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The Silent Erosion: Anti-Terror Laws and Shifting Contours of Jurisprudence in India

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The repeal of the *Prevention of Terrorism Act*, 2002 (POTA) figured prominently in the Common Minimum Programme (CMP) of the United Progressive Alliance (UPA), the coalition that replaced the National Democratic Alliance (NDA) government in May 2004.[1] On 21 September 2004, the President promulgated an Ordinance repealing POTA a month before it was to come up for legislative review. The Ordinance was approved by the Parliament in its winter session confirming the removal of POTA from the statute books.

From its inception as an Ordinance, its enactment, subsequent amendment and repeal, POTA unfolded in multifarious ways. This paper examines the diverse ways in which POTA was applied, and the effect it has had on people's lives, in the delivery of justice and on the legal institutions of the State. From the *Preventive Detention Act*, 1950 through TADA (the *Terrorist and Disruptive Activities (Prevention) Act*, 1985 and 1987) to POTA, apart from laws that are operating in different parts of the country, namely the *Armed Forces Special Powers Act* (AFSPA) and the *Public Safety Act* (PSA) which have been applied in parts of the North-East and Jammu and Kashmir, these laws restrict the 'political' by determining who (group/collectivity, individual) belongs to 'the people'. By excluding elements of the population from the political community they attempt to iron out diversity, and in the process affect a greater distancing and conflict between plural collectivities and the general laws that affect them. Their unfolding in specific contexts has shown that the targeting of minority communities (TADA in Punjab, TADA and POTA in Gujarat) and tribals and peasants associated with Marxist-Leninist groups (TADA and POTA in Jharkhand and Andhra Pradesh) is a prominent feature of such laws.

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I. Anti-terror laws: the idea of extraordinariness

Within the legal framework of constitutional democracy the political community in India gets constituted in two ways: (a) through the processes of standard application of rules and according a uniform legal status to all as citizens, and (b) through the inclusion of pluralities as special categories, or through special means such as religious, linguistic groups, specially administered areas, or through scheduled lists and special provisions. The nature of the accommodation of pluralities within the legal/constitutional framework in terms of 'cultural categories' with special rights, or as 'administrative units' requiring separate structures of administration, means that any *political* assertion of specificity is more likely to be seen as disruptive and a threat to the political community.

As a result, therefore, extraordinariness can be seen as having dual facets. It demonstrates a normalization procedure whereby through representation as extraordinary, specific conditions and ideological and cultural diversities are not only included as exceptional, it is also assumed that in matters of governance, the structures and institutions within the constitutional ensemble, they would require special arrangements.

The examination of extraordinariness as delineated through anti-terror laws throws up the following features:

1. These laws come with objects and intents proclaiming the need to respond to specific problems of an extraordinary nature.
2. It follows from the fact of extraordinariness that these laws are temporary and that their lives are coterminous with the extraordinary events they intend to overturn.
3. Since they are extraordinary measures in response to extraordinary events/situations, they are constitutive of extraordinary provisions pertaining to arrest, detention, investigation, evidence, trial and punishment.

II. The universalizing discourse on terrorism and the construction of a 'suspect community'

With the events of 11 September 2001 having been followed closely by the attack on the Indian Parliament on 13 December the same year, the discourse on terrorism in India accommodated itself in the burgeoning idea of global risks, pressing for concerted and consensual efforts against global terrorism. The debates in Parliament – from October 2001, through March 2002 – show that POTA was being justified as part of the international effort to fight terrorism, and its 'statement of objects and reasons' clearly identifies the 'global dimensions' of challenges to 'internal security'.

TADA judgments of the last couple of years, as well as the few POTA judgments that have been delivered, allude to Islamic terrorism. In a POTA judgment, delivered on 21 July 2003, in the case *State vs. Mohd. Yasin Patel alias Falahi and Mohd. Ashraf Jaffary*, for example, the POTA court sentenced the accused Falahi, an American national, and Ashraf, an Indian national, to five and seven years, respectively. The

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prosecution's case was that on 27 May 2002, the accused, who were members of the Students' Islamic Movement of India (SIMI), an organization banned in September 2001, were 'present on the road near Jamia Milia Islamia University library, and were pasting stickers on the eastern wall'. The stickers carried the following message in English: 'Destroy Nationalism Establish Khilafah,' accompanied by a picture of a closed fist. 'In the fist,' reads the judgment, 'was shown a missile with an Indian sign, and flags of several countries like Russia, America, including that of India, crushed. At the bottom of the fist were several Muslim youths raising their hands and thereafter the name of the organization – "Students' Islamic Movement of India" – was written. In the bag the police found 33 more stickers.'

Although the veracity of the evidence and the investigative procedures followed are not the concern of this paper, it is significant that the POTA court also found the perpetrators guilty under section 124-A of the Indian Penal Code (henceforth IPC) that deals specifically with charges of sedition. Sentencing under this section, the judgment reads: 'The motive of SIMI as stated in the Constitution of SIMI is to bring into force Islamic Order and to destroy nationalism in India and other countries' (Judgment July 2003: 36).[2] Given that Section 124-A IPC explicitly removes 'criticism of government' from its purview, the judgment goes on to say: 'a person may affix posters criticizing the Government. He can do it freely and liberally but it must be without an effort to incite the people to break the nation or to destroy the nation. Nation and government are two different things. When one criticizes the government, he criticizes the manner in which government functions or apathy of government to the public in general or to specific class. *But when a person attacks the very nationalism [sic], he acts as a fundamentalist and his motives are not to criticize the government but to act against the very fabric of society*.'[3]

The fact that one of the accused was an American national, that both the accused had received education in a *madarsa*,[4] and had chosen India as their 'workshop' and 'hatchery', was seen as evidence corroborating guilt. Sentencing Falahi, the judge pronounced: 'He is a person who believes in international Islamic order and wants to destroy the nationalism of the people here. Instead of working in the USA for his aims, of which country he is a citizen, he has chosen India as his workshop. I consider that a person who chooses to become a USA national and works for the destruction of other countries does not deserve leniency.'[5]

