

A CONSTITUTIONAL ASSESSMENT OF THE PREVENTION OF TERRORISM ACT

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INTRODUCTION

Terrorism has today become the latest threat to world peace and particularly to India's National Security. Terrorists are improving their sophistication and abilities in all aspects of their operation and support. Weapon technology is more increasingly available, and the purchasing power of terrorist organisation is on the rise with the ready availability of both technology and trained personnel to operate it. The terrorists are not only threatening the ideals of democracy and freedom but also causing a serious challenge to the existing progress and development of mankind. There is need for stringent provision for prevention of terrorism. Shortly after the attack on India's Parliament building in December 2001, India had passed its own anti-terrorism law, the Prevention of Terrorism Act (POTA). The law makers in India acted quickly and declared the Act to be a necessary weapon against terrorism. After facing such terrorist attacks if a law regarding terrorism is framed in a country it should be made so stringent that the culprit does not go scot-free just because of loopholes in the law. The need for special laws to combat terrorism cannot be underestimated, actually the problem lies with the implementation of laws and the abuse of powers conferred on the authorities under the special laws. In 2004, the central government had repealed POTA in place of which Unlawful Activities Prevention (amendment) Act, 2004 had come up. The reason behind the repeal of POTA was that it was found to be violating Art. 14, 19(1)(a), 19(1)(c), 20(3), 21 and 22 of the constitution and also the misuse of the provisions of this act by the police officials and other authorities.

PREVENTION OF TERRORISM ACT (POTA), 2002

Defining Terrorism

The European Union in its 2002 summit included the definition of terrorism. It defines terrorism as the aim of “destabilising or destroying the fundamental political, constitutional, economic or social structures of a country.” The FBI further describes terrorism as either domestic or international, depending on the origin, base, and objectives of the terrorists. In simple words it refers to using violence, social threats, or coordinated attacks, in order to generate fear and brings about compliance with political, religious or ideological demands.

What is POTA?

The Prevention of Terrorism Act, 2002 (POTA) was passed by the Parliament of India in 2002, with the objective of strengthening the anti-terrorism operations. It deals with crimes like terrorism subversion and insurgency. Few salient features of POTA are, it allowed detention of up to 180 days of an accused without filing of charges in the court and also it allowed law enforcement agencies to hold back the identities of the witnesses and treat confessions made to the police as admission of guilt. POTA was defined as a weapon against terrorism in the interest of the nation by the then prime minister Shree Atal Bihari Vajpayee. POTA helped in changing the scenario of the cross border terrorism in the country. POTA in accordance with the UN resolution 1373 of September 2001 will help this cross border terrorism in the country. The Act came into force due to several terrorist attacks that were being carried out in India and especially in response to the attack on the Parliament in December 2001. The Act replaced the Prevention of Terrorism Ordinance (POTO) of 2001 and the Terrorist and Disruptive Activities (Prevention) Act (TADA) (1985–95), and was supported by the then ruling NDA government. POTA was binding upon all states including Jammu and Kashmir and it comes under the state list unlike other criminal laws which are enforced in whole of India except for Jammu and Kashmir and which come under the concurrent list.

Journey of POTA, 2002 in India

All states that enacted POTA without wasting much time in capitalizing the broad detentions of terrorist offenses and powers of arrest and detention. Only four months after its implication, officers had arrested 250 people nationwide under the Act, and the number kept increasing. A mere eight months later, , the seven states applying POTA had arrested over 940 people, at

least 560 of whom were languishing in jail. The application of POTA varied from state to state in surprising ways. The State of Jharkhand in particular appeared to have detained more people under POTA than even terror-plagued Jammu and Kashmir, which had witnessed some of India's most violent insurgency for over ten years.

