The State, Democracy and Anti-Terror Laws in India

UJJWAL KUMAR SINGH

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List of Abbreviations

ABNES	Akhil Bharatiya Nepali Ekta Samaj
ACMM	Additional Chief Metropolitan Magistrate
ACP	Assistant Commissioner of Police
AFSPA	Armed Forces Special Powers Act
AIADMK	All India Anna Dravida Munnetra Kazhagam
AIPRF	All India Peoples' Resistance Forum
AIR	All India Reporter
AISAD	All India Shiromani Akali Dal
APDP	Association of Parents of Disappeared Persons
ATTF	All Tripura Tribal Force/All Tripura Tiger Force
BJP	Bharatiya Janata Party
BSF	Border Security Force
BSP	Bahujan Samaj Party
CBI	Central Bureau of Investigation
CD	Compact Disc
CID	Crime Investigation Department
CJS	Criminal Justice System
CM	Chief Minister
CMP	Common Minimum Programme
CPI(ML)	Communist Party of India (Marxist-Leninist)
CrPC	Criminal Procedure Code
CRPF	Central Reserve Police Force
CSDS	Centre for the Study of Developing Societies

DCP	Deputy Commissioner of Police
DEM	Dukhtaran-e-Millat
DGP	Director General of Police
DIR	Defence of India Rules
DMK	Dravida Munnetra Kazhagam
FEMA	Foreign Exchange Management Act
FIR	First Information Report
GUJCOCA	Gujarat Control of Organised Crimes Act
HINDALCO	Hindustan Aluminium Company
IAS	Indian Administrative Service
IPC	Indian Penal Code
ISI	Inter-Services Intelligence
J&K	Jammu and Kashmir
JKLF	Jammu and Kashmir Liberation Front
JMM	Jharkhand Mukti Morcha
KCP	Kangleipak Communist Party
KLF	Khalistan Liberation Force
KKMKSS	Kaimur Kshetra Mazdoor Kisan Sangharsh Samiti
KYKL	Kanglei, Yawol Kanna Lup
KZF	Khalistan Zindabad Force
LTTE	Liberation Tigers of Tamil Eelam
MCC	Maoist Communist Centre
MCOCA	Maharashtra Control of Organised Crimes Act
MDF	Muslim Defence Force
MDMK	Marumalarchi Dravida Munnetra Kazhagam
MISA	Maintenance of Internal Security Act
MLA	Member of Legislative Assembly
MP	Member of Parliament
MPLF	Manipur People's Liberation Front

NC	National Conference
NCL	National Coalfields Limited
NCP	Nationalist Congress Party
NCT	National Capital Territory
NDA	National Democratic Alliance
NDFB	National Democratic Front of Bodoland
NDTV	New Delhi Television
NHRC	National Human Rights Commission
NLFT	National Liberation Front of Tripura
NMML	Nehru Memorial Museum and Library
NSA	National Security Act
NTPC	National Thermal Power Corporation
OBC	Other Backward Classes
OSA	Official Secrets Act
PACE	Police and Criminal Evidence Act
PDA	Preventive Detention Act
PDP	People's Democratic Party
PDS	Preventive Detention System
PLA	People's Liberation Army
POTA	Prevention of Terrorism Act
POTO	Prevention of Terrorism Ordinance
PREPAK	People's Revolutionary Party of Kangleipak
PSA	Public Safety Act
PUCL	People's Union for Civil Liberties
PUDR	People's Union for Democratic Rights
PWG	People's War Group
RJD	Rashtriya Janata Dal
RLD	Rashtriya Lok Dal
RYL	Radical Youth League
SAD(A)	Shiromani Akali Dal (Amritsar)
SC	Supreme Court
SGPC	Shiromani Gurdwara Prabandhak Committee
SHRC	State Human Rights Commission

SIMI	Students Islamic Movement of India
SLP	Special Leave Petititon
SOG	Special Operations Group
SP	Samajwadi Party
TADA	Terrorist and Disruptive Activities (Prevention) Act
TNLA	Tamil Nadu Liberation Army
TNRT	Tamil National Retrieval Troops
UAPA	Unlawful Activities Prevention Act
UAPO	Unlawful Activities Prevention Ordinance
ULFA	United Liberation Front of Assam
UNLF	United National Liberation Front
UP	Uttar Pradesh
UPA	United Progressive Alliance
USA PATRIOT	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism
UT	Union Territory
VHP	Vishwa Hindu Parishad

