CHAPTER- IV

4.1 State Responses to Combat Terrorism in India since 1950.

From the political perspective a policy is a public need assuming importance and as far as possible, appropriately assessed for its actual fulfillment. It involves an identified and definite public problem and the preparation of the state to meet it in a particular style. It conceives a line of action to achieve a certain result negative or positive or disclose a resolve to refrain from acting on a specific issue or matter.

To the general public — public policy usually means a goal that is something to be gained by a governmental decision or decisions. Stated most simply, public policy in the sum of the activities of governments, whether acting directly or through agents, as it has an influence on the lives of citizens. Within that definition, we can determine three level of policy, defined by the degree to which they make real changes in the lives of citizens. At the first level we have policy choices — decision made by politicians civil servants or others and directed towards using public power to affect the lives of citizens.. At the second level we can speak of policy outputs — policy choices being put into action. At this level the government is doing things: spending money, hiring people or promulgating regulations that will affect the economy and society. Finally, at the third level we have policy impact and policy outcomes on citizens.

Our definition recognizes the complexity and interorganisational characteristics of public policy. Few policy choices are decided and executed by a single organization or even a single level of government rather policies in terms of their effects — emerge from a large number of programs, legislative intentions and organization interactions to affect the daily lives of citizens.

Policy decision can be made by means of several different types of rules. Decision-rules can include chance, one-man decree, contests, technological discovery, majority vote and much more.

Justifications of the referendum have a long history. First, there is the argument from ethics: people who are to be affected by a decision ought to be consulted in making the decision. Second, the quality of a decision is sometimes said to be improved by allowing the people to speak out and influence the decision. Third, if people join in making decision, the costs of implementation are reduced, as opposition is co-opted. Even when all three reasons apply to an issue, however it is not common to have the people make policy directly why not? Partly because of time, partly because of general convenience, the people have traditionally been satisfied to have representatives of one sort or another make policy decisions. But even when referendums are not used to decide policy, the policy process often does involve a wide range of people; frequently the public participates in ways less formal then referendums.

Public policies are the clusters of specific decisions to solve problems. The term public policy has been defined in various by different authors. Robert Eyestone terms 'Public Policy as the relationship of government unit to its environment'. Thomas R. Dye says that 'Public Policy is whatever government chooses to do or not to do.' Richard Rose says that Public Policy is not a decision; it is a course or pattern of activity. In Carl J. Friedrich's opinion Public Policy is a proposed course of action of a person, group or government within a given environment providing opportunities and obstacles which the policy was proposed to utilize and overcome in an effort to reach a goal or realize an objective or a purpose.

The government of India have resorted to issuing statesman on public policy for several reasons including the need to make a formal declaration of their intentions to tackle complexity in decision making or to make a clean break from the past. In their origination, they are preceded sometimes by a study or a committee the report of which forms the basis of the statement on policy.

Terrorism today is engaging attention of whole world though we are more concerned with terrorism in our own country. There is hardly any country, which is not affected by terrorism today though reasons are widely different. In many countries terrorism is fired by separatist fire. Many regions were included in colonized countries by imperial powers to suit their own convenience least knowing that increased awareness and democratic movements in future would

ignite separatist movement and when their aspirations for autonomy or independence are denied violence would be used.

Why anti-terrorism policy is needed?

It is not only Kashmir; Punjab too has suffered. Also Mumbai, Delhi and other regions of the country like the North East. Development has suffered, the economy has suffered. We have now a brand of Maoist terrorism; People's War Group and other groups. A large part of Andhra Pradesh, Orissa, Madhya Pradesh, Chattisgarh and Jharkhand right up to the Nepal border is affected. We had insurgency and terrorism in Tamil Nadu. We lost two of our former prime ministers to this kind of terrorism.

In terms of our sovereignty, unity and integrity and our feeling of nationalism, terrorism strikes at each one of them. This is the enormity of the problem that we are addressing. But it is also said that our criminal law systems have broken down; it seems to be a sad fact to accept. Are we aware of the conviction rate under the so-called ordinary laws- At times we try and conceal the figures and say that in India the conviction rate is 40%. But that 40% is actually a camouflage because every time there is a challan and somebody pays Rs 100 as fine, it is recorded as a conviction. Every time somebody feels guilty and pays a fine under company law, we take it as a conviction and then claim that the conviction rate is 40%. In heinous crimes like murder, the conviction rate under

the so-called normal processes has come down to 6.5%. There are several reasons for this. One is that when we deal with hardened criminals, some of our old notions of criminal law have to change. It is a sad reality that crime in India has become a low risk business. It is a high profit business with a 93% probability that you can commit a hard crime and get away with it.

So it becomes very necessary in a country like India that if a law regarding terrorism is enacted it should be made so stringent that the culprit be bought to book and does not go scot-free just because of the loopholes and lacunas in the ordinary law because when our neighboring nation Pakistan which is the cause of perpetrating terrorism in India and can have such stringent laws why can not we have such laws.

India's set-up to counter-terrorism consists of the following:

The state police and its intelligence set-up: Under India's federal Constitution, the responsibility for policing and maintenance of law and order is that of the individual states. The central government in New Delhi can only give them advice, financial help, training and other assistance to strengthen their professional capabilities and share with them the intelligence collected by it. The responsibility for follow-up action lies with the state police.

The national intelligence community: This consists of the internal intelligence agency (the ministry of home affairs' Intelligence Bureau), the

external intelligence agency (the Cabinet secretariat's Research and Analysis Wing), the Defence Intelligence Agency (DIA) that was set up a year ago, and the intelligence directorates general of the armed forces.

The IB collects terrorism-related intelligence inside the country and RAW does it outside. The DIA and the intelligence directorates general of the armed forces essentially collect tactical intelligence during their counter-terrorism operations in areas such as Jammu and Kashmir, Nagaland, etc, where they are deployed.

Physical security agencies: These include the Central Industrial Security Force, responsible for physical security at airports and sensitive establishments; the National Security Guards, a specially trained intervention force to terminate terrorist situations such as hijacking, hostage-taking, etc; and the Special Protection Group, responsible for the security of the prime minister and former prime ministers.

Paramilitary forces: These include the Central Reserve Police Force and the Border Security Force, which assist the police in counter-terrorism operations when called upon to do so.

The Army: Their assistance is sought as a last resort when the police and paramilitary forces are not able to cope with a terrorist situation. But in view of Pakistan's large-scale infiltration in Jammu and Kashmir and the presence and activities of a large number of Pakistani mercenaries, many of them ex-

servicemen, the army has a more active, permanent and leadership role in counter-terrorism operations here. What India is facing in J&K is not just terrorism, but a proxy war being waged by the Pakistani Army through its *jihadi* surrogates.

In recent months, there have been two additions to the counter-terrorism set-up:

A multi-disciplinary centre on counter-terrorism, headed by a senior IB officer, within the IB, expected to be patterned on the CIA's counter-terrorism centre. Officers of various agencies responsible for intelligence collection and counter-terrorism operations will work under a common umbrella and be responsible for joint analysis of the intelligence flowing in from different agencies and co-ordinated follow-up action.

A counter-terrorism division in the ministry of external affairs, expected to be patterned after the counter-terrorism division of the US state department. It will be responsible for co-coordinating the diplomatic aspects of counter-terrorism, such as briefing other countries on Pakistan's sponsorship of terrorism against India, processing requests for extradition and mutual legal assistance, servicing the work of various joint working groups on counter-terrorism which India has set up with a number of countries, etc.

Techniques to Counter-terrorism followed by India:

The techniques followed by India stress the following:

The importance of good grievances detection, monitoring and redressal machinery so that the build-up of grievances in any community is detected in time

and the political leadership alerted and advised to take prompt action to redress them. The intelligence agencies have an important role to play as the eyes and ears of the government in different communities to detect feelings of anger and alienation which need immediate attention.

The importance of good, preventive human intelligence. This is easier said than done because of the difficulties in penetrating terrorist organizations, particularly of the religious kind.

The importance of timely technical intelligence, which is generally more precise than human intelligence.

The importance of objective and balanced analysis to avoid over-assessing the strength and capabilities of the terrorists, which could lead to over-reaction by counter-terrorism agencies, thereby aggravating the feeling of alienation within the affected community, driving more people into the arms of terrorists. Such analysis is particularly difficult in the case of human intelligence. For every genuine source who gives correct intelligence, there are often two or three spurious sources who, out of greed to make more money or at the instance of the terrorists themselves, give false information. This tends to make security forces over-react or take wrong action.

The importance of reverse analysis so that one is trained to analyse possible scenarios not only as a good intelligence analyst, but also as an irrational terrorist.

The importance of prompt and co-ordinated follow-up action on well-assessed intelligence from all agencies, without allowing inter-agency jealousies and rivalries to come in the way.

The importance of effective physical security measures so that even if intelligence fails, security agencies are able to prevent acts of terrorism.

The importance of an effective crisis management apparatus so that if both intelligence and physical security measures fail, one is able to deal effectively with the resulting crisis or disaster.

The importance of good investigative machinery, specially trained to investigate terrorism-related cases.

The importance of not over-projecting the personality and capabilities of terrorist leaders, so that they do not become objects of idolisation in their community.

The importance of constantly underlining to the public that just because some people of a particular community or religion have taken to terrorism, the entire community or religion should not be looked upon with suspicion.

The importance of highlighting the positive aspects of the affected community or religion to prevent the build-up of a negative image of the community or religion in the eyes of the public.

