

**SUBMISSIONS TO THE REVIEW COMMITTEE ON POTA
BY COMMONWEALTH HUMAN RIGHTS INITIATIVE¹**

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Considerable concern was expressed about the possibility of misuse of POTA when the government enacted it. This concern was based partly on the experience with TADA and partly on the contents of the law itself. Despite government's loud protestations that the law contains a number of safeguards, the short history of its use proves that the concern of different groups was not misplaced. The implementation of the Act in fact shows that it has been misused for incarcerating political opponents, to serve communal purposes, and without application of mind against innocent citizens including minors.

POTA AS A TOOL OF POLITICAL EXPEDIENCY

The arrest of the MDMK leader and MP Vaiko under Section 21 of POTA shows the wide scope for misuse, which is built into the law itself. Mr. Vaiko had merely stated that he "would continue to support the LTTE." The LTTE is a banned terrorist organization and any person acting or speaking in support of such an organization invites penal consequences under POTA. The point is not that Ms. Jayalalitha was motivated by political vendetta in going after her political rival; the point is that the law made it quite easy for the CM to do so. In fact the faux pas of the Central Government in the Supreme Court, where they first agreed that Vaiko had committed an offence under POTA, but later, on facing opposition from the coalition partners, argued that Vaiko's observations did not attract POTA provisions, only mocks at the claims that the law is unambiguously clear with enough safeguards to prevent its misuse. The Government has been interpreting the Act according to the dictates of political expediency in a given situation and time.

This conclusion is further substantiated by numerous other cases that have occurred in the past year.

The arrest of R.R. Gopal, the Tamil bi-weekly *Nakkeeran* editor, under POTA after alleged recovery of an unlicensed revolver is one such case. Then there is the arrest of the independent M.L.A. Raghuraj

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Pratap Singh alias Raja Bhaiya and his father under POTA in U.P. Raja Bhaiya was a law unto himself till he tried to organise a revolt of MLAs against Ms. Mayawati, the then CM, U.P. The moment he failed in this attempt, he became a terrorist and was put behind bars under POTA. With the recent shift in the regime, one of the first steps that the new Chief Minister took was to order the removal of the POTA charges against Raja Bhaiya. The recent political drama in U.P. thus clearly exposes POTA for what it is, a tool of political expediency.

When the Centre is questioned regarding its abuse, it washes off its hand by stating "It's up to the states how they implement it". The Home Ministry is on record having admitted that it had no figures about the number of arrests made under POTA, as the implementation of the law was the responsibility of states. This shows that the central government is not even making any attempt to monitor how this law is being used in different areas.

POTA TO DISCRIMINATE BETWEEN CITIZENS ON THE BASIS OF RELIGION

The governments have been applying POTA selectively not only against individuals, but also against communities. The evidence of the most unapologetic and discriminatory application of the POTA can be seen in the way it was used in Gujarat. All 240 cases of POTA in Gujarat have been filed against minorities and all but one of these has been filed against Muslims. Most of them have been languishing in prisons for more than a year. In contrast, despite the most brutal post Godhara carnage in which more than 2000 persons were butchered, not even one of the accused is being prosecuted under POTA.

Thus in Gujarat, members of the minority community shall be tried under an extra-ordinary law meant for terrorism for the heinous crimes that they committed, while the accused from the majority community, who committed equally heinous crimes shall be tried under the ordinary laws. This arbitrary discrimination in the application of POTA to two groups of citizens committing equally horrendous crimes violates the basic principles of rule of law. And it is no use arguing that the law is good but some political parties are not implementing it properly. A law, any law is only as good as the manner in which it is implemented and if POTA is not implemented properly, if it leaves wide gaps that can be abused by the executive; then it needs to go.

NON-APPLICATION OF MIND IN THE IMPLEMENTATION OF POTA

The misuse of this law need not be motivated by political or communal² considerations. The law is so bad and so conveniently easy and tempting for the law enforcement authorities to misuse it, that they will do it with even non-application of mind. The use of POTA in Jharkhand glaringly illustrates this approach. Hundreds of innocent citizens, including minors, have been arrested under this law in that state. In fact, doubts have arisen about the number of those languishing in jails under POTA. Though the state government maintains that only 207 persons have been booked, independent observers claim that about 3,200 persons have been framed under the notorious legislation. The Tribune, dated 7th March 2003, in its editorial mentions that the Jharkhand Government has the dubious distinction of arresting 12 boys, one of them being 12-year-old Gaya Singh, and even 81-year-old Rajnath Mahto under POTA. The March 2003 issue of The Week in its story titled "Catch 'em Young" reports many instances of abuse of POTA where young children were booked under the draconian Act. While in certain cases these children were arrested under the "extra-ordinary law" on mere suspicion, in others they were booked merely because their parent belonged to a banned organization, irrespective of the fact whether the said parent had any links with the family or not!