ABUSE OF POTA

Discriminatory towards Muslim minorities

India, the world's most populous parliamentary democracy with "the most powerful court in the world"¹ following the common law system, has a large Muslim Minority with a Complicated History of strife with the Hindu Majority. With such diversity, in context of religion, in the nation there is a discriminatory use of POTA by particular state governments against minorities, particularly Muslims. Here is an example, in 2002, a train carrying a large number of Hindutva activists returning from the city of Ayodhya caught fire at the train station in the city of Godhra. At least 59 people were killed, including 15 children. Gujarat had not previously been considered a major center of terrorist activity, and despite several detailed investigations, to this day it remains unclear whether the Godhra fire was an intentional act or an accident.² However, almost immediately, before any significant investigation had taken place, leading Hindu nationalists, including the state's chief minister, incited Hindutva groups within the community, spreading the theory that the fire had been an act of terrorism. In the violence that followed throughout the entire state, thousands of Muslims were killed and tens of thousands of others displaced. Human rights advocates, the media, and the NHRC have extensively documented the organized and systematic nature of the violence, the complicity of police and other officials, the failure to protect Muslims, and the unwillingness or inability to hold perpetrators of that violence accountable.³ Hundreds of Muslims have been formally arrested or illegally detained for extensive periods in connection with cases pending under POTA. In the immediate aftermath of the violence, the state government filed POTO charges against as many as 62 Muslims, including at least seven boys below the age of sixteen, who it

¹ George Gadbois, *Indian Supreme court Judges- a portrait*, 3 Law & Soc'Y Rev.

² GUJARAT: THE MAKING OF A TRAGEDY,

³ GUJARAT: THE MAKING OF A TRAGEDY

accused of involvement with the Godhra fire, and illegally detained as many as 400 others without charge.⁴ While the POTO charges were quickly withdrawn in the face of sharp public criticism, ordinary criminal charges remained in place against these

Individuals, and approximately one year later the government retroactively filed charges under POTA against 121 individuals suspected of involvement in the Godhra incident. Subsequently, the Gujarat police initiated as many as nine additional POTA cases alleging wide-ranging conspiracies by Muslims against Hindus in explicit retaliation for the post-Godhra violence. These conspiracy prosecutions typically have been vague and open-ended, permitting the police to add charges against additional persons over time and thereby to subject them to POTA's severe provisions for pretrial investigation and detention. Despite the disproportionately high number of Muslim victims in the post Godhra violence, no Hindus responsible for the post-Godhra violence have been charged under POTA at all even though POTA's broad and malleable definition of terrorism could have been applied to much of that anti-Muslim violence – and few have been charged under ordinary criminal laws. Several studies and reports by civil rights activists and scholars show the vast slippages between arrests and convictions, the disproportionate arrests of Muslims, and the insidious normalisation of these laws by their incorporation into ordinary criminal law.⁵

In preventive detentions and TADA cases the Muslims were not targeted by the Judges. India's Supreme Court judges made a distinction between the religious and political affiliations of the minority litigants and supported Muslim Minorities without separatists ambitions, were anti-Kashmiri separatists, and pro-state after a terrorist crisis (without targeting minorities). More experienced judges, shunned Majoritarianism and made a distinction between religion, separatism and security of the state. A judge was more likely to be antistate when the litigant had no political affiliation.

In preventive detentions and TADA cases the Court made a distinction between the religious faith of the Litigant and political goals of separatism and punished only those espousing separatist's goals.

⁴ Joydeep Ray, Gujarat's 'Minor'

⁵ Anil Kalhan, Colonial continuities: Human rights, terrorism and security laws in India.

Constitutional validity of POTA

Terrorism has immensely affected India. The reason for the rise of terrorism in India may vary vastly from religious to geographical to cast to history. The Indian Supreme Court took the case of *Kartar Singh v. State of Punjab*⁶, and observed that the country has been in the firm grip of spiraling terrorist violence and is caught between deadly pangs of disruptive activities of anti-terrorism laws in India which 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 constitutional validity of POTA, 2002 was challenged in the Supreme Court in the case of *People's Union for Civil Liberties v. Union of India*⁷. The first contention raised by the petitioners was on the lack of legislative jurisdiction of the centre to enact this draconian law. It was contended by the petitioners that the parliament had no legislative competence to enact this law as its provisions fall under the entry (Public Order) of State List 2. Since the subject "Public Order" falls under the state list hence, only a state or states are competent to pass such laws. On this count, the petitioners submitted that the whole Act should be declared ultra vires of the Constitution and hence struck down. The petitioners submitted that terrorism is actively confined only to the states and therefore states alone have the legislative competence to enact POTA.