The importance of active interaction with the media to ensure that they do not make terrorist leaders appear like heros or prejudice the minds of the public about the affected community or religion or create problems for effective counter-terrorism operations.

The importance of well-designed psychological war operations to project the terrorists for what they are -- irrational killers.

The importance of observing human rights during counter-terrorism operations.

The importance of periodic refresher training of all those involved in counter-terrorism operations through special classes, seminars, opportunities for interaction with those who have distinguished themselves in counter-terrorism operations, etc.

India's domestic policies to counter-terrorism

India's counter-terrorism policies are based on the following principles:

A genuine and well-functioning democracy, good governance, responsiveness to public grievances, effective policing and economic development are the best antidotes to terrorism.

India has not allowed the intimidatory violence of terrorism to come in the way of the electoral process. In the 1990s, elections were held in Punjab at the height of terrorist violence. Elections were held in J&K in September last year

despite instructions from the ISI to the Pakistani jihadis to disrupt the process. Foreign diplomatic missions in New Delhi were encouraged to send their observers to the state to satisfy them that the elections were free and fair. All of them have certified this. Elections to the Nagaland assembly were held last month.

The government has not allowed terrorists to disrupt the economic development of the affected areas. Even at the height of terrorism, Punjab continued to be the granary of India, producing a record wheat crop year after year. In J&K, the fall in revenue due to a decline in foreign tourists' arrival is being sought to be remedied by encouraging greater domestic tourism.

In the 1990s, when terrorists prevented the holding of examinations in Srinagar, the government flew the students to Jammu at its cost to take the examination.

When they prevented businessmen from the rest of India from going to the valley to purchase their requirements of handicrafts and dry fruits, the government flew the vendors to New Delhi to enable them to dispose of their stocks.

The government has announced many packages for the economic development of the affected areas and has been trying to implement them despite the terrorist violence.

The government has refused any kind of concessions to terrorists resorting to intimidation tactics such as hijacking, hostage-taking, etc.

The government has refused to hold talks with terrorists until they give up violence, but began to search for a political solution through talks once the terrorists give up violence.

In the 1970s, a large section of the Naga hostiles and the Mizo National Front gave up violence and entered into talks with the government, which led to a political solution. But the National Socialist Council of Nagaland, led by Isaac Swu and T Muivah, has been holding on without reaching an agreement. It has, however, been observing a cease-fire for the last two years and holding talks with the government.

The government is maintaining an open mind to suggestions coming from all sections of J&K for improving the political and administrative set-up. It has recently appointed former home secretary N N Vohra to enter into a dialogue with all the elected representatives of the state on their demand for greater autonomy.

India's external policies to counter-terrorism

India has been the victim of Pakistan-sponsored terrorism since the 1950s. In those years, Pakistan's ISI had supported the insurgent/terrorist groups in India's northeast region and provided them sanctuaries, training, arms and ammunition in the Chittagong Hill Tracts of the then East Pakistan. India's anxiety to stop this played an important role in its assistance to the people of East Pakistan to liberate them.

Since 1980, the ISI has been providing sanctuaries, training, arms and ammunition in Pakistan to religious terrorist groups operating in Punjab, J&K and other parts of India. It is also infiltrating the mercenaries of the Pakistani pan-Islamic jihadi organizations into India to promote cross-border terrorism.

India has taken up this issue with the US since 1992 and wants Pakistan declared a State sponsor of international terrorism under US laws and has punitive action taken against it. In 1993, the Clinton administration placed Pakistan on a watch list of suspected State sponsors of international terrorism for six months and forced Nawaz Sharif, who was then in power, to sack Lieutenant General Javed Nasir, then ISI's director-general, and other senior officers. This did not have any effect on the use of terrorism by the ISI.

Since 9/11, Pakistan's military-intelligence establishment has been collaborating with the US in taking action against Al Qaeda elements posing a threat to US nationals and interests. But it has not taken any action against cross-border terrorism directed against India and to destroy terrorist infrastructure in PoK and the Northern Areas.

After the attack by terrorists belonging to LET and JEM on the Indian Parliament in December 2001, India mobilised and deployed its Army on the border in response to public pressure for action against the terrorist infrastructure in Pakistani territory. In response to appeals from the US, UK and other friendly

governments, India refrained from action against Pakistan. Under US pressure, Pakistan banned LET and JEM, but not HUJI and HUM, and arrested some of their leaders and cadres. They have since been released.

US officials themselves admit Pakistan has not implemented its assurances to the US that it would put a stop to cross-border terrorism in J&K. Despite this, the US is reluctant to act against Pakistan because of its cooperation in assisting the US in neutralising Al Qaeda elements who have taken shelter in Pakistan.

India has made it clear that there will be no question of any talks with Pakistan on the normalisation of bilateral relations till it stops cross-border terrorism, winds up the terrorist infrastructure in its territory and gives up the use of terrorism as a weapon against India.

India has also been greatly concerned over the use of Bangladesh territory by religious and non-religious terrorists operating against India. The non-religious terrorist groups continue to enjoy sanctuaries in the CHT. Of the religious terrorist organizations, HUJI has an active branch in Bangladesh. Some Al Qaeda elements, who escaped into Pakistan from Afghanistan, have found their way into Bangladesh, where they have been given shelter by HUJI.

There is active complicity between the ISI and its counterpart in Dhaka in this matter. The Bangladesh authorities have not been co-operating with India in taking effective action against the large-scale illegal immigration into India.

However, keeping in view the otherwise good relations with Bangladesh, India has been trying to have these problems sorted out bilaterally at the political and diplomatic levels. But the progress so far has been disappointing.

Intelligence-sharing with other countries

Even before 9/11, arrangements for intelligence-sharing on terrorism amongst the agencies of different countries existed. 9/11 brought the realisation that terrorism is an absolute evil whatever be the cause and that unless the intelligence agencies of the world network themselves as effectively as the terrorist organizations, they might not be able to eradicate this menace. This has improved intelligence-sharing.

India's success in bringing Sikh terrorism in Punjab under control before 9/11 might not have been possible but for the valuable intelligence inputs received from agencies of many countries. Some of the significant successes in different countries against Al Qaeda were apparently possible due to increased intelligence-sharing without reservations.

While this is welcome, one has to remember that political considerations peculiar to each country influence their perceptions of terrorism and this is bound to have an effect on intelligence-sharing. Hence, while continuing to benefit from increased intelligence-sharing, the important task of strengthening one's national intelligence collection capability should not be neglected.

Regional cooperation in South Asia

Regional cooperation in the battle against terrorism has not been as successful in south Asia as it has been in the Southeast Asian region. This is largely because of Pakistan's policy of using terrorism as a weapon to keep the Indian security forces bleeding and pre-occupied with internal security duties and Bangladesh's tolerance of the activities of terrorists from its territory. Unless these two countries realise the folly of their policies and actions, which have made their own territories playgrounds for terrorist groups of different hues and irrationalities, there is very little scope for any meaningful co-operation.

India has been facing the problem of Pakistani state-sponsored terrorism for over 40 years and nearly 40,000 civilians and 3,500 members of the various security forces have been killed. This has not prevented India from becoming self-sufficient in agriculture, emerging as a major manufacturing country, developing educational, particularly technological, institutions of excellence the like of which no other Asian country can boast of, becoming the leading information technology software power of the region, and building up a foreign exchange reserve of US $72 billion, which, at this rate, should cross the US $100 billion mark in a couple of years.

India can continue to fight Pakistan-sponsored terrorism for another 40 years and yet move forward on its path of development as a major power in the

region. Pakistan, on the other hand, has not had the required funds for educational and social development and for the economic advancement of its people because of its obsessive urge to keep India bleeding through terrorism. In its attempt to lift a big boulder and throw it at India, it is dropping it on its own feet.

There is peace in Nagaland with a duly elected government promoting the economic development of the state. Only a small group of Nagas from the bordering areas of Manipur has not yet given up arms, but it is observing a ceasefire and negotiating with the government.

There has been peace in Mizoram for nearly 20 years now.

There has been peace in Punjab since 1995. However, Pakistan has not yet given up its efforts to re-kindle terrorism in Punjab through some terrorist leaders and hijackers given sanctuary in its territory.

The Ananda Marg has been dormant since 1995.

As the economic and social development of the states affected by Maoist terrorism moves forward, these groups are bound to wither away.

In J&K, the opposition has come to power after last September's election and is trying to reduce the alienation of the people and deal effectively with the Pakistani *jihadis*.

The Indian Muslim community, despite feeling hurt because of the large-scale anti-Muslim violence in Gujarat last year, has remained fiercely loyal, law-abiding and forward-looking. It has kept its distance from Al Qaeda and the IIF and repulsed the approaches of Pakistani *jihadi* organizations aligned with Al Qaeda.

Southeast Asian countries have been increasingly affected by pan-Islamic *jihadi* terrorism spawned in *madrasas* and training camps in Pakistan and Afghanistan. Cadres of the Moro Islamic Liberation Front and Abu Sayaaf of the southern Philippines had fought along with Pakistani *jihadi* and Afghan mujahideen groups against Soviet troops in Afghanistan in the 1980s. The links built then have been sustained.

Pakistan's HuM, which is a member of Osama bin Laden's IIF, has been training the Abu Sayaaf group and providing it with arms and ammunition. HuM leaders claim that many of its cadres fought against Filipino security forces along with Abu Sayaaf, achieved 'martyrdom' and are buried there. In 1998, Abu Sayaaf became a member of bin Laden's IIF.