Vinod Singh, 12, of Maradang village in Latehar district was arrested when he had gone to graze cattle with his four friends and was beaten up mercilessly by the police. Jata Bhuia of Tirkuldiha village in Garhwa district was arrested under POTA after his cousins filed a complaint against him in a land dispute. Ropul Kumari, 17, of Tita Manotitoli village in Gumla district committed a crime in challenging the patriarchal set-up in her village and tried to organise women against it. The elders complained to the police that she was a member of the

² In fact, a recent news item in the Hindustan Times quoted a report that claimed that all but one of those charged under the Prevention of Terrorism Act (POTA) in Gujarat are Muslims. "Of the 240 people booked under the act, which carries the death penalty, 239 are Muslims while one is a Sikh, a newspaper reported. Muslims have been booked for three different attacks on Hindus, including the burning of Sabaramati Express at Godhra last year, the attack on Ahmedabad's Akshardham temple and the murder of former minister Haren Pandya" http://www.hindustantimes.com/news/181_376452.000900040003.htm

MCC. The police raided her house several times but failed to find any incriminating documents. Then, her father was brutally beaten up. With no option left, Ropul surrendered before the police, who booked her under POTA. Deo Sharan Mahto of Madheya village in Palamu district was arrested last July 18. When his pregnant wife questioned the police action, she was beaten up and their house ransacked. She suffered a miscarriage soon after. The only fault of Janaki Bhuia, 14, of Garikela village under Keredari police station, was that his father, Sohan, was associated with the MCC. It did not matter to the police that Sohan had not visited his family for the past three years. Janaki was arrested in the last week of December 2002. His mother had been arrested three months earlier but was released once the son turned himself in. These are but a few examples of the extent of abuse to which this extra-ordinary law is being put to.

The Jharkhand government recently decided to drop charges against many of those arrested under POTA. According to Chief Secretary G. Krishnan 207 people had been arrested in 125 cases under POTA till February 15. Four of them had died and five granted bail. Krishnan said that the charges may not stick on at least 83 POTA detainees who were arrested for supporting Naxalite outfits.

Chief Minister Marandi is apparently planning to ask district police chiefs to book only hardcore Naxalites under POTA. All the same, he dismissed allegations that POTA was being misused by the police. "In some cases minors have been arrested," he admitted. "But it was not with any bad intention."

If this can be the havoc that this legislation is capable of causing in cases where the police was "not having bad intention", imagine a situation where the police has a bad intention! Union Law Minister and the Home Ministry have said umpteen times that there are adequate in-built safeguards to prevent its misuse, but this is unbelievable. Its abuse is becoming more and more pronounced with each arrest.

PRE-DESTINED TRIALS WITH PRESUMPTION OF GUILT OF THE ACCUSED

The problem with this legislation is that through its unique provisions relating to presumption of guilt, admissibility of confessions before the police etc., it makes it very difficult for the court to release those who are arrested even though they may be innocent. A glaring example of this is the trial and conviction of Prof S A R Geelani in the Parliament

attack trial. The chargesheet against him stated that Geelani had received a call on his mobile phone on December 14 from Kashmir and 'while talking in Kashmiri language, supported the attack on Parliament. The transcription was translated in Hindi.' The other charge against Geelani was that he had been in touch with the other two persons who had been arrested, Mohammad Afzal and Shaukat Guru.

Despite the fact that the Supreme Court has laid down in many cases that absence of proper sanction to intercept communications is fatal to the prosecution case, the Sessions Court allowed the evidence of tapped conversation to be admitted in court. Further the prosecution produced one Rashid as a witness who had translated the conversation for the special branch. Rashid, who is educated up to class 6 and did not know Hindi well, informed the court that the tapped conversation did not include any English words and that therein Geelani had told his younger brother, while referring to the attack on Parliament, that the attack was necessary. Geelani admitted having a conversation with his brother on December 14. However, according to him, the conversation did not even refer to the attack and that his brother had called to ask for a copy of the syllabus and prospectus to be sent to Kashmir. Geelani requested the judge to hear the tape for himself so that he could hear the English words "prospectus" and "syllabus". The judge refused his request. Geelani also explained that he knew the other two accused merely as acquaintances as they all hailed from Baramulla district and lived in Mukherjee Nagar and that this could not imply a shared politics.

On 16th December 2002, the sessions court delivered its judgement holding all the four accused guilty and on 18th December, it awarded death penalty to the first three accused, including Geelani³.

ALLEGATIONS OF MISUSE RESULT IN SETTING UP OF THE REVIEW COMMITTEE

On March 13th, 2003, the Government announced the setting of this Review Committee to take a comprehensive view of the use of this legislation in various States and give its findings and suggestions for removing the shortcomings in the implementation of this law.

³ Facts taken from a piece titled "December 13" by Nandita Haksar and K. Sanjay Singh, members of the All India Defence Committee for Syed Abdur Rehman Geelani, with Professor Rajni Kothari as the Chairperson. See:

<http://www.india-seminar.com/2003/521/521%20nandita%20haksar%20&%20k.%20sanjay%20singh.htm>

In our view, the most glaring shortcomings of the legislation that need to be addressed are as follows:

I. LOOSE DEFINITIONS WITH EXTREMELY WIDE AMBIT

DEALING WITH TERRORIST ACTIVITIES

Section 3 defines acts "intended" to "threaten the unity, integrity, security and sovereignty of India" or "strike terror in the people or any section of the people" as terrorist acts. Besides the fact that this definition is very loose, the power to determine who is a terrorist is solely in the hands of the police and the political party in power. Such a law is clearly violative of Article 14 of the Constitution as it denies people equality before law. Under this law, protest can be interpreted as terrorism and political opponents as terrorists. From Raja Bhiaya's case to Vaiko's case, the same has been demonstrated across the length of the country. The Union Law Minister has been stating again and again that unless a person has the "intent" to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people, he/she cannot be booked under Section 3(1). However, the fact remains that the crime or prosecution under this Act shall be based on the interpretation of the law-enforcers of the intent behind that action. When the police suspect a person of having a particular intention, POTA can be invoked and the person has to spend years in jail before a court of law decides whether he actually is guilty of having that intention or not. Let us learn from the experience of TADA. The total number of detenus under TADA numbered around 76,000. Of these 25 per cent were dropped by the police without framing charges; trials were completed in only 35 per cent of the cases and 95 per cent of these trials ended in acquittals. The conviction rate was less than 1.5 per cent. The definition of terrorism under TADA was not much different from the present definition except that the former also covered the intent to "adversely affect the harmony amongst different sections of the people" and POTA does not include this.

