the subject of much criticism due to the fact that a common feature of these laws is a suspension or derogation of basic human rights standards. An Eminent Jurists Panel appointed by the ICJ¹ to look into issues concerning counter-terrorism and human rights, released a report that captures the worldwide phenomenon in terms of which, human rights are sacrificed by counter-terrorist methods and laws. One of the observations made was that in many countries, legal and human rights protections are regularly sidestepped. Individuals are abducted, held in secret prisons; and often tortured or ill-treated. They found that the effect was to place individual terrorist suspects beyond protections afforded by human rights standards, international humanitarian law, or domestic constitutional guarantees.

States around the world have engaged in the gradual degradation of human rights and international humanitarian law in the name of counter terrorism. This situation is made worse when a local government decides to also enact counter-terrorism laws in its own name and in conflict with state initiatives and domestic and international human rights. The Government of Karnataka passed the Karnataka Control of Organized Crime Act in 2000 under a Congress dispensation. In 2009 the BJP administration introduced certain amendments in the already harsh law which will in effect legitimize torture and entrench impunity. The Bill further arms the state with greater powers against its own citizens while making it less and less accountable to the people. The points of deep concern with respect to the proposed amendments are:

a.) Lack of transparency in the process leading up to the Bill being passed by the Assembly

The first intimation that the Government of Karnataka was considering the amendment to the Karnataka Control of Organized Crime Act, 2000 came through a series of newspaper reports in both February and May, 2009. In spite of efforts by human rights activists as well as members of the media, and repeated requests to the Home Ministry, the draft amendments were themselves not circulated.

The fact that the Bill makes many fundamental amendments affecting the fundamental rights as well as liberty of citizens should have meant that the Government should have engaged in a open democratic and transparent process before coming out with the Bill. By not providing a copy of the bill to the public in advance and also by not inviting public opinion, public debate is being curtailed. By bringing out a law in this fashion, one is sending out a message that public opinion is of scant concern and that laws will be framed without public consultation.

b.) Amendment of organized crime to include any "terrorist act".

The specific problems with the definition of terrorist act under the Bill are :

i.) Legislative Competence

The Bill attempts to bring within the fold of organized crime a terrorist act as well. In the definition of what constitutes a terrorist act, the Bill not only borrows heavily from the Unlawful Activities

¹ International Commission of Jurists, "Assessing Damage, Urging Action", Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights. http://www.icj.org/news.php3?id_article=4536&lang=en

Act as amended in 2008² but also broadens the understanding of a terrorist act. The Unlawful Activities Act defines a terrorist act as an act committed with the 'intent to threaten unity and integrity, security or sovereignty of India'. The Bill borrows the same clause and defines a terrorist act as an act which 'threatens the unity, integrity and security of the State'. It is submitted that the importation of the *notion of unity, integrity and security* from a central statute into a state statute has serious constitutional implications. The unity and integrity of the Union of India is recognized in the Preamble of the Indian Constitution as being a basic feature of the Indian Constitution in the sense that no state can secede from the Union of India. However the 'unity and integrity of the State enjoys no such Constitutional status. In fact as per Art 3 of the Indian Constitution, parliament may by law 'form a new State by separation of territory from any State' or 'alter the boundaries of any state or diminish the area of any state'. Such being the Constitutional status of States within the Union of India, to advocate the 'unity and integrity of the state' detracts from the 'unity and integrity of India' which has Constitutional status.

This issue is related to the lack of legislative competence of the state of Karnataka to make amendments relating to terrorism which is, as shown below, within the exclusive competence of the central government.

The state of Karnataka does not have the competence to legislate on matters relating to terrorism as this matter relates to the security of India and is within the exclusive competence of the Union in terms of section 246 of the Constitution³ read with Schedule 7, List 1, Entry 1 and Entry 9 which provide for central government jurisdiction over the following:

- “1. The defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination of effective demobilisation;
9. Preventive detention for reasons connected with Defence, Foreign Affairs or the security of India; persons subjected to such detention.”