The Jemmah Islamiyah, which has been co-ordinating pan-Islamic *jihadi* activities in Southeast Asia, is sought to be patterned after the IIF. It is believed to have many cadres of Afghan *jihad* vintage in its ranks and leadership.

Last year, the total number of students from Southeast Asia studying in Pakistan's pan-Islamic *madrasas* was estimated at 400. Some of them had gone to Afghanistan and fought against American troops in order to get *jihadi* experience.

The Pakistan branch of the Tablighi Jamaat is very active in Southeast Asia. It ostensibly teaches the Muslims of the region to be better Muslims, but actually acts as the front organization for IIF *jihadi* members for recruiting local volunteers for training and funneling financial and other assistance.

India has a good database on these organizations and their activities and valuable experience in dealing with them. Close interaction between the counter-terrorism agencies of India and countries of the Southeast Asian region would, therefore, be of mutual benefit.

Policies to combat terrorism (State responses since 1950)

Anti-terrorism laws in India have always been a subject of much controversy. One of the arguments is that these laws stand in the way of fundamental rights of citizens guaranteed by Part III of the Constitution. The anti-terrorist laws have been enacted before by the legislature and upheld by the judiciary though not without reluctance. The intention was to enact these statutes and bring them in force till the situation improves. The intention was not to make these drastic measures a permanent feature of law of the land. But because of

continuing terrorist activities, the statutes have been reintroduced with requisite modifications.

Preventive detention is an exception to the normal procedure. It has been sanctioned and authorised for a very limited purpose under article 22(2) (b) of the Constitution of India with good deal of safeguards. Exercise of the power of preventive detention must be with circumspection and care.

Our Constitution is supreme which embodies a philosophy and a way of life. The purpose of all Governments is to promote the common well-being and it must subserve the common good. It is, therefore, necessary to protect individual rights as far as consistent with the security of the society and an atmosphere wherein even tempo of community is least in danger. It is only with this object that the law of preventive detention has come into being, being an exception to the normal procedure.

There are various procedural safeguards like making known to the detenu within a particular time the grounds of detention and giving him information that he can make representation which should be placed before the Advisory Board and the opinion of the Advisory Board should be placed before the Government concerned and thereafter a decision be taken expeditiously.

The duty of the Government to consider the representation as soon as it is received is a constitutional safeguard against improper or unjustified exercise of

the power of detention. Since preventive detention is a serious inroad on individual liberty and its justification, the prevention of imminent danger of activity prejudicial to the community, the court would scrutinise delay on each of the stages involved and where there is no explanation for such delay it would strike down the order of detention on the ground of delay.

There have been many anti-terrorism laws in force in this country at different points in time. The first law made in independent India to deal with terrorism and terrorist activities that came into force on 30 Dec 1967. But before that there was an act called Armed Forces (Special Powers) Act, 1958 has been enacted to control the situation of the disturbed areas of North East of India.

Armed Forces (Special Power) Act, 1958

In 1958 the Government of India has been enacted a law called Armed Forces (Special Power) Act, 1958 to enable certain special power to be conferred upon members of the armed forces in disturbed areas in the State of Assam and the Union Territory of Manipur in India.

Under the AFSPA, the authorities only need to be "of the opinion that whole or part of the area are in a dangerous or disturbed condition such that the use of the Armed Forces in Aid of civil power is necessary."

When the whole country is suffering from terrible form of terrorism, to scrap in such laws would be harmful to the basic foundation of the country and its

unity in the long run. Northeast, being in a very remote corner of India with its only connection with the rest of India by a 33 square kilometre area in the Bengal Duars called the 'chicken neck', to allow further consolidation of the terrorist outfits in that part of the country would mean ultimately handing over this part of India to the militant groups.

Northeast India is strategically very important for India as it is surrounded by different countries from all sides, some of which are hostile to India.

To allow such laws to go would give a free hand to all those militant outfits, which operate from across the border from those hostile countries in this part of India.

The AFSPA empowers the representative of the Central government, the governor to subsume the powers of the State government to declare "undefined" disturbed areas. It also empowers the non-commissioned officers of the armed forces to arrest without warrant, to destroy any structure that may be hiding absconders without any verification, to conduct search and seizure without warrant and to shoot even to the causing of death. No legal proceeding against abuse of such arbitrary powers can be initiated without the prior permission of the Central government.

The Unlawful Activities (Prevention) Act, 1967

The UAPA was designed to deal with associations and activities that questioned the territorial integrity of India. When the Bill was debated in

Parliament, leaders, and cutting across party affiliation, insisted that its ambit be so limited that the right to association remained unaffected and that the executive did not expose political parties to intrusion. So, the ambit of the Act was strictly limited to meeting the challenge to the territorial integrity of India. The Act was a self-contained code of provisions for declaring secessionist associations as unlawful, adjudication by a tribunal, control of funds and places of work of unlawful associations, penalties for their members etc. The Act has all along been worked holistically as such and is completely within the purview of the central list in the 7th Schedule of the Constitution.

Terrorism and Disruptive Activities (Prevention) Act, 1987.

Another major act came into force on 3 September 1987 was The Terrorist & Disruptive Activities (Prevention) Act 1987 this act had much more stringent provisions then the UAPA and it was specifically designed to deal with terrorist activities in India. When TADA was enacted it came to be challenged before the Apex Court of the country as being unconstitutional. However, there were many instances of misuse of power for collateral purposes. The rigorous provisions contained in the statute came to be abused in the hands of law enforcement officials. TADA lapsed in 1995.

From the outset of the rise of the modern movement of Sikh nationalists in the early 1980's, the Indian state has sought to break such movements by any

means and responded by introducing the Terrorist and Disruptive Activities Act 1987 (TADA). The Act established special courts or "designated courts" to try those arrested for terrorist acts and disruptive activities. It conferred broad discretion upon the authorities to arrest persons and to try them. One of the most important points about TADA was the effect it had on the population of Punjab, it erased the distinction between violent and peaceful protests.

Under the definition used in TADA, the state saw itself justified in ordering police forces to break up demonstrations and detain thousands of people, particularly those connected with political organizations, however weak those connections are. Under TADA a person could be detained, without charge or trial for suspicion of belonging to, supporting or having knowledge of militant groups.

The police were given strong search and seizure powers under the Act, they could indict any person on the basis of suspicion. Once indicted under TADA, the accused would be tried by a special court under extraordinary procedures. In such trials, protections normally available to an accused in a liberal society would be ignored. Once under trial the accused could be convicted on the basis of minimal evidence that would have been insufficient for conviction by an ordinary court under normal Indian law.

Under Section 15, a confession allegedly voluntarily made before a police officer, not lower in rank than a Superintendent of Police, and recorded by such

police officer in writing or by using any mechanical device such as audio cassettes and video tapes, was admissible in court against an accused (or co-accused, abettor or conspirator) for an offence under this Act. There were widespread allegations that police routinely used torture to obtain confessions from detainees and/or planted evidence as a means of detaining them under TADA.

Preventative detention legislation facilitates custodial torture and places detainees at the risk of very serious harm. For example TADA permitted detention in judicial custody for up to a year (2 years in Punjab) without formal charges (s 20 (4) (b)). Bail was not allowed as of right; a magistrate had to be convinced of the innocence of the prisoner before it was granted and imposed a mandatory five-year sentence for those convicted of terrorist related activities in Camera (in private) trials and identity of witnesses was kept secret, so that no cross examination of them was allowed.

It is to be noted that 'terrorism' was defined very widely, including those who 'conspire or attempt to commit or advocate, abet, advise, incite or knowingly facilitate the commission of a terrorist act or any act prepatory thereof' (s 3) 'or harbouring or conceal terrorists' (s 4), were treated as such for the purpose of the Act. This included attending a meeting or participating in a peaceful demonstration that challenged the territorial integrity of India. Disruptive activities are so broadly phrased that they encompass peaceful expression of political or other conscientiously held views.

The government used TADA as a tool to fight trade unions and to detain Muslims, Sikhs, Dalits, and political opponents. Over 76,000 people were arrested while TADA was in force from 1987 to 1995. The conviction rate for these arrests was less than two percent. In the period since 1987 to its repeal in 1995, some 17,544 (The Tribune 1.6.94) persons suspected of terrorist activities were detained in Punjab under its provisions. However, no one has ever been convicted under section 3, which defines a terrorist and only 1.8% of those detained under T.A.D.A have been convicted.

Although TADA lapsed in May 1995 after immense international pressure from the organs of the United Nations and non-governmental organizations, it has been given retroactive effect and people are still being charged and held according to its provisions. People in Punjab and other States of India continue to be charged under TADA retrospectively and continue to be harassed under it. In addition, the position is that those wanted in connection with offences committed whilst TADA was in operation are subject to its provisions.

In addition there is further legislation permitting pre-trial detention of those suspected of involvement with militant activities on very loosely defined grounds of national security. These include the Armed Forces (Special Powers) Act allowing the security forces wide powers of arrest, to conduct searches without warrant and prohibiting a detainee from being legally represented when an

Advisory Board conducts review of the detention period. Reasons for the detention do not have to be disclosed if it is not in the "public interest" to do so.

