

India: The Politics of Anti-Terror Legislation

Vijay Nagaraj, Amnesty International India

It is now widely acknowledged that the events of 11th September in the USA have given States the excuse they needed to enact new and very stringent security legislation or further strengthen existing ones. However what the international human rights community has not done is to ask the next logical question - if 11th September was only an excuse, then what are the more material, real reasons behind the unprecedented level of enactment. This paper is an attempt to examine the politics of security legislation with specific reference to the 2003 Prevention of Terrorism Act (POTA), India's latest anti-terror law.

The history of security legislation in the Commonwealth is intimately connected to the institutional and ideological continuity that bridged the transition from the British Indian State to the independent Indian State. And nowhere has the continuity been so evident and so damaging than it is in the case of the criminal justice system. The institutional apparatus especially the police and the judiciary have not changed much since 1947. Indeed the State has only become more repressive and POTA is a case in point.

The essential underpinning of this ideological continuity is the notion of the State as Eminent Domain, a principle that informs all Common Law. This has continued to hold sway even as over the last 50 years the development of international human rights law has been established around the State as Duty Bearer, with the fundamental obligation to protect all peoples human rights at all times. This contradiction has gone virtually unchallenged and has meant that even the judiciary tacitly accepts that the State has the sole prerogative to decide who is a threat and who is safe and those who are a threat have none or little human rights. An assessment of POTA with the Rowlatt Act of 1919 illustrates this contradiction clearly.

POTA is in many ways more draconian than the infamous Rowlatt Act, enacted by the British to suppress the anti-colonial independence movement in India. Even the Rowlatt Act did not alter the trial process as drastically as POTA and provided for a standard of judicial scrutiny, including at pre-trial stage that POTA does not even envisage. The Rowlatt Act enshrines a far higher degree of judicial review of executive powers than does POTA.

For instance the Rowlatt Act made initial judicial scrutiny before prosecution mandatory. The Special Court had to send in writing to the Chief Justice of the High Court all the facts intended to be proved. The Chief Justice could ask for "further particulars" and even direct that a copy should be sent to the accused. POTA has no such provision for pre-trial judicial scrutiny.

Under the Rowlatt Act three High Court judges were appointed for trials by the Chief Justice and the Special Court could do no more than restrict or prohibit the publication of reports of proceedings. Further a death sentence could be imposed only when all three High Court Judges concurred. In contrast under POTA judges for Special Courts

can be of the rank of Sessions Judges and are appointed by the State or Central Government, with concurrence of the Chief Justice. The Special Court can not only conduct all proceedings *in camera* but even a single judge at the level of a Sessions Judge can pronounce a death sentence.

Security Legislation and Free Market 'Terrorism'

With the onset of neo-liberal globalisation, “public purpose” and “public interest” is increasingly sought to be served through private corporate interests to whom the State is willing to entrust all natural and livelihood resources. This has not only sharpened the lines of conflict between large sections of people, especially the poor and indigenous people, who depend on common natural resources for their livelihood but also intensified it. The direct and sometimes violent resistance to the State and its private allies seeking to take over natural resources and sources of livelihood is perceived as a challenge to the legitimacy of the Nation State itself. These challenges and resistance movements are criminalised or delegitimised as 'law and order' problems or 'national security threats' and organisations and individuals involved in resistance movements dubbed 'anti-national' or 'terrorist'. This opens the door for their repression, legalised through a spate of repressive laws and practices.

Clinching evidence of this is the fact that by late March 2003 the state of Jharkhand was infamous for having the largest number of arrests under POTA¹. Jharkhand is not a state where there is an armed conflict raging like in Jammu and Kashmir or other parts of India, it is however a state populated predominantly with indigenous people and is home to some of the richest natural resources in the form of forests, water and minerals. The past decade has witnessed an increasingly intense conflict, sometimes also violent, between indigenous peoples' organisations on the one hand and the state and its private allies on the other with the former struggling to retain control over their natural resources, habitat and sources of livelihood.