The issue that arises in this regard is the fact that the state of Karnataka has assumed legislative competence to legislate in terms of List III, (Concurrent List), Entries 1 and 3 which provide for the following:

- “1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of civil power.
3. Preventive detention for reasons connected with the security of the state, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subject to such detention.”

The amendments to KCOCA relate to the defence of India in terms of Entry 1 of the Union List and to preventative detention connected with the security of India in terms of Entry 9 of the Union List. The concurrent list contains a similar provision in terms of Entry 3, but this relates to the “security

² Unlawful Activities (Prevention) Act, 1967 with 2008 amendments.

³ Section 246 provides for the subject matter of laws made by Parliament and by the Legislature of States and the competences in this regard. Section 246 provides that:

“(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the “Union List”).
(2) Notwithstanding anything in clause (3), Parliament and, subject to clause (1), the Legislature of any State also have the power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the “Concurrent List”).”

of the state.”

This creates uncertainty as to whether the state or the Union has the exclusive or concurrent competence to legislate on terrorism. The Lists themselves do not contain any reference to terrorism but instead have obscure references to the “security of the state” and the “security and defence of India.” The first question that needs to be addressed is whether the Union or the state has the competence to legislate on matters related to terrorism and offences against the laws relating to terrorism.

Due to the fact that terrorism is not explicitly mentioned in the lists, it must be interpreted that terrorism falls within the ambit of the defence of India and preventative detention relating to the security of India, which read with section 248, schedule 7, List I, entry 97, encompass the residuary powers of the Union to legislate exclusively on matters not specifically mentioned in List II or III. The Union therefore has exclusive competence to legislate in this regard.

However, despite the fact that the KCOCA amendments encroach on the competence of the Union to legislate on terrorism, such encroachment does not immediately invalidate the amendment. As most recently observed by the Maharashtra High Court in the challenge to the Maharashtra Control of Organised Crime Act, (MCOCA)⁴ any state legislation which encroaches on matters within the exclusive competence of the Union is not automatically invalid and the legislation must be tested for invalidity in terms of whether in pith and substance it is a matter which falls within the jurisdiction of the Union and it is not merely an incidental encroachment on the Union List.⁵ This rule envisages that the legislation as a whole be examined to ascertain its “true character” in order to determine to what entry in which List it relates.

This determination is made by reference to whether the legislation, in this case the 2009 Amendments to KCOCA, deal with matters which should really fall within the competence of the Union. An examination of the relevant central government law and the existing KCOCA which is being amended, point to the true character of the amendments and show that the state has exceeded its competency.

Firstly, in regard to the overlap of the amendments with the Unlawful Activities Act, it is clear that although attempts to legislate on terrorism may affect both the security of India and the security of the state, the central government has already legislated on this matter and created both definitions of terrorism and stipulated the punishment of such acts.⁶ The amendments to KCOCA which adds to what constitutes an organized crime, creates a new definition of terrorism and changes the applicable punishments, cannot be regarded as an *incidental* encroachment on the competence of the Union, to legislate on matters relating to the defence and security of India. The overlap between the amendments and the state law are not incidental and instead allows the state to usurp an arena of legislative power which rightly belongs to and has already been claimed by the central government.

The objectives of the KCOCA are to deal with organised crime, generally committed for pecuniary benefit and can be compared to the central government legislation which is designed to specifically deal with terrorism. The objective of the Unlawful Activities Act, in its preamble, specifically

⁴ *Sheikh and Ors v State of Maharashtra*, MANU/MH/0497/2007.

⁵ *Delhi Cloth & General Mills Co. Ltd. v. Union of India and Ors.* MANU/SC/0377/1983. “To resolve the controversy if it becomes necessary to ascertain to which entry in the three lists, the legislation is referable, the court has evolved the doctrine of pith and substance. If in the pith and substance, the legislation falls within one entry or the other but some portion of the subject matter of the legislation incidentally trenches upon and might enter a field under another list, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence.”