Further, the Terrorist Affected Areas (Special Court) Act amends the Indian Evidence Act so that when a person accused of committing an offence can be shown to be in an area where firearms or explosives were used against the security forces, they are considered to be presumed guilty if an offence and must rebut the presumption at trial.

The majority of those detained under TADA were released on bail on the orders of the Supreme Court and cases were reviewed by the "Review Committees" which often recommended release. According to official figures, as of December 1999 TADA charges against almost 24,000 people had been dropped as a result of such reviews.

Maharashtra Control of Organised Crime Act, 1999

Other major Anti-terrorist law in India is The Maharashtra Control of Organised Crime Act, 1999 which was enforced on 24th April 1999. This law was specifically made to deal with rising organized crime in Maharashtra and specially in Mumbai due to the underworld. For instance, the definition of a terrorist act is far more stretchable in MCOCA than under POTA. For, POTA did not take note of organized crime as such while MCOCA not only mentions that but, what is more, includes 'promotion of insurgency' as a terrorist act. Again, the onus to

prove a person guilty under POTA lies on the prosecution while under the Maharashtra law a person is presumed guilty unless he is able to prove his innocence. MCOCA does not stipulate prosecution of police officers found guilty of its misuse. But POTA did.

Maharashtra Prevention of Organised Crime Act (MOCA) is an almost "duplicate" law, even more draconian than the TADA itself. It has been applied to arrest doctors, film personalities, a judge, reporters, workers, youth and people of all backgrounds. While extortion, contract killings, money laundering etc., continue unabated in Mumbai, this law has emerged as one of the most potent tools in the hands of Maharashtra police to threaten and terrorise the people fighting for economic and social justice. The Atal Behari Vajpayee Government approved MOCA in FEB 19 1999 in to the legislation to curb organized crime and extortion in Mumbai and other parts of the state.

The then Shib Sena-BJP alliance government's main contention was that after the lapse of TADA, police had virtually become handicapped and could not book gangsters. Subsequently, the alliance government introduced a new legislation, Maharashtra Prevention of Dangerous Activities (Prevention) Act, but that too failed to restore peace.

The new legislation gives sweeping powers to police, and its provisions are more or less similar to those of TADA. The highlight of the new legislation is that

the accused will have to prove he is not guilty of committing a crime and secondly, even a person remotely linked to gangsters can be punished for abetting organized crime.

"organized crime" means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organized crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency;

This law is considered to be a replacement for the infamous Terrorist and Disruptive Activities Prevention Act (TADA) that was allowed to "lapse" in 1995 in the face of broad opposition to its draconian provisions and use. Since then, the Maharashtra government has been the only state government that has successfully enacted a replacement for TADA while similar draft legislations have been withdrawn in Tamil Nadu, Andhra Pradesh, Jammu and Kashmir and at the Centre because of popular opposition.

MCOCA provides for an accused to be kept behind bars for at least six months without bail. Under this law, the accused is presumed guilt at the time of arrest, with the conditions to bail practically impossible because it requires the judge at the initial bail hearing, before any trial, to believe the accused to be not

guilty. Under the Act even if a person is falsely implicated, he will not get bail for a while. The police all over India want an Act which enables them to prevent bail and extract confessions and this is what the MCOCA has given to Maharashtra police. MCOCA have nothing to do with controlling crime and are likely to be used against people who are not in the good books of the system.

POTO (Prevention of Terrorism Ordinance) Act, 2002

The promulgation of the Prevention of Terrorism Ordinance is an important black mark in the National Democratic Alliance's record of misgovernance. POTO has produced consternation in India's political and journalistic communities and raised serious questions about citizen's freedom, and the fairness of the law-and-order and justice delivery systems. There is every reason why Parliament must oppose POTO. The Rajya Sabha in particular must pass a resolution to ensure that the Ordinance lapses or is defeated.

Why has POTO generated so much heat? It is not that we do not need to fight terrorism, but POTO is a remarkably ill-conceived, draconian and counter-productive instrument for doing so. Like TADA, the Terrorist and Disruptive Activities (Prevention) Act, it will victimise innocent people through unwarranted detention and harassment, promote irresponsible policing, and thus damage the credibility of the legal system. This can only lead to more discontent and aggravate the phenomenon of sub-state terrorism which POTO is meant to fight. It

is not the abuse of POTO but its normal use that should worry all those who value freedom and oppose terrorism.

To be fair, POTO is not an exact replica of TADA. In some respects, it is a slight improvement on TADA. It does not cover "disruptive" activities, which were left so ill-defined in TADA that striking students or milkmen could be detained for months. POTO allows appeals against rejection of bail to the High Court – TADA only permitted a Supreme Court appeal and reduces the victim's rigours beyond the first year of detention. It reduces the period of detention without a charge-sheet, although 90 days is still far too long.

However, POTO is significantly worse than TADA insofar as its scope extends beyond "terrorists" to "terrorist" organisations" and their supporters and sympathisers who by definition are not terrorists. This is POTO's most egregious feature POTO also empowers the government to tap telephone and other communications and confiscate suspected "proceeds of terrorism". POTO seeks to punish severely those who may have information about terrorist activities but fail to disclose it. This has damaging implications for the freedom of expression. POTO is thus a harsh preventive detention law, which reverses the burden of proof and permits the harassment of anyone the government considers undesirable.

- Section 3(1) defines a terrorist as somebody with the "intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the

people...", who commits violent acts by "using bombs or other explosive substances or... other... poisons," etc. to cause death, injuries, or damage to, "property or ... supplies"... to be used "for the defence of India or in connection with any other purposes" (emphasis added). Although the phrasing is somewhat vague, it at least requires that an act be committed, for which the sentence would be death or life imprisonment.

However, Chapter-III of POTO makes nonsense of this very requirement by creating a new category, of "terrorist organisations", defined merely as "listed in the [attached] Schedule." (Already, 23 groups have been named.) Such organisations need not have committed or participated in terrorist acts; it is enough that they are found to "encourage" terrorism or are "otherwise involved" in it.

Thus, the Central government can arbitrarily lable any organisation "terrorist" – for instance, because it promotes a "terrorist ideology" (also arbitrarily defined). It can harass its members, sympathisers, harbourers and so on. A "sympathiser" – by definition not a terrorist – can be sentenced to 10 years' imprisonment. "Members" are liable to be imprisoned for 10 years – whether they have engaged in any violent act or not. Those who raise funds can be sentenced to 14 years' imprisonment.

- The government can tap or intercept any communication, including electronic, wireless, oral or other messages from anyone suspected of indulging in a

terrorist offence. A Joint Secretary to the government serves as the "competent authority" for this non-judicial decision. The intercepts are admissible as evidence in court. This provision can easily become a charter for harassing and intimidating political opponents.

- An officer of the rank of Superintendent of Police is empowered to extract confessions from the accused and present them as evidence. This provision not only has potential for abuse it is itself directly abusive. It perverts the fundamental premise that statements recorded clandestinely, or in police custody under fear or duress, must not be admitted as evidence.

- Reversing the burden of proof directly violates the "innocent-until-proved-guilty" premise on which modern jurisprudence rests. It is trivially true that some existing laws such as the Income-Tax Act, the Narcotics Act and the Sati (Prevention) Act also demand proof of innocence. But that is no justification for POTO. The consequences of these laws are not comparable. For instance, if your bank account shows an abnormally large deposit, you must be able to explain its source to income-tax officials. But you are not imprisoned or tortured till you give an answer – as you could be under POTO. Most laws provide remedies. POTO has few : you are in the loc-up before you know it. Once you are accused, once arms are planted on you, or once your union, association or organisation is branded, you can be bunged into jail.

- Sections 3(8) and 14 are particularly obnoxious. They punish anyone who possesses information relevant to the possible commission of terrorist acts, but "fails" to disclose it. This prescribes one year's imprisonment for an act of omission, not commission – and three years for non-cooperation with the interrogating officer. This is abhorrent. In a situation where ordinary citizens hesitate to appear as witnesses to crimes out of fear of police harassment, it is unreasonable to demand that they suddenly trust the police. It is frivolous to compare this provision to Section 39 of the Criminal Procedure Code, which too mandates furnishing of information about impending crimes. This Section has mercifully not been seriously invoked for decades – like Section 377 of the Indian Penal Code pertaining to homosexuality.

Section 3(8) and 14 are liable to be used against journalists who in their line of duty may interview a "terrorist" or terrorist "sympathiser" without necessarily knowing their identity or criminal plans. To demand that the journalist part with this information amounts to imposing unreasonable restrictions upon the freedom of expression. This counterposes the right to information to an ill-defined "duty to the nation". Yet, POTO empowers the police to extract information for journalists. This is, potentially, extremely abusive. A conscientious journalist, if she or he discovers that a terrorist act is about to be committed, will want to alert not just the police but the larger public. The possibility of a clash between privileged

information (with the journalist) and knowledge available to the police is extremely rare.

Writing a whole piece of legislation on the basis of a rare, worst-case scenario risks interfering with the media. In the present situation, where there is suppression of the right of association and collective action such provisions are likely to lead to censorship. Journalists wanting to "play safe" will simply avoid certain beats. Publishers will restrict reporters' activities to areas where they cannot be held liable under POTO. The public will be the ultimate loser.