In *RR Gopal Alias Nakeeran Gopal V. Union of India and others*⁸ there was a writ petition under Article 32 of the constitution was filed by the petitioner seeking the following reliefs:

"Issue appropriate writ, order of directions and declare section 4 of POTA as unconstitutional and Void being violative of the rights under article 14 and 21 of the Constitution of India."

The petitioners contended that section 3(3) of POTA provides that whoever 'abets' a terrorist act shall be punishable and this provision fails to address the requirement of mens rea element. They added that this provision has been incorporated in POTA inspite of the contrary observation of this court in *Kartar Singh* wherein it was held that the word 'abets' needs to

⁶ *Kartar Singh V. State Of Punjab*, (1994)2 S.C.R

⁷ *PUCL V. Union Of India*, (2003) 4 SCC 399

⁸ (2004)13 SCC 540

have the requisites of intention or knowledge. It should therefore be struck down. But this contention was not accepted.

The constitutional validity of section 14⁹ was challenged by arguing that it gives uncontrolled powers to the investigating officer to compel any person to furnish information if the investigating officer has the reason to believe that the information will be useful or relevant to the purpose of the act. It was argued that this provision is without any checks and is amenable to misuse by the investigating officer, it does not exclude even lawyers or journalists who are bound by their professional ethics to keep the information rendered by their clients as privileged information, hence section 14 is violative of articles 14¹⁰, 19¹¹20(3)¹² and 21¹³ of the constitution. The Supreme Court turned down this contention.

Sections 18 and 19 deals with the notification and de notification of terrorist organisations. It was submitted that under section 18 (1) of the POTA, a schedule has been provided giving the names of the terrorist organisation without any legislative declaration. That there is nothing provided in the Act for declaring organisations as terrorist organisation. That under section 18(2) of the Act, the Central Government has been given unchecked and arbitrary powers to add or remove or amend the schedule pertaining to terrorist organisations; that under the Unlawful Activities (Prevention) Act, 1967 an organisation could have been declared unlawful only after the Central Government has sufficient material to form an opinion and such declaration has to be made by Notification wherein grounds have to be specified for making such declaration, and that Section 19 excessively delegates power to Central Government in the appointment of members to the Review Committee and that inadequate representation of judicial officers will affect the decision making and consequently it may affect the fair judicial scrutiny. Hence, Section 18 and 19 are violative of Articles 14, 19 (1) (a), 19 (1) (C) and 21 of the Constitution.

Rejecting the above contentions, the Apex Court held these sections intra vires the Constitution on the following grounds: i) The right of citizens to form association or union that is guaranteed

⁹ Section 14 of POTA - Obligation to furnish Information.

¹⁰ Article 14 of the constitution-Equality before the Law.

¹¹ Article 19 of the constitution - Protection of certain rights regarding freedom of speech.

¹² Article 20(3) of the constitution -No person accused of any offence shall be compelled to be a witness against himself.

¹³ Article 21 of the constitution - Protection of life and personal liberty.

by Article 19(1)(c) of the Constitution is subject to the restriction provided under Article 19(4). Under Article 19(4) of the Constitution, the State can impose reasonable restrictions in the interest of sovereignty and integrity of India. POTA is enacted to protect the same imposing restrictions under Article 19(4) of the Constitution. Hence Section 18 is not unconstitutional.

ii) The banned organisation can approach the Central Government and can prove that it is not a terrorist organisation and can subsequently approach the Central Review Committee and it is also free to exercise its Constitutional remedies. The post-decisional remedy provided under POTA satisfies the audi alteram partem (Listen to The Other Side) requirement in the matter of declaring an organisation as terrorist. Therefore, the absence of pre-decisional hearing cannot be treated as a ground for declaring Section 18 invalid.

iii) As per Section 60, chairperson of the Review Committee will be a person who is or has been a judge of a High Court. The mere presence of non-judicial members by itself cannot be treated as a ground to invalidate section 19; and iv) As regards the reasonableness of the restriction provided under Section 18, it has to be noted that the factum of declaration of an organisation as a terrorist organisation depends upon the 'belief' of the Central Government. The reasonableness of the Central Government's action has to be justified based on material facts upon which it formed the opinion. Moreover, the Central Government is bound by the order of the Review Committee. Considering the nature of legislation and magnitude or presence of terrorism, it cannot be said that Section 18 implies unreasonable restriction on fundamental right guaranteed under Article 19(1)(c) of the constitution. Sections 20, 21 and 22 deal with situations where a person 'Professes' (S-20) or 'invites support' 'or arranges, manages, or assist in arranging or managing a meeting; or addressing a meeting' (S-21). The Apex Court accepted the contention of the petitioners that mens rea is necessary for commission of offences under these Sections.