Recommendations: Apart from other changes that the Government may deem relevant to tighten the ambit of the definition of terrorist activity, CHRI is of the opinion that a proviso be added to the definition that states that a "terrorist act" does not include an act, if such act is lawful advocacy, protest, dissent or industrial action. Another addition that is recommended is the inclusion of the intent to adversely affect the harmony amongst different sections of the people as it existed under TADA within the definition of terrorist act in POTA.

Section 3(4) provides punishment for "*Whoever voluntarily harbors or conceals, or attempts to harbor or conceal any person knowing that such person is a terrorist...*" The only exception is the spouse of the terrorist. However, the parents and children (including minors) of an alleged terrorist can be prosecuted under this provision even if the latter merely visits them.

Recommendations: It is recommended that near relatives like children and parents should also be exempted from prosecution for harbouring or concealing persons known to be terrorists.

Section 3(5) provides punishment for "*Any person who is a member of a terrorist gang or a terrorist organisation, which is involved in terrorist acts*" and defines terrorist organization as "*an organisation which is concerned with or involved in terrorism*". For a provision that imposes a sentence of life term for mere membership of a terrorist gang or organization, this definition is very loose. Almost any organization can be covered under this clause to suit the political interests of those in power and a person can be deprived of his liberty for mere membership. To make it worse, the provision does not even define what constitutes "membership" to such an organisation.

Recommendations: It is recommended that terrorist gang or an organisation for the purposes of this section be defined as an organisation that has as one of its purposes or activities facilitating or carrying any terrorist activity; or a declared terrorist organisation under section 18 of POTA. Further the Act must specify the criteria for determining whether a person is member of an organisation or not. These may include, *inter alia*, attending the meetings of a terrorist organisation, collecting funds for the same, arranging meeting for the same, mobilizing public support for its terrorist activities, and facilitating its activities etc.

MEMBERSHIP OF A TERRORIST ORGANISATION

Once again as in Section 3(5), Section 20 does not define what constitutes membership while making it a punishable offence. Mere membership is a punishable offence even in the absence of any act of commission or omission. Even the lack of knowledge that the organization has been declared a terrorist organization is not relevant. Under Section 18, the Government has the power to declare any organization as a terrorist organization without giving any reasons for the same. Any person can be arrested and prosecuted as being a member of the organization and he shall have to prove that he became the member before the same was declared a terrorist organization and that he has not taken part in its activities at any time during its

inclusion in the schedule. However, the fact remains that accused will have to say that only in his defence in a trial that may take years.

Recommendations: It is recommended that the Act define membership and lay down criteria for determining the same as suggested above.

SUPPORT TO A TERRORIST ORGANISATION

Section 21 provides that a person commits an offence if he invites support for a terrorist organization and further clarifies that the support is not restricted to the provision of money or other property. The Section further provides punishment for managing, assisting, arranging or addressing a meeting, *inter alia*, for the purpose of encouraging support for a terrorist organisation or to further its activities. For the purposes of this section, the expression 'meeting' means, a meeting of three or more persons whether or not the public are admitted. It is a very, very dangerous law. Neither the Indian Penal Code nor the Criminal Procedure Code define the expression "support" and as such this provision is open to abuse by the police who can interpret it very widely to arrest and prosecute any person for providing support to a terrorist organization. The arrest of the MDMK leader Vaiko for making pro-LTTE speeches under this provision is a clear example of how this provision may be misused.

Recommendations: It is recommended that the Act define the term "support". As it exists, sub-Section (1) of Section 21 seems redundant. The Section makes it an offence to address, arrange or manage a meeting to support or further the activities of a terrorist organisation. Section 22 punishes inviting funding for terrorist activities. Section 3 punishes a person who harbours, advocates, abets, advises, incites or facilitates the commission of a terrorist act. In that case, the meaning of the term "support" that covers separate category of acts is not clear and the Act should clearly indicate the same or delete this provision.

POSSESSION OF UNAUTHORIZED ARMS, ETC.

Section 4 provides for life imprisonment for the possession of unauthorized arms or ammunitions in a notified area and possession of bombs, dynamite or hazardous explosive substance or other lethal weapons capable of mass destruction or biological or chemical substances of warfare in any area, whether notified or not. This provision has nothing to do with terrorism or terrorist acts and can be easily misused by the police by implanting a country made bomb or pistol and then arresting the person by effecting a seizure memo. The recent arrest of Tamil bi-weekly *Nakkeeran* editor R.R. Gopal under POTA after alleged recovery of an unlicensed revolver shows the extent to which it can be misused. In *Kartar Singh v. State of*

*Punjab*⁴, the Supreme Court had in fact struck down a similar provision under TADA holding that to save this provision from arbitrariness, it should be invocable only where possession of the arms and ammunition is connected with use thereof.