A similar spectre of an Indian nation under threat from transnational-Islamic terrorism is raised in the opening paragraphs of the POTA court judgment in the case of *The State vs. Mohd. Afzal*.[6] The judgment begins by identifying terrorism with a specific religion without naming it: ' . . . terrorism is a scourge of all humanity. It is being perpetuated and propagated by religious fanatics, to poison the minds of their followers and generate mercenaries and terrorists to kill innocent persons' (Judgment December 2002: 1). That the reference here is to Muslim fundamentalism is clear from the fact that page 3 paragraph 4 specifically mentions three instances of terrorist attacks – the attacks on the World Trade Center, on a theatre in Russia and on Akshardham temple: 'Strikes by terrorists on the World Trade Center or at a theatre in Russia and at Akshardham temple in Gujarat and other temples in the country show the capacity of terrorists to destroy innocent lives' (Ibid: 3). Care is taken thereby to show that the attack on Parliament was part of a global network of

terrorism that thrived on its nexus with 'under-world criminal organization' and 'obvious technical advantage'. It is not surprising then that much of the prosecution's case projects the attack on Parliament as part of a larger conspiracy, designed and dictated by unseen forces, linking up through a network of mobile telephones and laptop computers.

More significant perhaps is the manner in which the new contexts of 'global Islamic terrorism' have been cited in a recent judgment in a TADA case in the 1990s pertaining to Sikh militancy. On 22 March 2002, for example, the Supreme Court Judgment in the TADA case *Devender Pal Singh vs. State of NCT of Delhi and Another*,[7] coming several years after the institution of the case, had recourse to the new contexts of terrorism to justify the stringent interpretation of provisions pertaining to 'confession', and sentenced the accused to death.[8] 'The menace of terrorism,' the judgment states, 'is not restricted to our country, and it has become a matter of international concern and *the attacks on the World Trade Center and other places on 11-9-2001* amply show it. The *Attack on Parliament on 13-12-2001* shows how grim the situation is . . . .'[9] The spectre of the besieged nation and the perception of global risk affirmed by an international consensus, form the context of a judgment that is temporally removed from the circumstances in which the 'terrorist act' was originally committed and brought to trial.

Earlier, in the interregnum between TADA and POTA, discussions on the *Prevention of Terrorism Bill*, 2000, which was expected to take the place of the lapsed TADA, constantly referred to the 'besieged' nation, reiterating the 'urgent need' for a 'fresh examination' of issues of 'terrorism' and other 'anti-national' activities. It is significant that while the TADA-like Bill was being entrusted in 1999 to the perusal of the Law Commission of India, the latter expressed its concurrence with the government that India perhaps required a *permanent anti-terrorist law*, 'without any further loss of time'.[10] Within Parliament, however, questions were being raised about TADA having been used discriminatorily against minority communities, and the prolonged judicial process it entailed. However, suggestions for making extraordinary laws more foolproof, poured in.

The Law Commission in its 173rd Report, while examining the issue of a 'suitable' anti-terror Bill, continued to mark out the dangerous 'outsiders' within the country. Showing remarkably selective memory, the Commission claimed that 'religious fundamentalist militancy', '*first* raised its head' with bomb explosions in Mumbai, and since then 'continued to make its presence felt', the latest (February 1998) being the blasts by Al-Ummah, 'the principal fundamentalist militant outfit' of southern India, in different regions of Coimbatore. The other ingredients of the security situation persist as 'militant and secessionist activities' in Jammu and Kashmir, 'insurgency-related terrorism' in the North-East and 'extremist violence' in Andhra Pradesh and Bihar. What was significant about the Commission's assessment of the security situation and the chronology of events that made an anti-terror law immediately imperative, was the manner in which it disregarded Hindu fundamentalism, particularly that of the Shiv Sena and other components of the Sangha Parivar, which predated the violence cited in the Commission's Working Paper.[11]

A significant distinction between TADA and POTO/POTA, indicative of the political context of POTA, is that while TADA did not come with a focal image of

the nation or national security, POTA carried an image that was part of the Hindutva agenda of the nation and national security. TADA was enacted in May 1985 in the context of militancy in Punjab, specifically a series of bomb explosions in Delhi. POTA, on the other hand, did not mention specific states or regions as problem areas. The 'statement of objectives and reasons' referred to the 'upsurge in terrorist activities', 'intensification of cross-border terrorist activities' and 'insurgent groups in various parts of the country'. The challenge the nation faced in particular, it states, was from the 'global dimensions' that terrorism 'had now acquired'.[12]

Moreover, while identifying 'terrorist activities', TADA specifically mentioned 'threatening harmony between communities' as an act of terror. Following widespread allegations of its targeted use against religious minorities, POTA removed 'threatening harmony between communities' from the ambit of 'terrorist activities', purportedly as 'a safeguard'. Far from being a safeguard, the removal in practice translated into a deflection of attention from the communal activities of Hindu fundamentalist organizations, while the Act continued to be used selectively against the Muslim minority. Perhaps the most prominent selective use of POTA has been in Gujarat, where out of the 250 people against whom POTA has been imposed, 249 were Muslims.[13]

III. Extraordinary laws: exceptions or the norm?

The justification of extraordinary measures, as pointed out at the beginning, rested on the assumption that such measures are unavoidable and necessary responses to specific crimes of an extraordinary nature. They are, therefore, temporary, their lives coterminous with the extraordinary events they intend to overturn. In this section we shall see how extraordinary laws have not been transitory, either in terms of their temporality or their effect on the legal system. Moreover, we show how, through a subtle process of symbiosis, laws pertaining to so-called 'ordinary crimes' and those claiming to deal with extraordinary situations, intertwine in specific contexts. Not only does this interlocking become evident in the letter of the laws, and we see it unfold in judicial pronouncements, but it also, as the recommendations of the Malimath Committee[14] show, visibly affects ordinary laws – to the extent that much of the extraordinary gets accepted, ideologically and procedurally, in jurisprudence:

An unending string of extraordinary laws

There exists an unending string of extraordinary laws in India, all enacted after independence or in a continuum from the colonial period.[15] The *Preventive Detention Act*, 1950, used against the communists in Telengana, was the first detention law enacted after the Constitution was enforced. The Indo–China War of 1962 provided another occasion for the vigorous use of preventive detention by the government. The declaration of emergency due to the war enabled the government to promulgate the *Defence of India Ordinance*, 1962, and frame rules under it. The *Defence of India Act*, 1962, which replaced the Ordinance, empowered the Central Government to make

rules, ostensibly for securing the defence of India, on civil defence, public safety, public order, the conduct of military operations, or for maintaining supplies and services essential to the community.[16] The official state of emergency persisted until subsequent wars with Pakistan in 1965 and 1971, and the government continued to detain people under the *Defence of India Act*, 1962. In 1967 the *Unlawful Activities (Prevention) Act* was passed, under which any organization could be declared illegal and any individual imprisoned for questioning India's sovereignty over any part of its territory. The *Preventive Detention Act*, renewed seven times, lapsed in 1969 for lack of parliamentary support by Prime Minister Indira Gandhi, and there were no Central laws of preventive detention for two years. The states, however, continued operating their own preventive detention laws.[17]

The 1971 general election gave Indira Gandhi sufficient strength in Parliament to pass the *Maintenance of Internal Security Act* (henceforth MISA), modeled broadly on the *Preventive Detention Act*, 1950.[18] With the declaration of a state of National Emergency in 1975, the right of access to the courts for restoration of people's fundamental freedoms was suspended. Under such conditions *MISA* assumed formidable proportions. The *Constitution (39th Amendment) Act* placed *MISA* in the ninth schedule of the Constitution taking it beyond judicial review. The *Constitution (42nd Amendment) Act*, 1976 further strengthened the powers of the Central Government by providing that no law for the prevention of anti-national activities could be declared invalid on grounds that it violated the fundamental rights in Part III of the Constitution. In 1977 *MISA* was repealed by the Janata Party government. The government, however, did not repeal the other extraordinary laws that had been enacted by earlier governments, including the *Armed Forces Special Powers Act*, 1958[19] and the *Unlawful Activities (Prevention) Act*, 1967. A subsequent attempt by the Janata government to introduce a mini MISA in the form of a *Criminal Procedure (Amendment) Act* proved futile. When the Congress party returned to power, the *National Security Act* (henceforth *NSA*), 1980 was brought onto the statute books. The *NSA* was followed by the *Terrorist and Disruptive Activities (Prevention) Act* (TADA), 1985 and 1987, which after it expired in 1995 was replaced by POTA, 2002, itself repealed in September 2004.

Procedural continuities: self-perpetuating provisions

Extraordinary laws come with self-perpetuating provisions. The life of the *Preventive Detention Act*, 1950 was extended by consecutive amendments until 31 December 1969, so much so that it became a normal feature of Indian political life, with the number of persons detained under this Act gradually decreasing each year.[20] TADA provided for its extension every two years, and continued to exist on the statute books through extensions till 1995. In 1993, when TADA was extended for what turned out to be the last time, the extension had became so *routine* that only 8 Members of Parliament participated in a discussion that lasted just an hour and ten minutes.[21] It is significant that the period after which parliamentary review of the Act could take place was increased in POTO to five years. Following criticisms, the second Ordinance promulgated in December 2002 reduced the period to three years.

The increased period for which such Acts can remain on the statute books without being subjected to legislative review is indicative of the longevity that is sought for them. This quest for a longer life is justified through articulation of the risk of running into a 'legal vacuum' in the absence of effective anti-terrorist laws. The Malimath Committee proposed a *permanent solution* recommending that 'a comprehensive and inclusive definition of terrorist acts, disruptive activities and organized crimes be provided in the *Indian Penal Code*, 1860 *so that there is no legal vacuum* in dealing with terrorists, under-world criminals and their activities after special laws are permitted to lapse as in the case of TADA, 1987' (Report 2003: 294).

Anti-terror laws: 'life after death'

Extraordinary laws, moreover, come with the provision that the expiry of the law shall not affect 'any investigation, legal proceeding', etc., that may have been initiated when the Act was still in force, which shall continue 'as if this Act has not expired'. The experience with TADA showed that the continuation after expiry imparted a prolonged 'life after death' to the Act. Cases under TADA continue to be tried in various designated courts and the Supreme Court several years after it has expired. By one account, three years after TADA was revoked the state of Assam had nearly 1000 TADA detainees in prisons. Considering that only four out of 1237 TADA-related cases have ended in conviction, it is quite possible that the majority of those still languishing in jail may yet be acquitted.[22]

The unending string of extraordinary laws, provisions assuring decreased legislative review, and self-perpetuation so that such laws continue to cast their shadows long after they have ceased to exist in statute books, have made such laws part of the people's lives. Their existence as a system of laws that exists alongside but independent of ordinary law is a fact that no longer corresponds to reality. As the next section shows, almost imperceptibly, much of the extraordinary is creeping into ordinary law as a result of the development of a complex and interlocking system, so that laws pertaining to the so-called 'ordinary crime' and those claiming to deal with extraordinary situations intertwine in specific contexts.

IV. The ordinary and the extraordinary: from parallel to interlocking systems[23]

Ever since the enactment of the Preventive Detention Act in 1950, points out Upendra Baxi, the Indian Legal System managed the coexistence of the Preventive Detention System (PDS) as a parallel legal system in aid of the Criminal Justice System (CJS).[24] The most striking distinction that Baxi identifies between the two systems pertains to the object, models of justice, and the patterns of power-sharing that they espouse. The Criminal Justice System is based on the assumption of primacy of social defence as the object of law, the maximization and optimization of due process as its strategy, and the pre-eminence of courts that are legalistic and pro-accused in their disposition. The Preventive Detention System, on the other hand, is primarily geared towards repressing (primarily political and ideological) opposition, thrives on

minimal due process, and gives pre-eminence to executive decision-making and 'satisfaction' in the initiation and affirmation of extraordinary proceedings.