No sooner was POTA introduced that the Government of Jharkhand began affecting a series of arrests, which crossed the 680 mark by April 2003.² A large number of those arrested were indigenous people or those who supported the resistance movement. Following exposure in the media and protests by civil liberties organisations more than 80 cases were subsequently dropped³. For the people struggling to protect their livelihoods from State and corporate interest, POTA is another addition to the existing arsenal of laws that are regularly used and invoked against them to break their resistance.

At the national level, India is witnessing the redefinition of freedom as a level playing field and the role of the State from one of welfare to one of enhancing wealth. More insidious is the redefinition of democracy as the rule of the majority. A natural

¹ *POTA fact: Jharkand has a lot more terror than J-K*, The Indian Express: New Delhi, 28 March 2003, p1.

² Union Minister of State for Home, Harin Pathak, in a written reply in the Lok Sabha, (Lower House of the Indian Parliament) on July 22, 2003, said that 682 persons have been arrested under the Prevention of Terrorism Act (POTA) across the country thus far.

<http://www.hinduonnet.com/thehindu/2003/07/23/stories/2003072304771200.htm>

³ *Jharkand drops POTA against 83*, The Indian Express: New Delhi, 3 April 2003, p1.

concomitant of this is the redefinition of national security so that any movement or people that challenge the economic system, the market or majoritarianism become threats to national security. A system and a market that cannot tolerate the poor and the weak is to be protected by special 'security' legislation, as brute force can be the only answer to rebellion - democratic or otherwise. Any other solution would entail concessions that the system is unwilling and unable to make for its own survival⁴.

Whose Nation? 'Terrorism as the Militancy of Minorities?'

Another important dimension that needs stressing is the frequent confabulation of the militancy of ethnic and religious minorities with terrorism. The Law Commission of India's 173rd report on the Prevention of Terrorism Bill 2000 rationalised the need for a draconian anti-terrorist legislation citing increasing militancy of secessionist movements in Jammu and Kashmir and the North-East. The same report also noted that such a law was required to deal with religious militancy, which according to the Law Commission first raised its head with the 1993 bomb blasts in Mumbai. The Commission clearly did not view events of the 1992 mosque demolition in Ayodhya and the widespread violence engineered by militant Hindu nationalist organisations prior to preceding the demolition as religious militancy.

The Annual Reports of the Union Home Ministry (available at www.nic.in) are very instructive in this regard. Terrorism is discussed primarily in terms of Pakistan, Islamic fundamentalism or the activities of the armed radical left-wing organisations i.e. Naxalites. There is however, little discussion in the Annual Reports of the Union Home Ministry on issues such as communal harmony and the incendiary politics or violent activities of militant Hindu fundamentalist nationalist forces. It is only Islamic fundamentalism is seen as a grave threat to national security.

It is this thinking that apparently gets translated into policy and eventually takes the form of laws that cannot but be repressive. Clinching evidence of this is the selective use of POTA in the case of the violence in Gujarat early last year⁵. In the days following the torching of a train in which 59 people, many of them Hindu pilgrims, were killed, over 2000 Muslims were killed and hundreds of women raped and Muslim businesses and houses looted and burnt etc. As of today the Gujarat Government has charged over 120 Muslims under POTA in the train burning incident. The same Government or the Central Government has not taken any meaningful steps to bring to justice any of the accused in the massacre that followed. Indeed the Gujarat Government and leaders of the ruling BJP branded the attack on the train terrorism, while they characterised the massacres that followed as 'natural' or 'spontaneous' reactions, exposing beyond doubt the political and communal expediency of invoking terrorism.

⁴ From an oral presentation made by Pradip Prabhu, a political activist and lawyer working with the Kashtakari Sagthana in Western India.

⁵ *In Gujarat, only Godhra case is fit enough for POTA*, The Indian Express: New Delhi, 3 April 2003, p.5.