In *Devender Pal Singh Vs. State of N.C.T of Delhi*¹⁴, Section 3(a) that defines terrorist act was challenged to be unconstitutional. In this case there where 9 people had died and several others injured on account of perpetrated acts. The court said that such terrorist who have no respect for human life and people are killed due to their mindless killing. So any compassion to such person would frustrate the purpose of enactment of Tada and would amount to misplaced and unwarranted sympathy. Thus they should be given death sentence. In the same case the constitutional validity of Section 32 which talks about certain confessions made to police officers taken into consideration was challenged. The court said that it is entirely up on court

¹⁴ Devender Pal Singh V. State Of N.C.T Of Delhi , (2002)5 SCC 234

dealing with the offence to decide the question of admissibility or reliability of a confession made to the police officers in its judicial wisdom strictly adhering to law it must while so deciding the question should satisfy itself that there was no trap. No track and no importance seeking evidence during the custodial interrogations and all the conditions required are fulfilled. If the court is satisfied then the confessional statement will be a part of the statement.

Section 21 of the act states that a person commits an offence if he addresses a meeting for the purpose of arranging support for a terrorist organization or to further its activities. In the famous case of Vaiko who is a politician from Tamil Nadu. Vaiko had defended POTA in Parliament during the debate on it. Therefore his petition challenging the validity of Section 21 of the Act assumes particular significance. He is guilty if he arranges or addresses a meeting which he knows is meant to support a terrorist organization or to further its activities. Vaiko was arrested under this Section on the basis of certain remarks saying that "I was a supporter of LTTE once. I was a supporter of LTTE yesterday; I am a supporter of LTTE today and I will be a supporter of LTTE tomorrow." Then, he asked his audience whether the LTTE had engaged in terrorism for the sake of violence or had taken up arms to suppress a culture. Mr. Vaiko, was in detention for 17 months, did not choose to seek bail on a matter of principle.

Section 27 talks about Powers to direct for samples, etc In *S. Srinivasa Vs. M/s Deccan Petroleum Ltd*¹⁵. The constitutionality of this provision was challenged and the court in this case said that, where the order of refusal to issue summons for production of document was prejudicial to accused then such order is not sustainable. The most important part of the section says that the power to take samples is not given to the police authorities but when a police officer investigating a case requests a Chief Metropolitan Magistrate to obtain samples of any accused person reasonably suspected to be involved in the commission of this act and then if only the Chief Metropolitan Magistrate gives the order to obtain such samples its only then he can force the accused to give such samples. If any accused person refuses to give such samples the court shall only then draw adverse inference against the accused

¹⁵ S. Srinivasa V. M/s Deccan Petroleum Ltd. (2001 Cri LJ 659)

The three Bench Judgement in *Mahmadhusen Abdul Rahim Kolata Shaikh V. Union Of India*¹⁶ The Supreme Court responded that “by the reason of amendment of POTA, the provisions introduced namely sub-sections (3) to (7) in section 2 thereof, did provide that if the review committee was of the opinion that there was no Prima Facie (the first evidence) case for proceeding against the accused and issued directions under section 4 then “the proceeding pending against the accused shall be deemed to have been withdrawn from the date of such direction.”

Examples of Abuse of the Prevention of Terrorism Act, 2002

Anti – terror acts such as POTA can be easily abused by the law enforcement officers and executive officials through political and communal grounds. As the POTA curtails the procedural safeguards against the arbitrary arrest and detention, that are conferred to citizens under clauses (1), (2) of Article 22. As India is a home for various minority groups, the abuse of anti-terror laws in India are precisely visible and is more likely to be persist.