POTO represents an unhealthy, pathological, "big-stick" response to the social disorders which underlie sub-state terrorism. It is based upon the 173rd Report of the Law Commission – a body reduced to a pale shadow of itself by members such as a long-time swayamsevak, whose sole claim to "scholarship" is that he has edited two volumes of Atal Behari Vajpayee's speeches. This Report shows a strong communal bias in emphasising the dangers posed by "fundamentalist terrorists" and "religious fundamentalists", selectively highlighting the plight of "Hindu families" in communal disturbances, and in drawing parallels between the 1993 Bombay blasts (although not the Babri Masjid demolition) and the activities of "Muslim militants". The government has carried this communal bias into the Prevention of Terrorism Bill 2000 (since dropped) and into POTO. POTO will be used by the Bharatiya Janata Party to harass the

minorities, polarise religious communities and whip up hysteria to win votes, especially in Uttar Pradesh.

The government has learnt nothing from the dismal experience with TADA, under which 76,036 people were detained under charges which were often so flimsy that two-thirds of them were discharged by the courts as the government could not even make out a prima facie case. The rate of conviction under TADA was an appalling 0.9 per cent. The law was extensively used in Gujarat and Maharashtra against college students, trade unionists and women's organisations – anyone considered "inconvenient".

By 1995, TADA had become so discredited that no government could think of extending or reviving it – until the right-wing NDA came to power. Exploiting the September 11 carnage and anti – "terrorist" shibboleths, it deviously pushed through POT rather than pilot a Bill through Parliament. This corresponded to the hardening attitude in sections of the Indian elite which have gung-ho approaches to issues such as crime and social discontent. The government did not inform the Parliamentary Standing Committee on Home Affairs of the relevant developments. The committee has not even received a copy of the ordinance.

Draconian laws such as POTO are not just intrinsically obnoxious; they overload and pervert the judicial system. They give the police the option of not investigating crimes and painstakingly gathering evidence. Mere suspects can be

charged with "terrorism" and detained for long, painful years. This can only encourage irresponsible behaviour on the part of a force which increasingly fails to bring criminals to book in cases ranging from petty theft to obnoxious killings – such as the Jessica Lall murder case, "the tandoor murder", or the BMW hit-and-run scandal, to mention examples from the national capital alone.

The BJP is disingenuous to argue that there are preventive detention Acts in States ruled by the Congress – for instance, Maharashtra and Karnataka – and therefore that party must not oppose POTO. Bad preventive detention laws everywhere must go. However, it must be noted that the Maharashtra Control of Organised Crime Act 1999 is meant to deal with "acts... with the objective of gaining pecuniary benefits or an economic advantage". It does not have POTO's broad-spectrum scope. The Act was brought into being by a Shiv Sena-BJP government, although that is no excuse for the Congress-Nationalist Congress Party government to perpetuate it. It is also fallacious to argue that in TADA's absence, Rajiv Gandhi's assassins would not have been convicted. In reality, the Supreme Court acquitted all the 27 persons who were accused under TADA, but contradictorily, upheld their testimony under police custody as admissible evidence. Ultimately, four were convicted for murder under Section 302 of the IPC.

Laws like TADA and POTO assault not only our rights as citizens, but also our democratic sensibilities. We are asked to forget that terrorism in Punjab was

brought under control not through K.P.S. Gill's strong-arm methods, nor through torture, nor by police squads moving around in unnumbered jeeps, but through a political solution which exposed the Khalistani terrorists as a bunch of extortionists and rapists. If the Naga insurgency dies down, it will not be because of the ruthless use of guns, but because of negotiations. Our existing laws can adequately deal with terrorism without preventive detention. But their enforcers are not up to the job. What we need to do is use existing laws conscientiously to bring culprits to trial and convincingly establish their guilt. That can create conditions conducive to deterring serious crime and terrorism.

Regrettably, the NDA's approach is just the opposite. Its government has done all it could to discourage, ban and vindictively punish dissent, whether on the Afghan war, WTO, or religious issues. Recent attempts to deny permission for the holding of rallies in the national capital bear testimony to this – as with a citizens' peace march on October 30, Ram Raj's conversion-to-Buddhism rally on November 4, or the Centre-Left's impressive November 6 mobilisation against a new round of talks at the WTO. The growing official intolerance of dissent, like POTO, spells serious trouble for our freedom and democracy. POTO must become a litmus test. It must go in toto.

The POTO Debate

The National Democratic Alliance (NDA) government finds in the Prevention of Terrorism Ordinance (POTO), to quote Home Minister L.K.Advani,

a "win-win situation". Its passage in Parliament during the winter session beginning November 19 would give the government one more oppressive instrument in its so-called fight against terrorism; its defeat would help the Bharatiya Janata Party (BJP)-led alliance seek political mileage in the coming Assembly election in some states.

The cutting edge of POTO, Advani said in an interview to a newspaper, lay in the provisions relating to evidence that enabled conviction. One important fact that was brought to the notice of the executive. He claimed, was that if the Terrorist and Disruptive Activities (Prevention) Act, or TADA, did not have the provision to admit confessions by the accused before police officers as valid evidence, none of the accused would have been convicted in the Rajiv Gandhi assassination case. Union Minister for Law and Justice Arun Jaitley endorsed this view by saying that but for this provision under TADA, now adopted by POTO, India would have appeared a soft state, where a former Prime Minister was killed and none was convicted.

Central to those arguments is the assumption that without confessions by the accused admitted as valid evidence; it would not be possible to secure convictions in any case where the accused are powerful enough to intimidate witnesses. On the face of it, this is a ridiculous argument as it concedes that the Indian prosecution and investigative system is in capable of securing corroborative evidence to confessions.

Having said this, it is worth examining how crucial Section 15 of TADA was in securing the conviction of the accused in the Rajiv Gandhi case. Under Section 15, a confession voluntarily made by a person before police officer. Not lower in rank than a Superintendent of Police are recorded by such police officer in writing or by using any mechanical device, such as audio cassettes and video tapes, was admissible in the trial of such person (or co-accused, abettor or conspirator) for an offence under this Act.

The Supreme Court, while disposing of the appeals in May 1999 by the 26 accused in the Rajiv Gandhi Assassination case against the death awarded to them by the Designated Court in Chennai, had held that all the accused committed no offence under TADA. But it confirmed death sentences to four and life imprisonment to four of the accused under the provision of the Indian Penal Code (IPC) and other Acts for various criminal offences.

Section 12 of TADA enabled the Designated Court to try jointly any offence under the TADA together with any other offence with which the accused might have been changed as per the Code of Criminal Procedure (CrPC). Therefore, Justice K.T. Thomas held in that judge meant that the confessional statement duly recorded under Section 15 would continue to remain admissible. An Amendment, through a proviso, was introduced in Section 15(1) of TADA in 1993, which said confessions by one accused could be admissible in the trial of a

co-accused, abettor or conspirator, provided they are charged and tried in the same case together with the accused making the confession.

Justice Thomas, interpreting this provision, said: "While a confession is substantive evidence against its maker, it cannot be used as substantive evidence against another person, even if the latter is a co-accused, but it can be used as a piece of corroborative material to support other substantive evidence."

Justice D.P. Wadhwa said: "Under Section 15 of TADA, confession of an accused is admissible against a co-accused as substantive evidence.... As a matter of prudence, the court may look for some corroboration if confession is to be used against a co-accused though that will again be within the sphere of appraisal of evidence."

Concurring with this view, Justice Sayeed Shah Mohammad Quadri said: "Insofar as use of confession of an accused against a co-accused is concerned, rule of prudence cautions the judicial discretion that it cannot be relied upon unless corroborated generally by other evidence on record." It is precisely because the police failed to get enough corroborative evidence to the confessions against the co-accused, that the Supreme Court refused to confirm the convictions of all the 26 accused. It confirmed the convictions only where their confessions were sufficiently corroborated. In other words, confessions alone are not sufficient for conviction.

On the contrary, Congress (I) Member of Parliament and legal expert Kapil Sibal argues that if Section 15 alone mattered for the promulgation of POTO, the government could have thought of amending the Evidence Act, to provide for admissibility of such confessions in certain cases where investigation of a terrorist crime is involved. Ironically, Section 32 of POTO, which is the equivalent of Section 15 of TADA as amended in 1993, does not have the provision that the confession of the accused would be admissible against a co-accused, abettor or conspirator, charged and tried in the same case together with the accused. It is surprising, therefore, that a provision of TADA, which does not find a place in POTO, should be cited in defence of the ordinance.

Civil liberty groups have questioned the police claim that the confessions secured under Section 15 were 'voluntary'. (POTO also makes it clear that the police without the use of force should secure confessions). This is one of the issued raised in the mercy petition submitted by the convicts facing death sentence. Seventeen of the 26 accused in the Rajiv Gandhi case gave confessions to the police under Section 15 but retracted them before the Designated Court, which rejected their retraction.

In 1994, the Supreme Court, while upholding the constitutionally of TADA, said that Section 15 left ample room for misuse and miscarriage of justice. Therefore, recommended certain safeguards - such as producing the accused

before a court within 24 hours of recording his/her confession and arrangement of medical examination of those accused in case of any allegation of torture.

To some extent, POTO incorporates these safeguards. Under POTO, a person whose confession has been recorded shall be produced before the court within 48 hours, and the court would record his statement, and send him for medical examination, if there is any complaint of torture. But POTO does not empower a Judge to reject the admissibility of a confession if the complaint of torture. Is sustained by a Medical Officer. Even if such a power is implicit in some cases, relief under POTO may be available only after 180 days of police custody and the threat of further police custody after a brief spell of judicial custody are not entirely ruled out. The accused, it is feared, are unlikely to retract their confessions before a court.