A cursory analysis of 32 organisations listed as terrorist organisations and therefore proscribed under POTA, for instance, illustrates this point⁶. Of the organisations, 4 are organisations related to the movement for an independent Sikh homeland, 9 organisations are Islamic in character, 11 are organisations of various ethnic minority groups from the North-East and 2 are radical left wing organisations. Another is the Liberation Tigers of Tamil Eelam (LTTE) which does not function in India and 2 are organisations that support the cause espoused by the LTTE. The latest to be added to the list is an organisation of Nepalis living in India, in no way concerned with the Indian State.

What does a ban under POTA represent? Though the stated purpose of bans, whether under the Unlawful Activities Prevention Act or POTA or other State enactments is to target criminal activities of such organisations, in effect they result in a ban on the politics of these organisations.

On the other hand militant Hindu organisations like the RSS, Bajrang Dal, Shiv Sena etc that have supported, instigated and engineered large scale violence are not branded terrorist organisations. So terrorists according to POTA essentially tend to be Sikhs, Muslims, Bodos, Tripuris and other ethnic minorities and of course the dalits and the poor. Terrorism as defined by the Indian State today seems to be really the militancy of minorities, religious or ethnic.

Do we need POTA?

It is maintained that India needed a new law to deal with terrorist acts that are apparently new types of crimes being committed by terrorists. But every criminal act defined in Section 3 of POTA is already contained in the Indian Penal Code (IPC) and/or various other laws such as the Arms Act, 1959; Explosive Substances Act, 1908; Unlawful Activities (Prevention) Act, 1967; Essential Services Maintenance Act, 1981; 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; and the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 etc.

Referring to the plethora of security related legislation in the country the National Human Rights Commission (NHRC), in its opinion on the Prevention of Terrorism Bill, 2000, observed "Between these legal measures, all the "terrorist acts" contemplated under the new Bill appear to be covered. If necessary, the Indian Penal Code or any provisions of any other Act can be amended to cover any specific action that at present may not be covered, though, it does not appear to be so. The punishments provided under these Acts can be increased where necessary. But there does not appear to be any need to have a separate new bill for the purpose of creating new offences".

Indeed POTA creates no new offence. What POTA does is to merely criminalise the intent i.e. intention to cause terror, threaten the unity, integrity and sovereignty of the country, supporting terrorists, being a member of a terrorist organisation, etc. The accused will then have to prove they did not have such an intent, in other words they

⁶ See the schedule of the Act for the entire list of the 'terrorist' organisations.

have to prove that they or their politics which may be read to bear any such intent, are not a threat in the perception of the State or its agencies’.

Conclusion

The mass murders of Muslims in Gujarat in 2002, the large number of starvation deaths and rampant chronic hunger, increasing poverty, joblessness etc are just some of the signs that economic, social and cultural insecurity in India have reached unprecedented levels. This insecurity has precipitated outrage, mass organised protest and even armed rebellion against the Indian State. Security and anti-terror legislation like POTA is the natural response of a State that has failed to provide for the legitimate economic, social and cultural security of the large mass of people and lacks the integrity, commitment and vision to understand or engage with the resistance it is faced with.

Laws like POTA are being used by the Indian State to create and entrench an atmosphere of fear and insecurity, taking advantage of which the State, security and law enforcement agencies in particular, demand exemptions from human rights obligations, typically seeking more powers and lesser accountability. And the inevitable repression and abuse of this power typically results in a violent backlash that invites more State sanctioned repression, contributing on the whole to an atmosphere in which there is little respect for human rights and the rule of law.

The National Human Rights Commission, in its opinion on the Prevention of Terrorism Bill, 2000 summarised the issue succinctly;

The correct remedy for speedy trial and punishment of crimes connected with terrorism in India is proper strengthening of the crime investigation and prosecution machinery and criminal justice system. If there are a large number of acquittals today, it is not for lack of any laws but for lack of proper utilisation of these laws, lack of proper investigation and prosecution, and lack of adequate number of courts to try the offences. Unless this root problem is redressed, adopting draconian laws will only lead to their grave misuse as has been the case with the previous TADA law.