While laws like TADA and POTA are not preventive detention laws, the principles of justice they espouse correspond with Upendra Baxi's illustration of the preventive detention system. In fact it is in the insidious nature of such laws that they masquerade as substantive, bypassing thereby the constitutional and procedural safeguards, the latter provided by the Supreme Court for the accused pertaining to arrests, detention and trial. Investigating agencies and the prosecution, moreover, also bypass the procedures and safeguards provided under the ordinary law and subject the accused to special procedures prescribed under extraordinary laws. Thus, confessions made to a police officer (Section 32) and telephone interceptions (Sections 36–48) were considered valid and reliable evidence under POTA. Under Sections 25 and 26 of the Evidence Act as ordinarily applicable, confessions to police are not admissible as evidence because they can be easily extracted by torture. Similarly, under the ordinary legal procedure, telephone interceptions may not be produced as primary evidence against an accused, unless they have been collected under the *Indian Telegraphs Act*, 1885, which assures procedural safeguards. Moreover, several clauses under POTA do away with the personal safeguards that are normally available to an accused. Once a person is detained, s/he is denied bail for a minimum of one year (Section 49); moreover, bail cannot be given if the prosecution opposes it, and unless the court is satisfied of the accused person's innocence. This withdrawal of existing safeguards and dilution of evidence, decreases the threshold of proving guilt, encourages shoddy investigation and tilts the trial disproportionately in favour of the prosecution.[25]

A distinctive pattern has, however, emerged in the operation of extraordinary laws, lending to a normalization – that of an interlocking between the ordinary and extraordinary laws. Extraordinary laws, for example, often carry specific provisions whereby the accused may be simultaneously charge-sheeted and tried for violation of other (ordinary) laws in a common trial. Like other anti-terror laws, POTA worked on the principle that terrorist acts cannot be proved by ordinary means and they require extraordinary measures. POTA, therefore, permitted the inclusion of evidence that could not otherwise be admitted under the ordinary law, e.g. confessions to a police officer and telephonic interceptions. In the Parliament Attack case, telephonic interception formed a crucial part of the evidence against the accused. The defence successfully challenged the admissibility of this evidence in the High Court on the ground that the safeguards laid down in POTA were not followed. Significantly, the judgment by the POTA court, while submitting to the decision of the High Court, concluded that its admissibility could be considered for offences under other Acts. It subsequently considered the interceptions under the Telegraph Act and, along with confessions, admitted them as evidence against the accused, sentencing three of them to death.

This brings us to yet another instance of interlocking in the Parliament Attack case. It is important to note that while one of the accused, SAR Gilani, had made no confession, the confessional statements of two others, Afzal and Shaukat, had been collected under POTA. While admitting that confession by co-accused was not 'evidence against Gilani', the POTA court judge nonetheless used it against the

latter citing the following grounds: 'u/s 30 of Evidence Act the court can look into this confessional statement to lend assurance to other circumstantial evidence' (Judgment: 253). While confession by co-accused could be used as evidence under TADA, POTA had come with a safeguard whereby confession by co-accused could not be used as evidence against the accused.

In the POTA case *State vs. Mohd. Yasin Patel alias Falahi and Mohd. Ashraf Jaffary* discussed earlier, one can see how the interlocking between POTA and UAPA 1967 allowed the discarded ground of 'disturbing peace and communal harmony' to sneak almost imperceptibly into POTA, broadening thereby the scope of the Act. The two accused in the case were members of SIMI, an organization banned under UAPA. The government notification banning SIMI stated that the latter had been indulging in activities that were prejudicial to the security of the country and had the potential of disturbing peace and communal harmony and disrupting the secular fabric of the country. It should be noted that the accused were arrested on 27 May 2002 under UAPA. Since SIMI was also a banned organization under Section 18 of POTA, four days later the accused were booked under POTA. Investigations against them were conducted under POTA, and they were subsequently sentenced under section 20 of the Act. The proceedings against SIMI effectively made communal disharmony a punishable offence under POTA.

V. The Report of the Malimath Committee and the fudging of boundaries

With the Malimath Committee Report (2003), one sees the most explicit manifestation of the process of normalization of the extraordinary. The Committee's recommendations, as its terms of reference indicate, intended to reform the criminal justice system so as to bring it 'into harmony with the aspirations of the people', which included, 'simplifying judicial procedures and practices', 'closer, faster, uncomplicated and inexpensive' delivery of justice to the common man, 'making the system simpler, faster, cheaper and people-friendly' and 'restoring the confidence of the common man' (Report: 3–6).

Declaring at the outset its dislike for a law that 'should sit limply', while those who defied it went 'scot free', the report sets out to make recommendations that allow for the creeping into the ordinary law of provisions that are specific to laws catering to extraordinary situations and theoretically limited in their scope and temporality. In the process it not only makes a case for a reversal of the philosophical premises of criminal jurisprudence, but also proposes the inclusion in the Criminal Code, through amendments and additions, of some of the most controversial and contested extraordinary procedures for crimes of an 'ordinary nature'.

A direct offshoot of the proactive role for the judge envisaged by the Committee is the truncation of the 'right to silence' of the accused guaranteed under Article 20(3) of the Constitution. This right, the Committee felt, was an impediment in the quest for truth, as the accused in most cases was 'the best' and 'critical source of information', which the judge was bound to tap (Report: 267). It is interesting that this 'tapping' is envisaged as *a non-coercive* exercise despite the fact that failure to answer in a convincing way was to be seen as evidence of guilt, allowing the court to draw

inverse reference against the accused. Augmentation of the inquisitorial capacity of the judge to elicit information from the accused is sought by the Malimath Committee by bringing it in line with section 27 of POTA that authorizes the Special Court to take from the accused fingerprints, footprints, photographs, blood, saliva, semen, hair, voice samples, etc.