The government has sought to minimise the threat to the freedom of the media from Section 3(8) and Section 14 of POTO. Arun Jaitley has argued that Section 3(8) merely imposes an obligation on a citizen to give information relating to a crime under POTO. This obviously does not cover publication of an interview with a terrorist, he suggested. Section 14 empowers an investigating officer to require anyone to furnish information. An identical provision exists under Section 39 of the Cr. P.C., which imposes an obligation on a citizen to give information to the police on any offence covered under the IPC. Non-compliance is punishable under the IPC.

But the distinction between Section 39 of the Cr.P.C read with the provisions under the IPC and POTO is obvious: while the former has enough safeguards against abuse, the latter does not. POTO's safeguards come into operation after the damage is done.

In order to counter the Opposition's protest, the government has pointed to the laws, existing and proposed laws similar to POTO in Maharashtra, Karnataka and Andhra Pradesh. The Maharashtra Control of Organised Crime Act, 1999, (the Karnataka Control of Organised Crime Bill, 2001, and the Andhra Pradesh Control of Organised Crime Act, 2001 are modelled on this) has a narrow definition of what constitutes an organized crime - any continuing unlawful activity by an individual, singly or jointly. Either as a member of an organized crime syndicate or on behalf of such a syndicate, by use of violence or threat of violence or intimidation or coercion or other unlawful means with the objective of gaining pecuniary benefit, or gaining under economic or other advantage for himself or any other person or promoting insurgency.

The Act is clearly intended against the Mumbai underworld. POTO lifts the provision relating to interception of communication from this Act and applies to it all citizens suspected of having committed a terrorist act.

As Kapil Sibal points out, the Maharashtra Act makes sense in the context of threats from organized crime syndicates, whereas the militants in Jammu and

Kashmir, against whom POTO might be intended, do not communicate with anyone but indulge in mindless violence. Sibal, however, concedes that laws introduced by the States need to be reviewed. If they have not served the purpose, they should be dropped.

Unlike these states - specific pieces of legislation, POTO applies to every Indian and lacks the precise definition of a terrorist act, as attempted by Section 3(1) of TADA. The more vague the definition of a terrorist act, the greater the possibility of abuse, warns Sibal.

If a wide definition under POTO is intended to bring in all the terrorist organizations under its ambit, its schedule of terrorist organizations reveals exactly the opposite. Of the 23 organizations notified under POTO, four belong to Punjab, some of them already defunct and six belong to Jammu and Kashmir, many of whom had been banned under the Unlawful Activities (Prevention) Act (UAPA), 1967, which suggests that the existing laws could have been sufficient to secure their proscription, seizure of their properties, and stoppage of the flow of funds to them. The banned People's War Group, which strikes terror in Andhra Pradesh, Madhya Pradesh, Chhattisgarh and Bihar, has not been notified. The Students' Islamic Movement of India, and the Deendar Anjuman, both banned under UAPA, have been notified under POTO. The notification of the Liberation Tigers of Tamil Elam (LTTE) has surprised observers.

Whereas the National Socialist Council of Nagalim (Isaac-Muivah), with whom the Centre is holding talks, has been left out in the schedule, six organizations espousing the ethnic cause in Manipur, where there is no visible separatist movement, have been included. Two organizations each in Assam and Tripura have been notified. None of these organizations could be expected to maintain any membership records; a mere suspicion that an individual might belong to or sympathise with these organizations could lead to action under POTO.

All Opposition parties, with exception of All India Anna Dravida Munnetra Kazhagam (AIADMK), have vowed to oppose POTO in Parliament. While POTO's defeat in the Rajya Sabha, where the NDA is outnumbered by the Opposition appears certain, it is not clear whether the NDA will succeed in neutralising the opposition to the ordinance from within. Although the DMK, the Akali Dal and the Telegu Desam Party expressed some reservations, they have not been vocal in their opposition to POTO.

The real test of POTO is, however, not in Parliament but in the electoral arena, where the psychological war over equating the opposition to POTO with support to terrorism would be fought.

A person arrested under the POTO cannot be released on bail by a court until the court is satisfied that there are grounds for believing that he is not guilty

of committing such an offence. When the odds are heavily loaded against a person accused of an offence under the POTO, is it not unfair to deny him the right to move an anticipatory bail?

The Prevention of Terrorism Ordinance (POTO) is the reincarnation of TADA. The TADA was introduced for the first time in 1985 after the assassination of Indira Gandhi. The modified version of the TADA was enacted in 1987. Both the 1985 and 1987 TADA Acts were introduced as a temporary measure for two years. But the 1987 Act was extended every two years till its expiry in May 1995. The POTO is also a temporary legislation for three years. It is believed that the TADA Act has helped to a great measure in containing terrorism in Punjab. Several cases of violence between criminal gangs were booked under the TADA in Maharashtra. In the rest of the country including Tamil Nadu, though several cases were booked under the Act, almost all of them including the Rajiv Gandhi assassination case, have been declared by the Supreme Court as cases not relating to terrorist activities.

There were several incidents of the TADA being misused by the Executive. Many TADA cases investigated by the police in Tamil Nadu ended in acquittals as they were not cases of terrorist activities. The Padmanabha case is a telling example of the misuse of the TADA. The incident regarding the assassination of Sri Lankan Tamil leader Padmanabha was reported in June 1990. The case was

altered to that of an offence under the TADA 14 months later in August 1991 after the change of government in the aftermath of Rajiv Gandhi's assassination.

Former Tamil Nadu Minister, Ms. Subbulakshmi Jagadeesan, was booked along with her husband Mr. Jagadeesan under the TADA Act on the charge of harbouring a terrorist in September 1991. She was arrested by the State police in January 1992 and was in prison till August 1992 when she was released on bail by the Supreme Court. Similarly Mr. V. Ravichandran, younger brother of the General Secretary of MDMK, Mr. Vaiko, was arrested on the charge of harbouring terrorists in October 1991.

Mr. Veerasekaran, advocate, was accused of rendering legal advice to his client, a terrorist involved in the conspiracy thereby assisting the conspirator to the assassination of Padmanabha. As the TADA prohibited any appeal to the High Court, Mr. Veerasekaran was constrained to move an application under Articles 226 and 227 of the Constitution for his release on bail. However, appeal to the High Court has been provided under section 34 of the POTO.

Messrs Subbulakshmi Jagadeesan, her husband Jagadeesan, V. Ravichandran and Veerasekaran underwent the ordeal of arrest, detention and trial proceedings for over six long years before they were found not guilty of the charge of conspiracy or abetment in Padmanabha assassination.

A Basic Difference

In the case of Kartar Singh vs. the State of Punjab (1994 SCC Cr. 899) the Constitution Bench of the Supreme Court upheld the validity of section 15 of the TADA which made a confession statement recorded by a police officer as admissible in evidence. The minority view of Mr. Justice K. Ramasamy and Mr. Justice Sahai that the approach of the police is absolutely different from that of the judiciary as the former is concerned with the result and not with the procedural fairness, is worth consideration.

While commenting on the admissibility of the confession recorded by a Superintendent of Police, Mr. Justice Sahai in the Kartar Singh case observed, "There is a basic difference between the approach of a police officer and a judicial officer. A judicial officer is trained and tuned to reach the final goal by a fair procedure. The basic of a civilised jurisprudence is that the procedure by which a person is sent behind the bars should be fair, honest and just. A police officer is trained to achieve the result irrespective of the means and method 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".

Mr. Justice S. Ratnavel Pandian delivering the majority view in the Kartar Singh case upheld the validity of section15 of the TADA and has laid down certain guidelines to be followed by the police officer while recording a

confession. In the case of Lal Singh vs. the State of Gujarat (2001 3 SCC 221) when it was pointed out that the guidelines laid down in the Kartar Singh case were not followed, the Supreme Court held that confession recorded by a police officer without following the guidelines is still admissible. In the case of S.N. Dube vs. N.B. Boir (2000 SCC Cr. 343) the Supreme Court ruled that it is sufficient if the court is able to conclude that the requirements have been substantially complied with by a police officer. However, now the guidelines have been more or less incorporated in section 32 of the POTO. Even then it is unsafe to allow a police officer who is trained to achieve the result without following fair procedure to record the confession. Why the police officer should be allowed 48 hours to produce before the court the accused along with the confession statement recorded by him. Section 57 of the POTO makes a police officer, who exercises his powers corruptly or maliciously, punishable with imprisonment for two years.

This section will drive the police officer to disregard all the procedural fairness for achieving the success of his prosecution and avoiding the onslaught of section 57. The confession to be recorded by a police officer has been ruled as substantive evidence in the Rajiv Gandhi assassination case (State vs. Nalini (1999) 5 SCC 253) overruling the earlier proposition of law that such confession can only be used as corroborative piece of evidence held in the Kalpanath Rai case (1997 8 SCC 732). Conviction on the basis of a confession recorded by a police officer is permissible now. In such background no police officer should be armed

with the dangerous weapon of recording confession which can be the sole basis for conviction. Producing an accused person before a magistrate for recording his confession is not difficult today. Section 32 of the POTO is too dangerous a weapon to be entrusted to the police.