⁶ Unlawful Activities Prevention Act, 1967, with 2008 amendments.

mentions that the Act is to provide for the more effective prevention of the certain unlawful activities of individuals and associations and for dealing with terrorist activities and for matters connected therewith. The preamble to the Act provides further that object of the Bill is to make powers available for dealing with activities directed against the integrity and sovereignty of India. In defining terrorism, the Unlawful Activities Act describes a terrorist act as any act with intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India. Section 15(a)(iv) specifically refers to the damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State government or any of their agencies. The language of the aforesaid provisions is indicative of efforts on the part of the Central government to create uniform and effective policies relating to terrorism which is regarded as being a threat to sovereign India as opposed to threats on one particular state within India, with specific provision being made for any destruction of property within any State. There is no need for the state of Karnataka to create legislation relating to terrorism when such legislation already exists on a national level and when such legislation does not create any new law designed to address specific problems or crisis within the state

A relevant albeit distinguishable matter can be found in the *Sheikh* case, which involved a challenge to the MCOCA on the ground that insurgency was a matter related to terrorism and therefore within the exclusive competence of the Union. The Court found that insurgency was related to terrorism but also to organized crime and that in regard the encroachment of the MCOCA on the UAPA, such encroachment was merely incidental. The Court found the following:

“We have already referred to the Preamble, Statement of Objects and Reasons and relevant provisions of the MCOCA. We may reiterate that the MCOCA is enacted, inter alia, to take care of organized crime syndicate who indulge in organized crime. Though 'promoting insurgency' is one of the facets of terrorism, offence of terrorism as defined in the UAPA Act as amended in 2004 is not identical to the offences under the MCOCA. It is not possible to accept Mr. Sebastian's submission that the UAPA 1967 as amended in 2004 covers the whole field under Entry No. 1 of List III and leaves no space for the MCOCA as terrorism and insurgency are synonymous and thus make the MCOCA impliedly repugnant. In any event, in our opinion, both the enactments can stand together as there is no conflict between the two. Section 2(1)(e) of the MCOCA so far as it includes 'promoting insurgency' does not impinge on the offence of 'terrorism' as defined in the UAPA 1967 after its amendment in 2004. As we have already stated, there may be permissible incidental overlap, which does not create any repugnancy nor a situation of unworkability. Since in our opinion, there is no repugnancy between the MCOCA and the UAPA 1967 as amended in 2004, there is no question of any implied repeal.”

It is clear from the statement above that while insurgency in itself cannot be found to be repugnant to the objectives of the Unlawful Activities Act, any legislation which specifically mentions and deals with terrorism, as in the case of the KCOCA amendments, can clearly be found to be repugnant to the Unlawful Activities Act and beyond the legislative competence of the state of Karnataka.

A further consideration is the difference in the manner in which the state of Gujarat has legislated upon organized crime in terms of the Gujarat Control of Organised Crime Act. The objectives of the GCOCA is clearly different from that of the KCOCA as amended and the GCOCA makes no reference to terrorism except for a reference to “insurgency” which in itself has recently been challenged as being beyond the competency of the state legislature in terms of MCOCA.

Another issue which is relevant to the competency of Karnataka to legislate on terrorism, is the fact that India has ratified international treaties relating to terrorism and the 2008 amendments to the Unlawful Activities Act all relate to the India's ratification and implementation of such international resolutions. The preamble to the amendments are as follows:

“ *And Whereas* it is considered necessary to give effect to the said Resolutions and the Order and to make special provisions for the preventions of, and for coping with, terrorist activities and for matters connected therewith or incidental thereto.”

The amendments to the Unlawful Activities Act, including the amendment to the definition of a terrorist act were all done in lieu of the signature, ratification and domestic incorporation of the U.N resolution. The State of Karnataka has no competence to legislate on matters relating to the implementation of such a treaty or any matter connected thereto unless in terms of Union regulations. This is in terms of Entry 14 and 93 of the Union List which provide that the Union has exclusive competence in terms of:

“14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries; and

93. Offences against laws with respect to any of the matters on this list.”

It should also be noted, in regard to the competency of the state of Karnataka to legislate on terrorism, that the amendments are also at odds with the national approach and developing policy on terrorism, which encompasses a goal to deal with terrorism on a uniform basis in terms of federal law. In this regard, one should take into account the statements of Prime Minister Manmohan Singh in response to the increasing threat of terrorism.