Recommendations: It is recommended that the observations of the Supreme Court be incorporated in the Act and the section should be invocable only where the possession of the arms and ammunition is connected with use thereof.

II. WIDE AND UNGUIDED POWER OF THE EXECUTIVE

A. GOVERNMENT

DECLARATION OF A TERRORIST ORGANISATION

Section 18 lays down an organization as a terrorist organization if it is listed in the schedule and the Central Government is empowered to add an organization to the schedule but “only if it believes that it is involved in terrorism”. Clearly there is no fair procedure laid down for declaring an organization as a terrorist organization. The mere existence of belief on the part of the Government is sufficient and no reasons have to be accorded for its decision. The Unlawful Activities (Prevention) Act, 1967 prescribes a procedure, under which a notice is given to that organisation and the issue is decided by a tribunal, in fact, by a Judge of the High Court. It is only on court’s direction that the organisation is declared an unlawful organisation. Under POTA, the Government does not have to prove that an organization is a terrorist organization; rather under Section 19, the burden is upon the organization to prove that it is not a terrorist organization.

Although Section 19 of POTA permits a review by the Review Committee, Section 54 bars jurisdiction of courts. In the Criminal Law Amendment Act, 1951 there was a similar provision as in the Unlawful Activities (Prevention) Act, 1967, that is, section 15 (2) of that Act. There was a provision for an Advisory Board under that Act. That Act was challenged before the Supreme Court and a five-Judge Bench of the Supreme Court⁵ came to the conclusion that section 15 (2) (b) could not be upheld as falling within the limits of authorized restrictions on the right conferred by article 19 (1) (c). The Court felt

⁴ (1993) Supp (2) SCC 740

⁵ *State Of Madras V. Union Of India & State Of Travancore Cochin* AIR 1952 SC 196

that a one-sided review by an Advisory Board cannot be a substitute for a judicial enquiry.

Recommendations: It is recommended that the procedure prescribed under the Unlawful Activities Prevention Act, 1967 be followed under this Act also. An organisation that is to be declared a terrorist organisation should be given a notice and the court of law should decide whether to declare it so. However, if the Government is unable to do so because of the existence of an extra-ordinary situation, the Act itself should provide clear guidelines on the basis of which an organisation may be declared a terrorist organisation. Further the power of judicial review should not be taken away from the courts keeping in view of the observations of the Supreme Court in the *State of Madras v/s Union of India*⁶.

B. POLICE

OBLIGATION TO FURNISH INFORMATION

Section 14 obliges individuals and organizations to furnish such information in their possession as the investigating officer (IO) may require. Given the fact that there is no judicial scrutiny of the need for the information, this provision can be easily misused by police. Recently in his submissions before the Supreme Court while defending the validity of Section 14 of POTA, Attorney General stated that even "journalists and lawyers were obliged to divulge sources as well as information relating to terrorist activities to police under POTA as it had been universally recognized that they did not enjoy any privilege in matters of national interest"⁷.

The Canadian law provides for a detailed procedure where a person is obliged to furnish information only after a court order⁸ to that effect passed on an application made by the "peace officer"⁹ after obtaining prior consent of the Attorney General¹⁰. Further a person is required to furnish such information to a judicial officer and not a police officer. Such a person also has a right to retain and instruct counsel at any stage¹¹. The law also provides that such a person "may refuse if answering a question or producing a thing would disclose information that is protected by any law relating to non-disclosure of information or to privilege."¹² If the Government of India is of the opinion that it is

⁶ *ibid.*

⁷ Indian Express, 24-4-03

⁸ Section 83.28(4), Anti Terrorism Act (Bill C-36), Canada

⁹ Section 83.28(2), *ibid*

¹⁰ Section 83.28(3), *ibid*

¹¹ Section 83.28 (11), *ibid*

¹² Section 83.28 (8), *ibid*

not possible to include all these safeguards under Section 14, privileged communication should at least be kept out of the purview of this section.

Recommendations: It is recommended that the privileged communications should be an exception to this provision. Obligation to provide information in respect of such communications, if necessitated by circumstances, should be before a judicial authority. It should be made clear that such information is to be given only before a judge after a court of law has made an order on an application by the IO showing the necessity for such information. Further such information should not be admissible as evidence against the person divulging it in a criminal prosecution.

INTERCEPTION OF COMMUNICATIONS

Section 45 provides that the evidence collected through the interception of wire, electronic or oral communication under Chapter V shall be admissible as evidence against the accused in the Court during the trial of a case. Chapter V also lays down a detailed procedure for interception of the communication.

The recent trial of S.A.R. Geelani brought to the fore the problem with allowing intercepted communications as evidence under POTA. In the said case, the investigating authority had intercepted the communication between the accused and his brother without following the procedure laid down under POTA. During the trial, which was under POTA, the police claimed that the interception was made under The Telegraph Act and not under POTA.

The special court admitted the interception as evidence. However on appeal, the High Court set aside the lower court order on the ground that "The prosecution cannot fall back upon the general law of evidence for the offence under POTA on the strength of evidence, admissibility of which is forbidden by Section 45 of POTA,"¹³. Although the Supreme Court reversed the decision of the High Court observing that by the time the impugned order was passed the evidence had already been recorded, it declined to go into the merits of the case and asked the parties to urge the all the questions in appeal before the High Court.