In Usmanabhai Dawoodbhai vs. the State of Gujarat (1988 2 SCC 271) the Supreme Court viewed the TADA as "an extreme measure to be resorted to when the police cannot tackle the situation under the ordinary penal law. The intension is to provide special machinery to combat the growing menace of terrorism in different parts of the country. Since, however, the Act is a drastic measure; it should not ordinarily be resorted to unless the government's law enforcing machinery fails."

It should not be forgotten that Kalpanath Rai, former Union Minister, was ultimately found not guilty of TADA charges after undergoing prolonged incarceration.

When such was the experience with the TADA, what is the guarantee that professionals, political leaders, presspersons and others who are not favourably disposed towards the party in power will not be harassed by using the stringent provisions of the POTO.

A person arrested under the POTO cannot be released on bail by a court until the court is satisfied that there are grounds for believing that he is not guilty

of committing such offence. This in other words requires the arrested person to prove his innocence before he was fully apprised of the material implicating him in the charge. When the odds are heavily loaded against a person accused of an offence under the POTO, is it not unfair to deny him the right to move an anticipatory bail? Section 48(5) which prohibits moving anticipatory bail has to be deleted in view of the past experience of innocent people having been made to face false accusations of terrorist activities.

The review committee provided under section 59 of the POTO appears toothless. It should be assigned a role similar to the advisory boards in preventive detention laws. The review committee shall be empowered to review every arrest and charge sheet filed under the POTO. The committee should give its opinion within four weeks of such arrest or charge sheet. The opinion given should be made mandatory if it recommends the release of an accused. It is reported that on March 23, 1999, the Jammu and Kashmir Minister for Home Affairs told the State Assembly that 16,620 persons had been detained under the TADA in the State since 1990; of these, 1,640 were brought to trial and 10 were convicted. Can the POTO achieve what the TADA could not achieve? Is the hurry in introducing the POTO with such stringent provisions justified?

The events of 11 September gave the Government of India the pretext it needed to launch yet another salvo in its own "strike against terror". Promulgated six years after the Terrorist and Disruptive Activities Act (TADA) lapsed in 1995,

the Prevention of Terrorism Ordinance (POTO) is expected to come up for debate in Parliament during its winter session beginning on 19 November 2001. POTO is, according to the Government, "less draconian" than the defunct TADA. Other official explanations dwell on the "necessity" of new legislation to tackle "new" crimes. And for good measure, references are made to "similar" legislation in countries such as the United States of America and the United Kingdom.

The Ministry of Home Affairs (MHA) has justified POTO by claiming "an upsurge of terrorist activities, intensification of cross border terrorism, and insurgent groups in different parts of the country." Ministry officials however evidently failed to consult their own data sheets – the MHA's Annual Report for the year 2000 actually revealed a decrease in terrorist incidents in Jammu and Kashmir, a state that remains the main focus of the Indian Government's counter-terrorism measures.

Most of the provisions contained in POTO can be found in statutes such as the National Security Act, 1980; the Armed Forces Special Powers Act, 1958; the Disturbed Areas Act, 1990; the Unlawful Activities (Prevention) Act, 1967; the Prevention of Seditious Meetings Act, 1911; the Anti-Hijacking Act, 1982 No. 65 of 1982; the Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982, No. 66 of 1982; the Disturbed Areas Special Courts Act 1976; the Foreign Exchange Management Act, 1999; the Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980; the Prevention of

Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988; the Indian Telegraph Act, 1885 or the Information Technology Act, 2000.

Furthermore, the few provisions that are not covered by the above Acts violate the Indian Penal Code, the Criminal Procedure Code, the Indian Evidence Act, and fundamental rights chapter of the Indian Constitution. Assertions regarding the appropriateness of the Ordinance are therefore highly questionable.

Attempts have also been made to justify POTO by reference to anti-terrorism legislation in other countries. However, the main arguments along these lines are flawed. The United States legislation, the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996, for example, in no way limits fundamental rights guaranteed to all defendants in the criminal process. Preventive detention on the ground of a person's potential dangerousness is prohibited. The detention of an individual, in all cases, must be pursuant to a lawful arrest - based on probable cause that the individual has engaged in criminal conduct - and an indictment must be confirmed by a judge or grand jury. At the trial stage, the US Constitution's guarantees of due process of law in all criminal proceedings, the presumption of innocence, the right of the defendant to an open and speedy trial and the right of the defendant to confront witnesses against him are neither suspended nor circumscribed by AEDPA.

Moreover, AEDPA provides for absolute freedom of speech and freedom of communication as enshrined in the First Amendment of the US Constitution. Under POTO, a journalist's refusal to share information, which in the views of the Investigating Officer could lead to the arrest of an alleged terrorist, is a terrorist offence.

The USA Patriot Act of 2001, enacted in the aftermath of the 11 September attacks, grants certain additional powers to the federal government and the Attorney General and establishes a new criminal prohibition against harbouring terrorists. However, it does not alter the criminal trial process for terrorism cases, nor does it accord the Executive powers immunised from meaningful judicial review

Under the United Kingdom's Prevention of Terrorism Act 2001, the detention of an individual arrested under the Act can be extended for up to five days, but only with the permission of the Home Minister. The European Court of Human Rights has held that this provision in breach of Article 5(3) of the European Convention on Human Rights. The contrast with POTO is stark– POTO provides for extension of detention for up to 180 days. Further, the Prevention of Terrorism Act allows compensation under Schedule IV for wrong forfeiture of property.

What POTO seeks to do is hold the accused for a prolonged period of detention for upto 180 days without charging him, and effectively subverts the cardinal principle of the criminal justice system – the presumption of innocence- by putting the burden of proof on the accused, withholding of the identity of witnesses, making confessions made to the police officer admissible as evidence, and giving the public prosecutor the power to deny bail. Moreover, little discretion is given to judges regarding the severity of sentences. While the Terrorist and Disruptive Activities (Prevention) Act was reviewed every two years, POTO is not subject to review for a period of five years. POTO is also more likely to be used for preventive detention of all peaceful dissenters than for tackling terrorism.

While TADA was reviewed every two years, POTO will not be reviewed for up to five years. The definitions of terms in POTO are sketchy and therefore highly susceptible to misuse. For example, "terrorist acts" bringing about the death of any person, incur the death penalty or life imprisonment (and a fine). Conspiracy, attempts at committing or the advocating, abetting, advising, inciting or knowing facilitation of the commission of "terrorist acts" or "any act preparatory to a terrorist act" call for imprisonment of no less than five years, extendable up to life imprisonment (and a fine). Imprisonment for three years can result from any attempt to harbour and conceal a person known to be a "terrorist", unless a husband-wife relationship exists between the "terrorist" and the harbourer/concealer. Membership in "an organization which is concerned with or

involved in terrorism" (that is, according to POTO, a terrorist gang or organization) and the holding of property derived or obtained from commission of any terrorist act is to be punished with life imprisonment and/or a fine.

SAHRDC opposes POTO, persuaded by the belief that such an instrument is not the solution to the complex problem of terrorism. Further, POTO can be used by the State to silence peaceful political dissent and to target minorities. The dismal history of national security legislation in India attests to the likelihood of such abuse.

With regard to the introduction of any anti-terrorist legislation, the following must be scrupulously adhered to:

1. Any anti-terrorist law must be subject to international scrutiny. In the absence of a regional mechanism in Asia, the Government of India should ratify the First Optional Protocol to the International Covenant on Civil and Political Rights and the Convention against Torture. India should withdraw its reservations to Articles 20, 21 and 22 of the Convention against Torture.

2. POTO must be subject to review by Parliament every year on the basis of a report submitted by the Review Committee to the Parliament and State Assemblies concerning the progress on every detainee's case under POTO.

3. POTO should be withdrawn from the statute books if it manifestly fails to meet its objectives.

4. POTO must contain a limited and specific definition of terrorism, such as that contained in the Prevention of Terrorism Act of the United Kingdom.

5. The time frame for detention without charge should be the same as that of other criminal offences under the Criminal Procedure Code. Sixty to ninety days is more than sufficient to gather information to charge a suspect.

6. Every detainee must be produced before a judicial magistrate within 24 hours of his or her arrest. No exceptions should be admitted to this rule. Anything short of this should entitle the detainee to immediate release and monetary compensation for wrongful arrest and detention.

7. The normal structure and jurisdiction of the courts should be restored; special courts should be abolished and the normal appeal mechanisms should be available with the normal time limits.

8. There should be a wider discretion for the magistrate to grant bail. The Criminal Procedure Code's provisions are sufficient to enable bail to be refused where appropriate in a particular case. Provision could be made for urgent appeal on any decision to a High Court by either side.

9. There should be a strict time frame for trials. There should be automatic release on bail if proceedings have not begun within 90 days of charges being filed.

10. Trials should continue on a day-to-day basis. Adjournments in exceptional circumstances should not be for more than 15 days.

11. Open hearings should be made the rule unless either party makes out a sufficient case for an in camera trial. Provisions should be made for urgent appeals to a High Court Judge if either party opposes the decision.

12. The presumption of innocence should be restored in all cases.

13. Substantial compensation should be payable for wrongful arrest and detention. The Government of India should withdraw reservations to Article 9 of the International Covenant on Civil and Political Rights.