The Instances related to abuse of POTA in India:

1. POTA has been invoked against a revolutionary Telugu poet for the first time in Andhra Pradesh. Mr Arvind Babu, convener of Prakasam district unit of Revolutionary Writers’ Association or Virasam. Activists insist that Mr Aravind was subjected to severe mental torture during interrogation and was pressurised into signing a confession statement in which he admitted to having links with the banned People’s War.¹⁷
2. In Delhi, nine cases have been filed under POTA at the Special Court in Patiala House. Only one has been decided — the ruling on the attack on Parliament House, easily the most publicized case, on December 18, a year after the attack on the parliament house.¹⁸
3. Those charged under POTA in Gujarat, belong to the minority communities. Of the 240 person charged, 239 are Muslims while there is a lone Sikh. POTA has been selectively applied in Gujarat.¹⁹

¹⁶ *Mahmadhusen Abdul Rahim Kolata Shaikh V. Union Of India* (2009)2 SCC 47

¹⁷ Deccan Herald, March 08, 2003

¹⁸ The Indian Express, April 05,2003

¹⁹ Hindustan Times, September 12, 2003

4. Mohammad Afroz Abdul Razzak was arrested in Mumbai under POTA in October, 2001. There were doubts that he was arrested in August, 2001 for questioning, although he was granted bail in April, 2002. The Mumbai police had nothing against him except his confession where he apparently revealed plans to blow up the House of Commons in the UK.²⁰
5. In Tamil Nadu had two juveniles among 46 who were arrested under POTA. The Madras High Court intervened in the case of one and the 17-year-old was released in 2002. Slamming the teenager's detention under POTA, the judge ruled that only the Juvenile Justice Act 2000 should be applied in this case. Juveniles arrested under POTA: Two minors Prabhakaran and Bhagat Singh were arrested along with 27 others. According to Prabhakaran's counsel, the arrested include 5 women also. In March 18, 2003 however, Justice K Sampath, concluded in his order that set aside the POTA charges against Prabhakaran and said that he should have instead been tried under the Juvenile Justice Act.²¹
6. Twenty-two year old Poonam Devi was arrested under POTA in March, and had neither been tried nor bailed till October. Other cases of women's arrests include that of fourteen year old Mayant Raj Kumari and Sheela Devi, and also Urmila Kumari and Savita Kumari. The last two continue to remain in jail despite bail being granted to them by the Jharkhand high court in May since their parents could not furnish the bail bonds.²²

REPEAL OF POTA

How and when

The provisions contained under the POTA were mostly contained in existing laws, except those, which were contained in the Criminal Procedure Code, the Indian Penal Code, the Evidence Act or the Constitution of India. But the Act also had some provisions, which were not attacked for being against human rights. These provisions stated that Confessions must be recorded within 48 hours before a magistrate, who will send the accused for a medical examination if there is a complaint of torture. Further a legal representative of the accused can

²⁰ The Indian Express, April 07, 2002

²¹ Indian Express, March 31 2003

²² Indian Express , October

be present for part of the interrogation. Moreover, police officers can be prosecuted for abusing their authority. The POTA also provided that victims could be paid compensation.

But these provisions could not act as an effective shield to protect the Act from the criticism it received for its other provisions abusing human rights. Those opposed to POTA had argued that existing laws were sufficient to deal with terrorism. Within a year POTA had already built up a dubious record and in some states it was already dreaded as its predecessor. State governments, including opposition-ruled ones, had not hesitated to use POTA to fix political opponents.

Finally, on September 17, 2004 the Union Cabinet in keeping with the UPA government's Common Minimum Programme, approved ordinances to repeal the controversial Prevention of Terrorism Act, 2002 (POTA) and amend the Unlawful Activities (Prevention) Act, 1967.

The Indian Government's decision to repeal the controversial Prevention of Terrorism Act (POTA) is a major step forward for civil liberties in India.

From the researcher's point, POTA's repeal would be an example for the rest of the world that counter-terrorism efforts need not undermine fundamental rights and urged the government to immediately release all individuals held without charge under POTA, drop cases filed under POTA, and promptly determine whether to refile such cases under criminal code.

When the Act came into force, many reports surfaced as the law being grossly abused, only four months later after the enforcement of this Act the state law enforcement officers had arrested 240 people nationwide, and the number went on increasing over a period of time and several people were languishing in jail. Several prominent people like Vaiko were arrested under this Act.