Unless a decision to the contrary comes, the police can easily misuse this provision in every case by not following the procedure laid down in

¹³ As reported in "The Hindu", Thursday, Oct 31, 2002

the Act and intercepting the conversation under the ordinary law but using it as admissible evidence under this special law.

Recommendations: It is recommended that the Act specifically provide that it is only interceptions that are made after following the safeguards as laid down by the Act that shall be admissible as evidence and any interceptions made under the ordinary law shall not be admissible as evidence in a case under POTA.

PROTECTION OF ACTIONS TAKEN IN GOOD FAITH

Section 57 provides legal impunity to Central Government, State Government, any officer or authority under them, serving or retired member of armed forces or para-military forces in respect of actions taken or purported to be taken by them in good faith. This protection of officers from legal action is an invitation for abuse as it sends a clear message to the executive that they can act in any manner with impunity.

Recommendations: It is recommended that this provision should be deleted and the citizens should not be deprived of their right to move the courts seeking redress for illegal and malicious actions taken against them by the security agencies as the agents of the State.

III. OBSTRUCTIONS TO FAIR TRIAL

A. STRIKING AT THE INDEPENDENCE OF JUDICIARY

SPECIAL COURTS

Section 23 provides for constitution of special courts to try cases under POTA. Sub-Section 7 provides that a judge may continue as a judge of the special court even after reaching the age of superannuation. A judge who continues to be in his office at the mercy of the executive can be easily controlled by the executive, thus undermining the basic principle of separation of powers and the independence of the judiciary.

Recommendations: It is recommended that if the Government deems it necessary in a particular case, it may, for reasons to be specified provide that the judge of a special court may continue to preside over the proceedings in case(s) pending before him even after he has reached the age of superannuation, but that this has to be done in consultation with the Chief Justice of the concerned High Court, whose decision shall be binding upon the Government.

B. TAKING AWAY THE IMPORTANT POWER OF REVIEW BY A COURT

BAR OF JURISDICTION OF COURTS, ETC.

Section 54 provides that no civil court or other authority shall have or, be entitled to, exercise any jurisdiction, powers or authority in relation to the matters referred to in sections 19 and 40 of the Act. Section 19 deals with denotification of a terrorist organization and Section 40 is about submission of order of interception to Review Committee. If an organisation is so declared on the basis of political interests, leaving it to the mercy of the Central Government and the review committee will not meet the interest of justice and the courts should have power to review the material on which the said organisation has been declared a terrorist organisation. Here, we would again like to refer to the judgement of the Supreme Court,¹⁴ that has regarded as unconstitutional a similar provision in the Criminal Law Amendment Act, 1951. As already mentioned above, the Court held that a review by an Advisory Board, even where its verdict is binding on the executive government, cannot be a substitute for a judicial enquiry.

Recommendations: It is recommended that the all-important power of the courts to review executive action should not be interfered with. Keeping in mind the decision of the Supreme Court in *State of Madras v/s Union of India*, the Government should amend Section 54 to allow for judicial review of executive action.

C. RESTRICTING DISCRETIONARY POWER OF THE JUDICIARY

RESTRICTIONS ON BAIL

Under Section 49, not only is an accused denied the right to move the court for anticipatory bail even in a case of patent abuse of the law, the obstructions to bail are in fact so high that in effect the court is not empowered to grant bail unless it is satisfied that there are reasonable grounds for believing that the accused is not guilty of committing such offence. This law effectively rules out bail unless the public prosecutor agrees to it. There has been some controversy that a detenu under POTA cannot even seek bail within a year of his arrest. While the Chennai High Court has ruled to the contrary, the controversy persists. Recently the Attorney-General, Soli Sorabjee, clarified in the Supreme Court that a person detained under the Prevention of Terrorism Act (POTA) could move for bail within one year and that he need not wait for the expiry of the one-year period. However, it might be recalled that this stand of the Centre was quite in contrast to the arguments of the Additional Solicitor-General, Altaf Ahmed, who while appearing for

¹⁴ *State Of Madras V. Union Of India & State Of Travancore Cochin* AIR 1952 SC 196

Tamil Nadu (before another Bench comprising Justice K.G. Balakrishnan and Justice P. Venkatarama Reddi), had stated that under POTA a bail petition could be filed only after one year. Till the time the matter is not settled by the Supreme Court, it shall depend on the individual judge whether to entertain the bail application or not.

Recommendations: It is recommended that the discretionary power of the judiciary should not be interfered with. There is no necessity to rule out bail for a year if the public prosecutor does not agree to it. In any case, the controversy in interpreting and harmonizing Section 49 (6) and (7) should be set at rest by the legislature. It should be clarified whether an accused may move for bail within a year or not and if he does so, by which provision is the court to be guided.