“The security situation has, if anything, become even more complex. Many predictions made a year ago have unfortunately turned out to be true. In some cases the scale and magnitude of terrorist attacks appear to have been stepped up exponentially. In the prevailing circumstances we cannot afford to take a partial or segmented view. A holistic approach to our security concerns is definitely called for...A strong sense of nationhood is important to withstand both these types of threats. Our nation is clearly united in our determination to defeat both external as well as internal security challenges. Our determination and sense of nationhood derives from our inheritance of a great historical experience of a multi-ethnic, multi-religious, multi-caste and multi-lingual society. To-day, even as Pakistan engages in whipping up war hysteria, our nation remains steadfastly united and, if anything, the process of national consolidation is becoming stronger.”

The notion of one state assuming the power to legislate and create offences against a new definition of a terrorist act is clearly one that was not envisaged by the national authorities. There are other practical issues which relate to the efficiency of responses against terrorist activity, effective co-operation and strategic co-ordination that would warrant against a state by state, piecemeal approach to combating terrorism and co-ordinating national and international efforts. Once a terrorist act occurs, questions of whether the state or the Union has jurisdiction to act and/or punish will arise just as it has arisen in regard to their competency to legislate. This confusion in an area of national and foreign affairs which require exactitude and co-ordination cannot be practically or legislatively sound and acceptable.

ii.) *The amended definition of terrorism is overly broad and vague.*

The Bill reproduces what constitutes a terrorist Act from the Unlawful Activities Act (2008 amendments) and adds two further sub clauses. The Bill includes within the definition of terrorist act, acts committed with the intent to 'disturb law and order' or 'public order' The conventional definition of terrorism as acts 'which strike terror in the people of India' is broadened to include within its ambit acts which disturb law and order or public order. This broadened definition of terrorist act could potentially include acts such as protests and demonstrations, public speeches etc all of which are acts which can be seen to 'intend to disturb law and order or public order.'⁷

The *actus reus* of the offence under the Unlawful Activities Act which is borrowed by the Bill includes 'using bombs, dynamite or other explosive substance or inflammable material or firearms or other lethal weapons or poisons or noxious gases or other chemicals or any other substances of hazardous nature'. The Bill adds the omnibus clause, 'by doing any act' to this wide ranging clause thereby bringing within the ambit of terrorist act potentially any act which the state considers has been done with the intent to disturb law and order or public order. This could potentially include the act of organizing and participating in a public rally, demonstration or making a public speech.

c.) *Punishment for terrorism as an Organized Crime*

Organized crime has been defined expansively to also include 'terrorist act' apart from 'any continuing unlawful activity'. With respect to punishment for this expanded definition of crime, the Bill amends section 3 of the Karnataka Control of Organized Crime Act 2000. While section 3 of the Act prescribed a minimum mandatory sentence of death or imprisonment life and fine of an amount not less than one lakh rupees if the act resulted in death, the prescribes the minimum mandatory sentence of death or imprisonment for life and an increased fine amount not less than five lakh rupees for offences which result in death and 'loss, damage or destruction of property' as well.

(The KCOCA amendment defines terrorism to include the death or injury to any person/s or loss, damage or destruction to property. In terms of the imposition of punishment, the amendment is anomalous in that it imposes the death penalty if the act of terrorism results in the “death of any person *and* loss or destruction of property.” There are situations in which a terrorist act could result in the death of an individual but not the loss or destruction of property, in which case the death penalty could not be imposed due to the inability to satisfy both requirements of the provision.)

d.) *Attachment of property pending investigation*

Section 21 of the Karnataka Control of Organized Crime Act empowers the state to declare that the property of the accused stands forfeited to the state in addition to any other punishment prescribed under the Act. This harsh 'punishment' has the effect of not only punishing the accused but also his family members as if a family's home is forfeited they are in effect punished for an offence which they might have had no hand in. The injustice of this form of collective punishment is particularly visible if one considers that the punishment is meted out to aged parents, wives, young children all for crimes they have had no hand in. The only saving grace is that this punishment can be meted out only on conviction. However clause 21 A in the Bill allows for the seizing of property which in the opinion of the Deputy Superintendent of Police or Assistant Superintendent of Police represents the proceeds of either organized crime or terrorism *even during interrogation or investigation of any offence punishable under the Act*. Thereby as per this amendment mooted in the Bill, the accused and his family becomes the target of a form of collective punishment even