This induction of the inquisitorial role of the court is accompanied by recommendations enhancing the role of the police. Suggestions under the head *Investigations* ask for the inclusion of provisions which are specific to extraordinary laws and have drawn criticism for circumscribing the right to life and liberty of citizens. It is significant that nowhere does the Committee express the slightest apprehension about abuse of powers by the police, and the likelihood of the increase in custodial violence with the inclusion of this provision in the Criminal Code. On the contrary, the Committee goes a step further to expand police powers by suggesting an amendment in section 167 of the Criminal Code, which fixes 90 days for the filing of the charge-sheet, failing which the accused is entitled to be released on bail. The modified section, under the Committee's recommendation, would empower the court to extend the same by a further period of 90 days 'if the court is satisfied that there was sufficient cause', in cases where the offence is punishable with imprisonment above seven years. This suggestion again seeks to bring the Criminal Code in line with the stringent bail conditions that exist in extraordinary laws like POTA (Report: 275). Apart from confessions before a police officer, laws like POTA consider electronic interceptions as valid and reliable evidence under the Act. The Malimath Committee recommends that 'a suitable provision be made on the lines of sections 36 to 48 of POTA, 2002 for interception of wired, electric or oral communication for prevention or detection of crime' (Report: 276).

VI. Terrorism and organized crime: spot the difference

Before POTA was brought onto the Statute books, debates surrounding it identified the failures of TADA to point out either the futility of anti-terror laws, or conversely, to work out a law that was more effective than TADA. The quest for effective law meant an imbrication with laws enacted to deal with organized crime. Subsequently, POTA came along with extraordinary provisions that were hitherto part of Acts like The Maharashtra Control of Organised Crime Act, 1999 (MCOCA) which boasted of 76 percent conviction rates as opposed to the paltry conviction rates in the ordinary law and the lapsed TADA. It may be pointed out that the provisions of the Act that made it efficient and a model for emulation were precisely the ones that also made it draconian and extraordinary.

In the course of his speech initiating the motion for the consideration of POTA, the then Deputy Prime Minister and Minister for Home Affairs, Lal Krishna Advani, declared:

> It is also true that one single provision which has been incorporated in MACOCA [sic], that intercepts or intercepted communication would be deemed admissible evidence, has changed the whole perspective . . . . (Debates, Joint Sitting: 17–18)

In a replication of Sections 13 to 16 of MCOCA that authorized interception of wire, electronic or oral communication, POTA came with detailed provisions pertaining to interception of communication. The distinction between POTA and MCOCA, however, as emphasized in the debates in Parliament lay in the definition of 'organized crime':

> The definition of organized crime has nothing to do with the definition of terrorism. *These are two different concepts*. . . . 'Organized crime' under MCOCA means 'any continuing unlawful activity by an individual'. *Before anything becomes an organized crime, the prosecution has to show continuing unlawful activity, which is also defined under the Act but there is no such definition under POTO because you do not have to do any continuing unlawful activity to be a terrorist*.[26]

While the concept of terrorism is indeed different from that of organized crime, the definitions of the two remain equally diffuse, leaving open possibilities of slippage. Even if the distinction made above was taken into account, there are ample grounds for slippage, permitting the use of the Act against 'terrorism'.

A careful reading of a Supreme Court Judgment of 2002 in a TADA case (*Jayawant Dattatrya Suryarao vs. State of Maharashtra*) is illustrative of how overlapping may occur: The case involved an incident of shoot-out in Mumbai's J. J. Hospital campus on 12 September 1992. According to the prosecution,

> . . . the accused persons *belonging to a criminal gang, engaged in organized crimes, extortion of money, smuggling, drug trafficking and eliminating or injuring persons* who do not follow their dictates, having made preparation, such as procuring sophisticated weapons like AK-47 rifles, pistols, revolvers, dynamite and hand grenades and by firing the shots through the said weapons, *committed murder of a person belonging to a rival gang* who was admitted in the hospital for undergoing treatment as well as two policemen who were on guard duty there.[27]

The five accused in the case were charged under Sections 3(1) [strike terror in the people, overawe the government] and 3(4) [harbouring terrorists] of TADA and Sections 302 (murder) and 212 (harbouring offender) of IPC. The Counsel for defence attempted to distinguish the offence of the accused from 'terrorist activities' questioning thereby the appropriateness of the application of TADA: 'there is nothing on record that the accused intended to create any terror', 'at the most intention to commit murder could be inferred', 'there was no question of creating any terror in the mind of the public at large' (p. 924). In their judgment, however, the judges held to the position that the offence amounted to 'terrorist activity' and TADA was indeed applicable in the case. The judges put forward the position that it is not possible to define 'terrorism' by precise words, what constituted terrorist activities had to be 'inferred from facts and circumstances of each case' since there would generally be no direct evidence [of terrorist activity].[28]

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VII. Repealing POTA and amending UAPA

MCOCA, we have argued, was largely seen as providing a modular template of efficiency for POTA, slipping into anti-terror law provisions that formed part of the laws dealing with organized crime. In this section we shall see how the repeal of POTA was accompanied by the importation of POTA provisions into the UAPA 1967, giving permanence thereby to measures that were brought in as temporary. On 21 September 2004, the President promulgated two Ordinances, repealing POTA a month before it was to come up for legislative review, and amending the provisions of the Unlawful Activities Prevention Act (UAPA) 1967, respectively. In Parliament's winter session both Houses gave the Ordinances their approval, confirming the removal of POTA from the statute books and the replacement of UAPA 1967 by UAPA 2004.