C. HINDERANCE TO PROCEDURAL FAIRNESS TO THE ACCUSED

CONFESSIONS BEFORE A POLICE OFFICER ADMISSIBLE AS EVIDENCE

Contrary to the provisions of the Indian Evidence Act (IEA), certain confessions before a police officer not below the rank of a Superintendent of Police become admissible as evidence under POTA. The IEA prohibits the admission of such confessions so as to discourage the police from torturing the accused to "confess". POTA does not even expressly prohibit admission of confessions procured through torture. Though the Act seeks to provide safeguards, there is no guarantee that the police would follow them. The confessions are to be taken after informing him of his right to remain silent and in an atmosphere free from threat or inducement. The Act is silent on what happens if this procedure was not followed. Though it provides that within 48 hours of making the confession, the police has to produce the accused before a judge who shall record his statement, there are no guidelines provided for the judge. If in a given situation, the policeman is standing next to the accused, or if his wife/son/daughter is in police custody under POTA, the accused, fearing reprisal, shall certainly not make any statement contrary to his "confession" before the judge. In any case, if the accused has to be produced before a magistrate within 48 hours of making the confession, there is no reason why such magistrate cannot himself record the confession of the accused.

In Kartar Singh's¹⁵ case, Justice Sahai (dissenting) observed:
"There is a basic difference between the approach of the police officer and a judicial officer. The judicial officer is trained and tuned to reach

¹⁵ *Kartar Singh v. State of Punjab* (1993) Supp (2) SCC 740

the final goal by a fair procedure. The basis of the civilized jurisprudence is that the procedure by which the person is sent behind the bars should be fair, honest and just. A police officer is trained to achieve result irrespective of the means and methods which is employed to achieve it. So long as the goal is achieved the means are irrelevant and this philosophy does not change by hierarchy of the officer."

Recommendations: It is recommended that keeping in mind the observations of the dissenting judges in Kartar Singh's case, confessions before a police officer, whatever be his rank, should not be admissible in a court of law. This unnecessarily increases the risk of torture to extract confessions in high profile cases where police is under a lot of pressure to show results.

PRESUMPTION OF GUILT

Section 53 provides that under certain circumstances the court shall draw adverse presumption against the accused. For example if the finger prints of the accused were found at the site of the offence or on anything including arms and vehicles used in connection with the commission of such offence, the special court shall draw adverse inference against the accused. The terms by which the court will be guided in drawing this adverse inference are not stated in the Act. The dangers manifest in this provision cannot be overrated.

Recommendations: It is recommended that this law should not have provisions that interfere with the basic principles of criminal jurisprudence and tenets of a fair trial. Presumption of innocence of an accused should be retained during trials under POTA and this Section may be deleted. However, if the Government is unable to agree with this recommendation, it is further suggested that the Section replace the expressions "shall draw adverse inference" with "may draw adverse inference".

IMPACT OF PROVISIONS FOR WITNESS PROTECTION

Section 30 not only provides that the proceedings under POTA may be held in-camera but also that the identity of witnesses may be withheld. While recognizing the importance of the witness-victim protection, CHRI is of the opinion that adequate balance needs to be drawn between the conflicting demands of a fair trial to the accused who is presumed to be innocent till proven guilty and the security of the witnesses who are the key to a successful prosecution. Providing for the withholding of the identity of the witness without providing guidelines for situations under which this can be done and without providing mechanisms for effective cross-examination in a law that

also admits confessions before a police officer is extremely dangerous. Experience under TADA showed that trials were held in prisons, and public was often denied attendance at such trials. Under these coercive settings, the defence witnesses were scared to depose against the police and in favour of the accused for the fear of reprisal. It was even difficult to find lawyers to defend the accused, as lawyers were also susceptible to harassment by the police. Since Section 30 also provides that the special court may deny even the publication of the proceedings, there is no way that the public can come to know of the manner in which trials are being conducted and whether the accused has any measure of fair trial being accorded to him.

Recommendations: It is recommended that law clearly provide that directions under Section 30 shall not adversely affect the right of effective cross-examination of the accused. Further it should not proscribe the publication of proceedings as the public have a right to know that a fair trial has been accorded to the accused.

SUMMARY TRIAL

Section 29 empowers the special court to try a person accused of an offence punishable with maximum three years of imprisonment in a summary way without an argument. As with TADA, this may result in gross miscarriage of justice especially where the police detains a person for years on, awaiting trial without enough evidence.

Recommendations: It is recommended that there should be no summary trials under this Act so that the accused may challenge the sufficiency of prosecution evidence to sustain a conviction through the court at the earliest.

IV. REVIEW COMMITTEES

Section 60 provides for the setting of Review Committees by the State and the Centre. Under the Act, these Committees have no power to supervise the conditions of detention. The detenus cannot make representations before the Committee claiming torture etc. The Act does not specify the qualifications of the members of the Committee except for the Chairperson. Even though the chairperson is a High Court judge, the other two members can overrule him. Further the Committee is not empowered to demand from the States, the number of arrests and the stages of investigation under the Act. There is no provision for the laying of the report of the Committee before the Parliament or the State Assemblies.

Recommendations: It is recommended that the qualifications of the other two members of the Review Committee be specified in the Act itself. Further the Review Committee should have wider powers to

review the conditions of detenus, to recommend the dropping of charges under this Act against accused who in its opinion should not have been so charged. The Review Committee should in fact work as a mechanism to monitor the implementation of the Act. The annual report of Review Committee should also cover the number of arrests under the Act in a year, the stages of investigation, and complaints of torture received by detenus under this Act. Further the Government should be under a duty to lay this report in the legislature within 60 days of its submission to the Government.