⁷ *Supreme Court in People Civil Liberties and Anr. v. Union of India* AIR 2003 SCW 7233, “ where the Supreme Court has stated that the entry "public order" in the State List only empowers the States to enact a legislation relating to public order or security so far as it relates to a particular State and however wide meaning is assigned to the Entry 'public order', the present day problem of terrorism cannot be brought under the same.”

before the conclusion of the criminal process and the finding by any Court of law that the offence has been committed. An executive determination that the property is the result of the proceedings of organized crime or a terrorist act is enough to inflict this particularly severe form of arbitrary punishment regardless of guilt or innocence. In effect one of the fundamental precepts of criminal administration that a person is presumed to be innocent until proven guilty is reversed by legally sanctioning punishment even before any judicial process has taken place.

e.) Extending the period of police remand

Amendments mooted by the Bill further increase the period of police remand. The Karnataka Control of Organized Act, 2000 increased the period of police remand from the period laid down in the Criminal Procedure Code. Where Section 167 of the Cr.P.C allowed for police custody upto 15 days the Karnataka Control of Organized Act substituted 30 days. Also where the Code mandated the filing of chargesheet within 90 days the Act substituted 180 days.

The Bill further extended the time of police remand giving the magistrate the power to authorize police custody from 30 days to 60 days. The period for filing chargesheets has also been extended from 90 days to 180 days. Further if the investigation is not able to be completed within 180 days, the Court is authorized to extend the period up to 365 days. In effect, the provision authorizes the police to hold a person for up to a year without filing chargesheet and thereby beginning the trial process. Limiting police power is a central feature of a legal regime which is in consonance with democracy. The conventional understanding within the criminal code is that the time when the police are entitled to custody of the accused has to be limited. The increase in the duration which accused will spend in police custody will only facilitate perpetration of police torture.

f.) Statements of Objects and Reasons

The statement of objects and reasons does not indicate the reasons for the passing of the Bill. A Bill which makes such fundamental alterations in the very premises of criminal law needs to set out the reasons. However there is no justification or reasoning supplied in the 'Statement of Objects and Reasons' for this wholesale departure from existing principles of criminal law. Further when the changes have constitutional implications the need to justify the proposals encoded in the Bill is deeper. This the Bill does not do.

g.) The KCOCA violates the fair trial rights of the accused.

There are numerous issues relating to the admission of evidence, statutory presumptions against the accused, previous convictions having probative value in the trial, and the seizure and attachment of property which result in an unfair trial of the accused as well as a violation of the dignity of such individual. Other issues that arise in regard to the KCOCA which arise prior to the amendments but are relevant nonetheless relate to police immunity for actions taken in good faith; the constitution and powers of the review committee, competent authority and the special courts and the atmosphere under which confessions are recorded and accepted. The relevant sections and the issues which they raise are highlighted in Annexure 1 to this document.

Conclusion

In sum it can be concluded that the Bill through the amendments discussed above makes an already harsh law, well nigh intolerable. One can note that some of the distinctive features of the KCOCA as amended in 2009 are directly lifted from one of the most odious laws of British India ie the Rowlatt Act. Gandhi writing about the Rowlatt Act noted, 'When the Rowlatt Bills were published, I felt that they were so restrictive of human liberty, that they must be resisted to the utmost. I observed too, that the opposition to them was universal among Indians. I submit that no state, however despotic, has the right to enact laws which are repugnant to the whole body of the people, much less a government guided by constitutional usage and precedent, such as the Indian

Government. In 1919 Gandhi launched the civil disobedience movement against the Rowlatt Act. It is shameful that in 2009 in free India an elected Government of the people decides to introduce the same repressive features into law on the 62 years after independence. The irony could not be more telling. If the history of the independence struggle is to mean anything at all it must mean that laws such as the amended KCOCA must not be a part of our future but our past.