POTA IS CONSTITUTIONALLY VALID

"Everything has been said already, but as no one listens, we must always begin again"   - Andre Gide

In its recent decision, the Supreme Court has upheld the constitutional validity of Prevention of Terrorism Act, 2002 (POTA) observing that "*mere possibility of abuse cannot be counted as a ground … for declaring a statute unconstitutional.*" As a legal concept this cannot be disputed. However, the abuse of POTA is not a "mere possibility" any longer, it is not even a probability but a fact. A law, any law is only as good as its implementation. Consequently if the provisions of a law are being misused, then it is for the courts to either rule that they are unconstitutional or to provide safeguards to check their abuse.

Some of the provisions that have been upheld as constitutionally valid by the Supreme Court include section 14 that empowers an investigating officer to compel a person to disclose information. "*No one has a sacrosanct right to withhold information regarding crime*" but what are the safeguards to ensure that citizens' rights are not violated while asking him to disclose information? Most of the countries that have enacted anti-terrorism legislations including U.K. and Canada include various safeguards in their disclosure provisions including: (1) the information is to be disclosed in a court of law and not before a law enforcement official, (2) the citizen has a right to engage a counsel, (3) privileged communications are exempted from disclosure, and (4) any information given and evidence so produced cannot be used against the person in a criminal proceeding against him/her. Given the fact that the Supreme Court does take into account provisions of law in these countries at various points in its judgment, it could have read these safeguards into the Indian law to check its abuse.

POTA also allows the Central Government to proscribe an organisation as a terrorist organisation. This proscription is done without giving the organisation any opportunity of being heard. The law provides that any person aggrieved by proscription may apply to the government for de-proscription. However this very procedure of de-proscription makes a person challenging the proscription even more vulnerable. Such a person leaves himself open to prosecution for various offences like membership of the proscribed organisation or giving support to it based on the very evidence that he provides in his application for de-proscription. This effectively rules out possibility of challenges to the government decision. There is no provision in the Act that states that any evidence given in such proceedings will not be used against the person in a case against him. Such provisions exist in laws of other countries like the U.K. that have enacted anti-terrorism laws and the Supreme Court could have read these into the Indian law. Secondly the Act does not allow judicial review of proscription. Appeal from the decision of the Government lies to a Review Committee established by the Government. Strangely the Supreme Court has upheld this provision without addressing the issue of judicial review. This decision is in contradiction to the jurisprudence laid down by its five-Judge Bench in *State Of Madras V. Union Of India & State Of Travancore Cochin* wherein it was observed: "…The right to form association … and its curtailment is fraught with such potential reactions … that the vesting of authority in the executive government to impose restriction on such right without allowing the grounds of such imposition both in the factual and legal aspect to be duly tested in a judicial inquiry, is strong element which … must be taken into account in judging the reasonableness of the

restriction imposed …. on the exercise of the fundamental right under article 19 (1) (c); *for, no … review by an Advisory Board, even where its verdict is binding on the … government, can be a substitute for a judicial enquiry*".

The Supreme Court also upheld the provision that makes confessions before police admissible in evidence. The Court simply observed that it had in the past upheld the validity of a similar provision in Kartar Singh's case and it "need not go into that question at this stage". The court does not answer the question of the petitioners when they ask that if a confessing person is to be produced before a magistrate within 48 hours of the recording of the confession, why not let him record confessions instead of the police? The Court should have weighed the opinion of NHRC that this would increase the possibility of torture in securing confessions and also taken into account the history of abuse of this provision by the police under TADA; and balanced it with the need to give this power to the police and not the Magistrate. Further, the court could have read several safeguards into the provision to check its abuse. The court could have mandated a video recording for all police interviews under the Act. POTA merely provides that a confessing accused shall be brought before a Magistrate, who shall record the statement, if any, made by the accused. The Court could have, as a safeguard, imposed a duty upon the Magistrate to inform the accused that he has the right to make a statement without fear of any reprisal. The Court could also have mandated that the atmosphere in the Magistrate's court should be free from threat or inducement and all the other safeguards that exist under the ordinary law for recording of confession should apply.

In this judgment, the Supreme Court observes that "the fight against terrorism must be respectful to the human rights". However, with all due respect to my Lords of the Supreme Court, this judgment may have put us a decade back in terms of respect for human rights in the combating terrorism.

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