RECOMMENDATIONS

Keeping in mind the terms of reference of this Hon'ble Committee, the following are suggested as some of the basic recommendations to remove the glaring shortcomings of Act:

- Act should have a sharp definition of terrorism so that it is applicable only to terrorist acts and not ordinary criminal acts. Apart from other changes that the Government may deem relevant to tighten the definition of terrorist act, CHRI is of the opinion that a proviso be added to the definition that states that a "terrorist act" does not include an act, if such act is lawful advocacy, protest, dissent or industrial action. The intent to adversely affect the harmony amongst different sections of the people as it existed under TADA may also be included within the definition of terrorist act in POTA.
- Apart from spouses, near relatives like children and parents should also be exempted from prosecution for harbouring or concealing persons known to be terrorists.
- Terrorist gang or an organisation as defined under Section 3(5) is very wide and for the purposes of this Section, terrorist gang or an organisation should be defined as an organisation that has as one of its purposes or activities facilitating or carrying any terrorist activity; or a declared terrorist organisation under section 18 of POTA.
- Other terms and expressions, like "membership" and "support" that are not defined either in this law or under the Cr.P.C. should be defined. As suggested, the Act must specify the criteria for determining whether a person is member of an organisation or not. These may include, *inter alia*, attending the meetings of a terrorist organisation, collecting funds for the same, arranging meeting for the same, mobilizing public support for its terrorist activities, and facilitating its activities etc. Similarly the Act should specify what

actions would be construed as providing support to a terrorist organization that are not already covered by Sections 3, 21 and 22.

- Mere possession of arms etc. in a notified area should not be a punishable offence as held by the Supreme Court in *Kartar Singh's*¹⁶ case. It should be connected with the use thereof.
- A proper procedure should be laid down for requiring information under Section 14. Privileged communications should be kept out of the purview of this section. It should be made clear that such information is to be given only before a judge after a court of law has made an order on an application by the IO showing the necessity for such information. Further such information should not be admissible as evidence against the person divulging it in a criminal prosecution.
- It is recommended that the procedure prescribed under the Unlawful Activities (Prevention) Act, 1967 be followed under Section 18 of this Act also. An organisation that is to be declared a terrorist organisation should be given a notice and the court of law should decide whether to declare it so. If it is considered necessary to retain this power with the executive, the Act should provide clear guidelines on the basis of which an organisation may be declared a terrorist organisation. Further the power of judicial review should not be taken away from the courts keeping in view of the observations of the Supreme Court in the *State of Madras v/s Union of India & State of Travancore Cochin*¹⁷.
- The Act should specifically provide that it is only interceptions that are made after following the safeguards as laid down by the Act that shall be admissible as evidence and any interceptions made under the ordinary law shall not be admissible as evidence in a case under POTA.
- The Act should provide penalties against officials who do not follow the prescribed procedure for taking action under the Act and failure to follow procedure should be a ground for vitiating trial under POTA.
- The accused should be produced before a trial court within 24 hours of his arrest and no exception should be made to this.
- Accused should be given a copy of the FIR against him upon arrest. He should also be entitled to copy of the remand report.
- Confessions before a police officer should be barred so as to minimize scope of torture to extract these. However, if the Government is not willing to agree to this recommendation, certain safeguards must be built into the provision itself. The section should

¹⁶ *Kartar Singh v. State of Punjab* (1993) Supp (2) SCC 740

¹⁷ AIR 1952 SC 196

expressly bar confessions obtained by torture, inducement, threat or promise. The person confessing before a police official should immediately thereafter be produced for medical examination before a medical officer not lower in rank than an Assistant Civil surgeon. Further he should be produced before a Magistrate within 24 hours and not 48 hours. The Magistrate should be under a duty to inform the accused that he may make a statement before him and that he shall not be sent to police custody thereafter. Before doing so Magistrate should ensure that the atmosphere is free from police presence. Other safeguards provided under Section 164 Cr.P.C. and as interpreted thereunder by the Supreme Court may be incorporated herein.

- The need of witness protection should be balanced with the need for a fair trial to the accused. The right to cross-examine a witness should not be unduly curtailed. The witness protection should also be available to defence witnesses and those who wish to testify against erring police officials.
- Section 57 should be deleted and the citizens should not be deprived of their right to move the courts seeking redress for illegal and malicious actions taken against them by the security agencies as the agents of the State.
- The trial should be public and in-camera trial should be permitted only upon application by one of the parties providing grounds for holding it in-camera. Trials should be public trials and the publication of the proceedings should not be prohibited.
- Trials should be conducted within a strict-time frame.
- Provisions that deny an accused a fair trial should be deleted or suitably amended. Presumption of innocence should exist in all cases and provisions that mandate the contrary should not be allowed to exist on the statute book.
- Independence of judiciary should not be compromised. Continuance of a judge beyond the age of superannuation should not ordinarily be allowed. Further if the Government deems it necessary that the judge continue beyond the proceedings of the case(s) before him, it may provide for the same in consultation with the Chief Justice of the concerned High Court, whose decision shall be binding upon the Government.
- Obstructions to bail should be lessened. The discretion of granting bail should be with the judiciary. The controversy in interpreting Section 49 (6) and (7) should be set at rest by making a clear amendment.
- Summary trial in cases punishable with maximum imprisonment upto three years should not be allowed.