Considering that it was the first time that an anti-terror law was being repealed, TADA having been allowed to lapse in 1995, by bringing in these changes through Ordinances the government sought to send out a message of having kept its election promise of repealing POTA, and at the same time having adhered to the CMP that sought to repeal POTA while simultaneously amending and strengthening 'existing law' for continued 'fight against terrorism'. It may be recalled here that the spectre of a 'legal vacuum' in dealing with terrorism had been raised persistently after TADA lapsed in 1995. The repeal of POTA alongside the passage of the UAPA 2004 incorporating POTA provision has confirmed a dangerous trend of making temporary and extraordinary measures part of the ordinary legal system, evident in the recommendations made by the Malimath Committee. The inclusion of extraordinary provisions in the ordinary law of the land not only gives permanence to temporary measures brought to deal with specific situations, it also ends the periodic legislative review that extraordinary laws go through for their extension.

POTA has not been repealed with retrospective effect. Cases already registered under the Act have been sustained and put through a time-bound review process. An especially empowered Review Committee has been provided for, to identify *appropriate* POTA cases for continued trial. The task of review has to be completed within a year. The Review Committee has the powers of a Civil Court, and can order the production of specific documents or requisition public records from any court or office. Thus, while the repeal of POTA has meant the elimination of the system of parallel justice that the Act had set up, and the reinstatement of the due process laid down in the *Criminal Procedure Code*, 1973 in matters of arrests, bail, confessions and burden of proof, the fact that the Act has not been rolled back, i.e. not repealed with retrospective effect, has led to a situation where a new and complicated procedure has supplanted the existing review process.

The unfolding of specific cases under POTA in different stages of investigation and trial continues to raise a quandary, which has deepened after the setting up of the Central Review Committee under the Repeal Act, opening up zones of contest. The struggle between the executive and the judiciary for primacy, especially in cases which have gone beyond the stage of executive sanction for initiation of legal proceedings to trial under the law, and, on the other hand, resistance by respective state

governments against interference in 'their' POTA cases by the Central government, has continued. The post-POTA repeal development in the Godhra case has shown that the decision of the Central Review Committee that no *prima facie* case under POTA existed against the accused and that POTA charges against them should be dropped, has met with resistance. The Gujarat government rejected the observations and recommendations of the Central POTA Review Committee and, on 31 May 2005, the Special Public Prosecutor, while placing the opinion of the Central POTA Review Committee before the designated court in Ahmedabad, argued that the prosecutor was not compelled to agree with the findings of the Review Committee. Moreover, the primacy that the Central government had sought in matters pertaining to invocation and withdrawal of POTA in specific cases, continued to be resisted, as the government's counsel reiterated the position that 'the review committee cannot interfere in the judicial process . . . It can address the State government that the case is fit to be withdrawn and its role extends only that far'.[29]

VIII. The Unlawful Activities Prevention Act, 2004: the silent erosion

The UAPA 2004 substituted four new chapters for Chapter IV of UAPA 1967 to include 'terrorist activities' alongside 'unlawful activities', specifying different procedures to deal with each. With this substitution, specific provisions of POTA pertaining to definition, punishment and enhanced penalties for 'terrorist activities', and specific procedures including the banning of 'terrorist organizations' and interception of telephone and electronic communications, were inducted into UAPA. The inclusion of POTA provisions pertaining to 'terrorist activities' and 'terrorist organizations' ensured that the amended UAPA, like POTA and TADA before it, replicated offences already listed under the ordinary law as 'terrorist'. The use of explosives, disruption of community life and destruction of property, for example, are already punishable offences under the law. Similarly, sedition and waging war are offences under Sections 124-A and 121 of the *Indian Penal Code*. We may recall that POTA had replicated offences, which were already part of the UAPA, 1967. This replication ensured that a range of activities could be converted into terrorist crimes, subject to special procedures of investigation and trial, and enhanced punishment. The Parliament Attack case showed that the charges under ordinary law when augmented by charges under POTA brought them the maximum possible punishment under POTA in the Special POTA Court judgment. The augmentation or 'strengthening' of UAPA 1967 as UAPA 2004 has inverted the process whereby POTA has flowed into UAPA changing the character of the Act. From here on, there can be seen a trend whereby emergency provisions become incorporated into the ordinary criminal law which then becomes the standard, to which future extraordinary laws must adhere or surpass.

The consequences of this strengthening, and the standards made acceptable in ordinary law, are not hard to gauge. Apart from the fact that the permanence given to extraordinary provisions has removed them from periodic legislative review, their induction into UAPA has not been accompanied by the induction of commensurate safeguards. Thus whereas POTA provisions that were especially insidious have been

dropped, namely confessions to a police officer and the period of police and judicial remand before bail could be given, the provision giving evidentiary value to telephone tapping has been retained, without the elaborate safeguards that were provided in the repealed POTA.

Apart from replication, the UAPA also comes with an innovation – extra-territoriality. A careful reading of the definition of terrorism in POTA and UAPA shows that the latter comes with provisions that enhance the scope of the territorial jurisdiction of the Act, extending the law to terrorism in foreign territories. The scope of terrorist activities is no longer confined to acts that strike terror or disrupt supplies of essential services, for the Indian people or in the territory of India, or with the intention of 'compelling' the Government of India. In each case 'terrorist activity' is widened to include people and the life of the community in India *and* in any foreign country, and the Government of India *or* the Government of a foreign country. This insertion of extraterritoriality may appear to suggest partnership in and a commitment to the United Nations resolution calling for international cooperation against 'global terrorism'. In actual practice, however, this is bound to affect the law of extradition and refugee protection.[30]

The process of replication and augmentation in the UAPA 2004 has, however, given rise to a strange contradiction within the Act. The UAPA 2004 imports the provisions prescribed in POTA for banning terrorist organizations, adding a separate chapter on 'terrorist organizations' and specifying the procedure for their banning. Thus the UAPA as amended now has two different kinds of banning – a simple one for banning 'terrorist organizations' imported from POTA, and a relatively complicated one for banning 'unlawful organizations' persisting from UAPA 1967. This basically means that while banning an organization for unlawful activities has inbuilt mechanisms of control, such safeguards are absent when banning an organization as 'terrorist'. Considering the interlocking between the UAPA 1967 and POTA as discussed earlier, where organizations banned as unlawful under UAPA came under the purview of Chapter III of POTA consisting of Sections 18 to 22 pertaining to offences relating to membership of terrorist organizations, it is likely that in future more organizations will be banned as terrorist than merely as unlawful. Moreover, the procedure for de-notification of terrorist organizations as laid down in Section 19 of POTA and retained in UAPA 2004 (Sections 36–7) are equally tedious. It must also be noted that the provision of a Review Committee in UAPA 2004 under Section 37 is only for the purpose of denotification of a terrorist organization and not for the review of cases of 'terrorist activities'.