14. Incommunicado detention should be prohibited.

Prevention of Organised Crime Act (POCA)

The improved Left Front in West Bengal was formulated a draconian act POCA (Prevention of Organised Crime Act) to deal with so called Muslim terrorism. A few years back the Chief Minister Mr. Buddhadev Bhattacharya proclaimed that the unregistered madrassas are the dens of anti national activities. Thus, Bush Advani or Buddhadev, all are signing the same tune of curbing 'Muslim terrorism'. Although following the serious protests launched throughout the state by the revolutionary and progressive forces belonging to all the

communities. Though the CPI(M) and the Left Front had promised to re-establish and enlarge the basic freedom and democratic rights in West Bengal, they are now busy with restricting and curbing it in the name of the changed situation.

A comparative examination of POCA and POTO would reveal that they are nothing but duplicates of each other. However, at present the CPI(M) state leadership have no personal experience of such draconian acts. They feel no hesitation in promulgating these acts.

Terrorism is a big concept. Today it is a big problem for our nation. In other words it is not the threat for our nation but the threat for all over the world. Though its circle is too large, so it is tough to cover all the area of terrorism. After discuss about terrorism and terroristic activities, some major matters are comes out from the discussion.

Terrorism today is a great threat for India's democracy. Some external and some internal terrorist groups they operate their brutal operation throughout all over the India, mainly in the part of Kashmir, Punjab, Assam, Delhi, Mumbai. The common thing is that the internal and international terrorism is the emergence and consolidation of terrorist groups wholly or in part motivated by religious fanaticism. All active international terrorist groups had secular goals and beliefs. The international terrorist groups were religiously motivated, the majority professing Islamist belief. The religious fanaticism causes a greater propensity for

mass-lethality inside indiscriminate attacks, because a bomber who believes he is carrying out the will of God or Allah and waging a Holy War is unlikely to be inhibited by the prospect of causing large-scale carnage.

We have noted that the threat of terrorism is changing in a member of ways, but we still confront a very wide range of terrorist groups and state. Some of the major principles and policies to combat terrorism are like. A law was attempted with the Terrorism and Disruptive Activities (Prevention) Act (TADA) of 1987. But TADA appears to have used unsuccessful as its model. In 2001, Government of India was implemented an another law to combat terrorism and that is Prevention of Terrorism Ordinance (POTO). But POTO will brutalise innocent people, violate human rights and debase the political culture – without effectively countering terrorism. The improved Left Front in West Bengal was formulated a draconian act POCA (Prevention of Organised Crime Act) to deal with so called Muslim terrorism. But POCA and POTA are nothing but duplicates of each other. Although, these policies are implemented to defeat terrorism but it is too hard to pluck out the root of terrorism which already spread its roots is the deep of society.

New anti-terror bill

The government has unveiled its plans to fight terrorism. Two bills were introduced in the Lok Sabha after the Mumbai massacre on November 26, 2008.

One to set up a national investigation agency with special powers and also to amend the existing law for tougher action.

Firstly, Discussion in the Parliament on the Unlawful Activities Prevention Act 2008 and

Secondly, setting up of National Investigative agency.

If cleared, the backbone of the anti-crime law, the Unlawful Activities (prevention) Act will be strengthened. Under the changes to Unlawful Activities (Prevention) Act, a fundamental change will be that a terror-accused may be held guilty until proven innocent. The difference from the Prevention of Terrorism Act (POTA) is that it's up to the judge to decide on a case-to-case basis.

"Under the new Bill the detention period has been changed from 15 days to 30 days and we have kept the original 90 days time period if there is reasonable case of suspicion the court can extend detention period to 180 days so will the period for the investigating agency to file a charge sheet. However, the petitions will be disposed within three months and after that if the court finds that there is reasonable ground of suspicion then the court can cancel the bail plea of the accused. There are divergent views in the ruling establishment on POTA, which was scrapped by the UPA, the government has tried to keep certain provisions of POTA while wiping out other controversial provisions.

The difference between POTA and newly implemented UPA is that the POTA gave extraordinary powers to public prosecutor. which will not be the case under the law. But UPA put special concentration on reaching terrorist funding and organizations that are carrying out terror activities. Under this act the National investigating Agency will be set up under the Central government and will investigate terror related cases and can also take up some special cases from the state governments.

Crucially, the basic anti-crime law will now have the teeth to freeze funding for terror activities and bail will be denied to foreign terrorists. Then, there's the Indian version of the Federal Bureau of Investigation (FBI).

The proposals give the Centre power over the state in law and order matters. It has been the key reason why this has been delayed for a year with states reluctant to give up their supremacy. Special courts will be set up with day-to-day hearings for quicker prosecutions. The hearings will be in-camera i.e. closed to the public and like America there can be a witness protection programme, although its details are being worked out.

What has been left out of all amendments are two key bits: One is the confessions before a police officer remains inadmissible as evidence. something that the Home minister P. Chidambaram also wanted. Secondly, the changes to the National Security Act. Ministers like Lalu Yadav and Ram Vilas Paswan argued

that linking terror to the already tough law could lead to its misuse. But politics could be remaining a big hurdle, although the Bharatiya Janata Party (BJP) says it will support it.

"Even though it's a reluctant and incomplete step, as a nationalist party we will support even an incomplete step, as long as it's a step against terrorism.

However, everybody in Parliament agrees that after the Mumbai attack fighting terrorism needs tough, new legal teeth. But it's a delicate matter, and now that details have been released, the government is bracing for various degrees of political opposition. Even if we forget the nitty-gritties and legal differences, whether the government's proposals will allow our agencies to work in a coherent manner is the question.

There has been a lot of discussion about setting up a central anti-terrorism agency. The rationale for such an agency is the inability of the central government to take any "police" action in cases of terrorism, primarily because Law & Order is listed in our Constitution as a State Subject. We already have a central investigative agency in the Central Bureau of Investigation (CBI), which derives most of its investigative authority from the near-obsolete Delhi Special Police Establishment Act. Setting up a new agency would have a significant gestation period to enact the required legislation, set up the infrastructure and finding the required specialist staff. Instead, it may be easier to add a special counter-terrorism

wing to the CBI. Irrespective of whether a new agency is set up or an existing agency is expanded, the present legal position that the central agency has to await an invitation or consent from the state government will continue severely to limit the capability to achieve the counter-terrorist objectives. The basic requirement is to empower the central government to have jurisdiction (concurrently with the states or exclusively) in specified cases like inter-state terrorist activities. Some important lessons can be learnt from the manner in which the Federal Bureau of Investigation (FBI) functions in the USA. It is for legal experts to examine whether this can be achieved through an executive order or by parliamentary legislation or would require a constitutional amendment. The rating in the area of creating the proper machinery is "bad".

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4.2 Major Findings of the Study :

Terrorism is a significant and controversial concept. Today it is a big problem for our nation. In other words it is not the threat for our nation but the threat for all over the world. Though its circle is too large, so it is tough to cover all the area of terrorism. After discussing about terrorism and terroristic activities, some major matters come out from the discussion.

The major findings of the study are followings:

At first, the main area of the study is that what is terrorism or what is the definition of terrorism. Terrorism by nature is difficult to define. Behind every terrorist group, there are different motives to spread violence and terror. But, after all of these, the main theme is that terrorism is the premeditated, deliberate, systematic murder, mayhem and threatening of the innocent to create fear and

intimidation in order to gain a political or tactical advantage, usually to influence an audience. After the discussion of the meaning of terrorism, then we have identified at least six different sorts of terrorism. These are: (i) Nationalist terrorism (ii) Religion terrorism (iii) State sponsored terrorism (iv) Left-wing terrorism (v) Right-wing terrorism (vi) Anarchist terrorism. Apart from these six types of terrorism there are some other categories based on techniques and methods.

Terrorism today is a great threat for India's democracy. Some external and some internal terrorist groups operate their brutal operation throughout India, mainly in the part of Kashmir, Punjab, Assam, Delhi, Mumbai. The common thing is that the internal and international terrorism is the emergence and consolidation of terrorist groups wholly or in part motivated by religious fanaticism. All active international terrorist groups have secular goals and beliefs. The international terrorist groups are religiously motivated, the majority professing Islamic belief. The religious fanaticism causes a greater propensity for mass-lethality inside indiscriminate attacks, because a bomber who believes that he is carrying out the will of God or Allah and waging a Holy War, is unlikely to be inhibited by the prospect of causing large-scale carnage.

We have noted that the threat of terrorism is changing in a number of ways, but we still confront a very wide range of terrorist groups and state. Some of the major principles and policies to combat terrorism are: Armed Force Special

Power Act 1958 (AFSPA), Unlawful Activities Act 1967 (UAPA), Terrorism and Disruptive Activities (Prevention) Act (TADA) of 1987, Maharashtra Control Organised Crime Act 1999 (MCOCA), Prevention of Terrorism Ordinance (POTO), 2002. A law was attempted with the Terrorism and Disruptive Activities (Prevention) Act (TADA) of 1987. But TADA appears to have been unsuccessful as its model. In 2002, Government of India has implemented a law to combat terrorism and that is Prevention of Terrorism Ordinance (POTO). But POTO will brutalise innocent people, violate human rights and debase the political culture – without effectively countering terrorism. The improved Left Front in West Bengal formulated a draconian act POCA (Prevention of Organised Crime Act) to deal with the so called Muslim terrorism. But POCA and POTA are nothing but duplicates of each other. After the 26/11 massacre of Mumbai, the Govt. have implemented two new anti terror bill, one is National Investigative Ageny and the other one is new form of Unlawful Activities Act. Although, these policies are implemented to defeat terrorism but it is too hard to pluck out the root of terrorism which has already spread its roots is the deep soil of the society.