- The qualifications of the all members of the Review Committee should be specified in the Act. Review Committees should have greater power to monitor the implementation of the Act and as such to supervise conditions of detention, oversee the number of arrests under the Act, the progress of investigation in these and to suggest dropping of charges against certain accused who have been wrongfully charged under POTA. It should be empowered to hear representation of detainees under the Act. It should review the Act annually and suggest changes in the same. Its annual report to the Government also cover the number of arrests under the Act in a year, the stages of investigation, and complaints of torture received by detenus under this Act. Further the Government should be under a duty to lay this report in the legislature within 60 days of its submission before the Government.
- The Prevention of Terrorism law must be further subject to review by Parliament every year, on the basis of a report submitted by the Government. A provision to that effect should be introduced in law.

NEED FOR A NEW LAW

Given the wide scope of misuse of the Act, it is suggested that it be scrapped off and a new anti-terrorism legislation is brought in that conforms to the basic principles of fair trial and balances the need of prosecuting the terrorists with the need to protect the innocents from excesses of the State. Clearly it is not one or two sections of this legislation that can be misused but almost the entire Act is capable of misuse.

MEETING THE ARGUMENTS IN FAVOUR OF THE EXISTENCE OF POTA AND CONCLUSION

The Government of India put forth many arguments in favour of this law and stated that extra-ordinary situations require extra-ordinary laws. The argument of the Government that all laws are capable of misuse and that the same is no reason why the law should not exist on the statute book does not wash.

It is true that one can misuse the law. However, one way to minimize the scope of abuse is to equip the investigative agency with enough skills. If the investigative agency is not doing its work properly, it is an admission of failure on the part of the Government. Government cannot reason that the criminal justice system is not working efficiently enough to deal with the problems of crime and law and order effectively and therefore it is necessary to introduce a new tough

law. It is the duty of the Government to ensure that the laws are not misused and that they have enough safeguards against them; and not to bring about laws that take away even the existing safeguards thereby increasing the scope of misuse.

Another wrong reasoning of the Government is that if other countries like the US or the UK can bring about such laws then why should Indians oppose the same, given the fact that we face much bigger threat of terrorism than these countries. Well the answer is in the Government's own argument. These countries do not go on record stating that their laws are being misused and that their criminal justice system is not working.

No one denies that confessions to the police are admissible in the United Kingdom. However there is no comparison between the ethos and culture of police forces in the two countries and also in their public image. In India, even the National Human Rights Commission says that confessions before police "would increase the possibility of coercion and torture in securing confessions and thus be inconsistent with Article 43 (f) of the International Covenant of Civil and Political Rights, which requires that everyone shall be entitled to the guarantee of not being compelled to testify against himself or to confess guilt." This provision of ICCPR is consistent with article 23 of the Constitution.

An argument often given is that the rate of conviction in criminal cases is very low and this is because our laws are soft. In this connection, we would like to refer to the debate that took place on this point in the Joint Parliamentary Sitting seeking the passage of this law. While opposing the passage of the Bill, a senior leader of the opposition stated: "If you, therefore, extract a confession through torture and then say that the rate of conviction has become 76 per cent, how can the people of this country accept such a law?" This was in response to the Union Law Minister's argument that under TADA and under other laws of this country, the rate of conviction was 6.5 per cent but under Maharashtra Control of Organised Crime Act (MACOCA) the rate of conviction was 76 per cent and this showed that MACOCA is efficacious. It was further stated, "... you can have a law in this country where the rate of conviction could also be 100 per cent. But will that show that that law is good or that law is efficacious? Why is it that you have a rate of conviction of 76 per cent? It is because the normal investigating agencies do not investigate the cases normally. What they do is to extract a confession. That confession becomes substantive evidence; that substantive evidence is made the basis of conviction; and so the rate of conviction would be high. But such a

procedure is not recognised under civilized jurisprudence. Do we have such confessions in the United States? Do we have such confessions in the UK? The answer is 'No'. So, the issue is not whether the rate of conviction is 76 per cent or 6.5 per cent. The issue is, in a civil society, will you adopt such procedures that tend to incriminate innocent persons who cannot fight against the State? This is what happens here."

Law does not exist in vacuum and has to be drafted in accordance with the context within which it shall be implemented.

In any case, in the United States, the due process of law, the presumption of innocence, the right of the defendant to an open and speedy trial and to confront witnesses against him are neither suspended nor circumscribed by that law in any criminal proceeding. There is no suspension of fundamental rights of the individual and there can be no preventive detention of **citizens** of the United States. So, the comparison of the American law with the Indian law does not really hold.

Under the UK law, if a person is arrested up to five days preventively through an order of the Home Minister, the European convention on Human Rights holds that such a provision is unconstitutional even for aliens. In the Great Britain, the Prevention of Terrorism (Temporary Provision) Act is a result of emergency declared under article 15 of the European Convention where the European Convention acts as a State-monitoring agency. This is not the situation here in our country. In other words, under POTA, we treat our citizens much worse than the US and the UK laws treat their aliens.

This is not to say that the US and the UK laws are the best examples of an ideal legislation to deal with terrorism and even these laws have come under severe criticism in the respective countries. One must bear in mind that the terrorists are out to destroy our democratic system of life based on rights and freedoms. Democracies should not respond to terrorism by dismantling the very framework of rights and freedom, which the terrorists want to destroy. Other effective means of response have to be thought out through a consultative process and that is the only way to respond to a crisis situation in a democracy.