Conclusion

Democracy in India is rooted in liberal constitutionalism and the doctrines of rule of law are accepted as the guiding principles of government. The definition of extraordinary situations, and the response to these situations through a separate set of laws are justified as *necessary* exceptions to the rule of law. Terrorism has provided the most plausible justification for enhancing the powers of the state through extraordinary laws. These laws greatly enhance the coercive powers of the state,

which makes itself manifest in the daily lives of the people, effects changes in the structures of governance, and ushers in a politics of suspicion and distrust.

POTA, as stated at the outset, unfolded in such a way that competing visions of politics were marked out as antagonistic. The resolution it sought was not through deliberation or recognition of difference, but through elimination and externalization of difference. Extraordinary laws thus are manifestations of a politics of negation.

Anti-terror laws in India as elsewhere in the world have generally been associated with specific contingencies or circumstances that are presented as justification for the extraordinary procedures and enhanced penalties that the Acts sanction for crimes that are also punishable under the ordinary law of the land. The ongoing and proposed changes in the criminal justice system indicate a pattern whereby the coercive aspects of the state are being progressively strengthened. The arming of the state with greater powers of surveillance and control over citizens prepares the ground for authoritarianism, albeit through the democratic path. This pattern shows that a 'strong' state is not necessarily the outcome of military takeover. More dangerous perhaps is the donning of 'authoritative control' by the state, sustained by claims of preserving democracy and representing the will of the people. While the repeal of POTA is welcome, the UAPA by including POTA provisions has confirmed a dangerous trend of erosion – that of making temporary and extraordinary measures part of the ordinary legal system. The manner in which the repeal of POTA has been conceived, as well as the normalization of 'extraordinary' situations and measures through incorporation in ordinary law are dangerous for democracy. They pose a permanent threat to the personal liberties of ordinary citizens and clear the way for an invasive, intrusive and hegemonic state.

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Notes

1. The NDA alliance was led by the right wing Bharatiya Janata Party (BJP). The UPA, a coalition led by the Congress party, formed the government with the support of the left parties. The left parties, however, remained outside the coalition government.
2. Unlike the Supreme Court and High Court judgments and orders which are published, the lower court judgments can be procured only through the court registry.
3. Judgment July 2003: 37, emphasis added.
4. An Indian school for Quranic studies which corresponds to a muslim 'madrasa'.
5. Judgment July 2003: 35ff.
6. The case is commonly known as the Parliament Attack case. On 13 December 2001 five armed men drove into the precincts of the Parliament House, killing nine members of the Parliament watch and ward staff and injuring sixteen others, before they fell to the bullets of the security men. This attack was widely portrayed as an attack on Indian democracy. The investigation, which was handed over to the Special Cell of the Delhi Police the day of the attack, implicated four people: (1) Mohammad Afzal, a former JKLF militant who had surrendered in 1994, (2) his cousin Shaukat Hussain Guru, (3) Shukat's wife Afshan Guru (Navjot Sandhu before marriage), and (4) SAR Gilani, a lecturer in Arabic in a college at Delhi University. In addition to the four accused, three others were

charged in the case, including Jaish-e-Mohammed chief Maulana Masood Azhar, who had been released by the NDA government in response to the hijacking of the Air India plane IC 814, and Azhar's aides, Ghazi Baba and Tariq Ahmed. The latter were declared proclaimed offenders and were not part of the trial. The accused were tried under Sections 121 (waging War), 121A (conspiracy), 122 (collecting arms, etc., to wage war), 123 (concealing with intent to facilitate design to wage war), 302 (murder), 307 (attempt to murder) read with 120B (death sentence for waging war). The charges under POTA added later pertained to sections 3 (punishment for terrorist acts), 4 (possession of certain unauthorized arms), 5 (enhanced penalties for contravening provisions or rules made under the *Explosives Act*, 1884, *Explosive Substances Act*, 1908, *Inflammable Substances Act*, 1952, or the *Arms Act*, 1959), 6 (confiscation of proceeds of terrorism), 20 (offences dealing with membership of a terrorist organization). The case was brought before a Special POTA Court in Patiala House, Delhi, under Justice S. N. Dhingra on 22 December 2001. The trial started on 8 July 2002 and continued on a daily basis. Arguments concluded on 18 November 2002, the conviction took place on 16 December 2002 and on 18 December three of the accused were sentenced to death, and the fourth (Afshan Guru) given five years' rigorous imprisonment. After their conviction by the Special Court, the accused went on appeal to the High Court. The High Court gave its verdict on 29 October 2003, upholding the death sentence on Mohammad Afzal and Shaukat Hussain, and enhancing their punishment under Section 121 of IPC. It exonerated S. A. R. Gilani and Afsan Guru. The Supreme Court Judgment delivered on 4 August 2005 on the appeals by the prosecution and Shaukat Hussain and Mohammad Afzal, against the exonerations and sentence respectively, dismissed the former, sustained Afzal's death sentence, and commuted Shaukat's death sentence to ten years of rigorous imprisonment. The review petitions filed against the order by the Delhi police and Afzal were dismissed by the Supreme Court on 22 September 2005.