At the Peoples Tribunal on POTA and Other Security Legislation at the Press Club in New Delhi on July 16, 2004 a 629-page report based on depositions made before the Tribunal by victims and their families from ten states in India, as well as expert depositions by lawyers and activists, showed that such security legislations grant sweeping powers to authorities, which has led to misuse of these powers and severe restriction of basic rights. At the same time, such legislations do not address the political, social and economic roots of the problem.

On 7th October 2004, The Union Cabinet under UPA Government approved the repeal by passing Prevention of Terrorism (Repeal) Act, NDA asked UPA to introduce the Act again, but the Congress criticized it and did not pass the Act again.

In *Kartar Singh v State of Punjab*²³ the court held that “ the Supreme Court cannot go into and examine the need of “POTA”. It is a matter of policy. Once Legislation is passed the Government has an obligation to exercise all available options to prevent terrorism within the bounds of the Constitution. Moreover, it has been repeatedly held that mere possibility of abuse cannot be counted as a denying the vesting of powers or for declaring a statute unconstitutional.”

On December 2, 2004 NEW DELHI, the Government introduced a Bill in the Lok Sabha seeking to repeal the Prevention of Terrorism Act. The move had cleared the decks for the review of all POTA cases pending in courts or at various stages of investigation within one-year period.²⁴

The Court, in *PUCL V. Union Of India*, Apart from challenging the Constitutional validity of the above Sections of POTA, the Constitutional Validity of Entry 21 of the Schedule to POTA is also challenged. On the aspect no specific arguments have been addressed by any of the parties. This matter will have to be heard separately and hence, this writ petition is delinked from other matters.

Consequences of repeal of POTA

In 2004, when the NDA government set up a review committee on POTA and it was decided that it would be repealed and in place of POTA a new act i.e. Unlawful Activities (prevention) Act had come into action. The UAPA was not completely different from POTA since all the terrorist organizations banned under POTA would continue to remain banned, under the Unlawful Activities Act, after the repeal of the Act and also some of the clauses in POTA, which will be completely removed from the amended Unlawful Activities Act, are: the burden on the accused to prove his innocence, compulsory denial of bail to accused and admission of the confession made by the accused before the police officer as evidence in the court of law.

²³ Kartar Singh V. State Of Punjab (1994)3 SCC 569

²⁴ The Hindu on Friday, December 3, 2004- POTA repeal bill introduced in the Lok Sabha

But there were also a few changes mainly in the provisions restricting release on bail and allowing long period of police custody of the accused. Now the suspected terrorists can roam freely under the bail. The police may also not get enough time to interrogate the accused to investigate the cases which, by their very nature, are complex. Also the government has removed all traces of strict liability which means that the burden of proof will be shifted from the accused to the police. Unlike POTA, there is no presumption of guilt under UAPA. All the concessions from the internal security establishment have not come without a price. The UAPA is said to be more draconian than POTA when it comes to the admissibility in evidence of telephone and e-mail intercepts. The police can now produce intercepts in the court without abiding by any of the elaborate safeguards provided under UAPA. Thus, if the police cannot anymore extract a confession in custody, they have been given more scope than before to plant evidence in the form of interceptions.

It can be suggested that the new law i.e. UAPA has retained all the important provisions of POTA or it has made only cosmetic changes to those provisions. The difference between POTA and UAPA is significant even though a lot of provisions are not changed in the new act.

CONCLUSION

The danger that terrorism poses to democratic values and the way of life that they permit stems not just from terrorist threats and violence and the vulnerabilities the terrorists exploit, but the ways in which our societies think about them, talk about them, prepare for them, respond to them and recover from their impact. Terrorism, which itself represents an attack on Human rights that governments have an obligation to combat, is a complicated, serious and difficult problem to address. In recent years, however India has taken several positive steps, repealing POTA and seeking to transform the police and criminal justice institutions. The profile of POTA cases affirms the claim of civil rights activists that the tendency of the police and prosecution to classify criminal and other non-security of state related crimes as “terrorism”, has shrunk the civil liberties of citizens and vulnerable minorities.

“No Constitutional Design can guarantee against the very worst case, and no constitutional design is needed for the best of all possible worlds. But there is a plenty of room in the middle,

and this is where Human Beings generally live out their lives. This is where the emergency Constitution can make a big difference.”

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