7. In this case, an explosion of a car bomb, on 11.9.1993, near a place from where the car of the then President of the Indian Youth Congress (I) was passing, resulted in the death of nine persons and injury to several others. The investigations implicated 5 persons, all members of the Khalistan Liberation Front (KLF), in a conspiracy to assassinate the Youth Congress leader. Devender Pal Singh was awarded the death sentence by the Designated TADA Court on 24.8.2001, which was upheld by the Supreme Court by 2:1 majority, in the above judgment. See *Supreme Court Cases* (Criminal), Part 7, July 2002, pp. 978–1014.
8. Like POTA (Section 32), Section 15 of TADA permitted certain confessions made to police officers to be taken into consideration. Unlike POTA, however, TADA allows under Section 21(c) that a confession made by a co-accused that the accused had committed the offence, shall be considered as 'Presumption as to offences under Section 3 (Punishment for terrorist acts)'.
9. *Devender Pal Singh vs. State of NCT of Delhi*, *Supreme Court Cases*, op. cit. Note 9, p. 978, emphasis added.
10. 'The Necessity for a Permanent Anti-Terrorist Law', Working Paper on Legislation to Combat Terrorism, Annexure I, 173rd *Report of the Law Commission on India on the Prevention of Terrorism Bill*, April 2000, p. 32.
11. For a fuller exposition of this theme see Balagopal (2000).
12. 'Objectives and Reasons', POTA 2002.
13. The majority of POTA cases in Gujarat have resulted from its application in the Godhra case involving the burning of a train, in which 125 Muslim men are charge-sheeted. On 27 February 2002, coach S.6 of the Sabarmati Express was burnt in Godhra, Gujarat, leading to the gruesome death of 59 persons, some of whom were 'karsevaks' returning from Ayodhya. This was followed immediately by a communal onslaught against Muslims in several districts of the state for more than three months.
14. The Malimath Committee, as the Committee for the Reform of the Criminal Justice System is commonly known in India, was constituted in November 2000 and submitted its report in April 2003, suggesting reforms in the Code of Criminal Procedure (1973), The Indian Evidence Act (1872) and the Indian Penal Code (1880).
15. The essential form of the two main codes of law – the *Code of Criminal Procedure* of 1898 (amended in 1973) and the *Indian Penal Code* of 1860 – drawn up during colonial rule, continue to operate in inde-

pendent India. The *Official Secrets Act* of 1923 (an amendment in 1967 enhanced most of the offences punishable under the Act with greater sentences of imprisonment) and the *Dramatic Performances Act* of 1876 are other examples. For a detailed study see Banerjee (1991: 226–35).

16. Section 3(1), *Defence of India Act*, 1962. Section 30(1)(b) dealt with preventive detention. The Act and the rules were modelled on the lines of the *Defence of India Act*, 1935. The Supreme Court declared the Act *intra vires* in the *Mohan Singh v. State of Punjab* case. *All India Reporter* (henceforth *AIR*), 1964, SC 381.
17. On 10 August 1970, the West Bengal government applied the *Bengal Suppression of Terrorist Outrages Act* of 1936 – a colonial law used against the revolutionaries – giving the police extraordinary powers of arrest and detention for terrorist activities, possessing arms or literature propagating such thoughts. In November 1970, the *Prevention of Violent Activities Act*, directed towards debilitating the mass organization of the CPI(ML) and CPI(M), was promulgated.
18. On 7 May 1971 the President promulgated the *Maintenance of Internal Security Ordinance*, 1971. Two months later, the Parliament passed the *Maintenance of Internal Security Act*, 1971 which became effective from 2 July 1971, authorizing the Central government to order the detention of a person, if satisfied, that such person is acting in a manner prejudicial to: (1) the defence of India, the relations of India with foreign powers, or the security of India, or (2) the security of the state or the maintenance of public order, or (3) the maintenance of supplies and services essential to the community. *MISA*, Section 3(1)(a).
19. The *Armed Forces (Special Powers) Regulation* 1958 was specifically promulgated in April 1958, to suppress the Naga movement. The Regulation gave special powers 'to officers of the armed forces in disturbed areas in the Kohima and Mokokchung districts of Naga Hills–Yuensang Area' while making the officers at the same time immune from 'prosecution, suit or other legal proceedings in any court of law' in respect of anything done in any part of Kohima or Mokokchung district of the Naga Hills–Tuensang Area with a retrospective effect from 23 December 1957. A similar Act was passed for the states of Assam and Manipur (*The Armed Forces (Assam and Manipur) Special Powers Act* 1958 No. 28 of 1958 (11 September 1958)). A disturbed areas legislation was enacted for Punjab in December 1983 (*The Punjab Disturbed Areas Act*, 1983 amended in 1989) to put down the movement for a separate state.
20. See Bayley (1962: 25).
21. See *Lawless Roads* (PUDR, 1993).
22. Mrinal Talukdar, 'TADA lives on in Assam Jails', *Indian Express*, 20 October 1999, p. 4.
23. For a more detailed discussion of this theme, see Singh (2004a).
24. (Baxi, 1982: 30).
25. See *Trial of Errors: A Critique of the POTA Court Judgment on the 13 December Case* (PUDR, 2003a: 4).
26. Kapil Sibal, responding to criticisms leveled at the Congress for its stand against POTA, while continuing the operation of MCOCA in Maharashtra (Debates, Joint Sitting: 105)
27. *Supreme Court Cases* (Criminal) 2002: 898, emphasis added.
28. *Supreme Court Cases* (Criminal) 2002: 925. Arguments given by judges in response to similar contentions by counsels of defence may be found in other cases, e.g. *Hitendra Vishnu Thakur vs. State of Maharashtra*, SCC (Cri) 1087, and *Girdhari Parmanand Vadhava vs. State of Maharashtra*, SCC (Cri) 159.
29. 'On Godhra, Gujarat rejects POTA review panel report', *Indian Express*, 10 June 2005.
30. In 2002 the Government of India deported several Nepali students and journalists to Nepal, despite the fact they were likely to be politically persecuted in their home country.

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