Chapter One

Dilemmas of Democracy or Reasons of State

Extraordinary Laws in India

The repeal of *Prevention of Terrorism Act* (POTA) figured prominently in the Common Minimum Programme of the Congress Party-led United Progressive Alliance (UPA) government that replaced the National Democratic Alliance (NDA) led by the Bharatiya Janata Party (BJP) in May 2004. The repeal of POTA through an Ordinance in September 2004, a rare occasion when an extraordinary law was repealed, would represent, albeit in a limited way, a triumph for democratic forces. Brought during the regime of the BJP-led NDA government POTA was primarily a political law, with a strong ideological content, manifested both in the context of its inception and subsequent implementation. The latter was demonstrated most starkly in the law's selective application in Gujarat, and its repeal became almost symbolic of the dismantling of communal politics. Yet, the repeal of POTA was synchronous and symbiotic with the enactment of the *Unlawful Activities Prevention (Amendment) Act* (UAPA) 2004, which imported into UAPA 1967, specific features of repealed POTA.[1] Thus, the repeal of POTA, like its commencement, will have to be seen in its specific political context. Moreover, since the story of POTA is specific as well as part of a long history of extraordinary laws, its temporal specificity will have to be woven into the general history of such laws. Through an examination of the specific and the general in POTA, the present work hopes to identify enduring strands of contest surrounding

extraordinary laws, unravelling in particular, the contest between political and procedural aspects of such laws, and exploring their ramifications for political processes, institutions, and democracy.[2]

While the contest between the procedural and political aspects traversed its entire life, and is expected to inform its *afterlife*,[3] it is the political aspect of law which assumed primacy both at the moment of its inception and repeal. It is not surprising, therefore, that the repeal of POTA was followed by accusations of emasculation of the Indian state. Reacting to the terrorist attack on the disputed site in Ayodhya in July 2005, L.K. Advani, the leader of the opposition in Lok Sabha blamed the withdrawal of POTA for sending the signal that India was willing to compromise on terrorism, leading to what he called the 'most serious terrorist attack in the country after the Parliament attack'.[4] A centre-page article in a leading newspaper argued that 'a combination of several events and some of its [the government's] own misplaced actions and utterances, [had] created an atmosphere which both terrorists and their masters can misread'. The withdrawal of POTA figures in the article as the first among several developments in the first year of United Progressive Alliance (UPA) government, which 'persuaded' the 'terrorists to draw the conclusion' that the government had 'no stomach for fight'.[5] Such arguments have recurred with each subsequent act of violence.

POTA was brought into the statute books on 24 October 2001 through promulgation as an Ordinance by the NDA government. Efforts to enact an anti-terror law had been afoot for quite some time and various draft Bills were considered intermittently before and, particularly, after POTA's more notorious predecessor *Terrorist and Disruptive Activities (Prevention) Act*, 1985, 1987 (TADA) lapsed in 1995. TADA was enacted under the Congress regime in 1985. It was then extended and expanded five times by the Parliament, each time with reduced participation and debate, till it finally expired in 1995, following opposition from the BJP and the Left parties. Other attempts to bring in a TADA-like law proved desultory until the 173rd Report of the Law Commission submitted what it called a modified version of TADA to the Government in April 2001. In the meantime, consistent with its stand against TADA, the National Human Rights Commission (NHRC) rejected the draft Bill submitted by the Law Commission

for its consideration. The promulgation of POTO (Prevention of Terrorism Ordinance) followed in the wake of 11 September 2001 bomb attacks on the World Trade Center Towers in the USA. In the period that followed, the 'international consensus' against terror along with the Security Council resolution became the most frequently quoted justification for an anti-terror law in India. In the meantime, with the attack on the Parliament building in New Delhi on 13 December 2001, the chorus of global war on terror became more pronounced in India. A second Ordinance was promulgated on 30 December 2001, since the Bill to replace the first Ordinance could not be passed in the Winter Session of the Parliament due to its adjournment following the attack. The Prevention of Terrorism Bill was presented in the Parliament in the Budget Session, amidst opposition by the Congress and the Left Parties among others, and reservations by several state governments. Eventually, the Bill replacing the Ordinance was passed on 26 March 2002 in a joint sitting of Parliament, convened after its rejection by the Rajya Sabha. The Bill was given presidential assent on 28 March 2002.

If one looks at POTA from its inception as an Ordinance, its enactment, subsequent amendment, and then repeal, interspersed with the Supreme Court decision upholding its constitutional validity, the trial of the Parliament attack case, the arrests of Marumalarchi Dravida Munnetra Kazhagam (MDMK) leader Vaiko in Tamil Nadu, and Raghuraj Pratap Singh *alias* Raja Bhaiyya in Uttar Pradesh, and thousands of 'invisible cases' from Jammu and Kashmir, Jharkhand, Gujarat, Delhi, Andhra Pradesh, Maharashtra and Uttar Pradesh, one finds that extraordinary laws unfold in multifarious ways. This work shall unravel the diverse strands in the manifestations of extraordinary laws, *focussing not only on law's words*, that is, the nature of rules, principles and procedures, and their interpretations in judgements, *but also on law's deeds and effects*—on their implications for assumptions of justice, on the lives of people, on democratic governance, and on the legal and penal structures of the state. The latter, I shall call, following Paddy Hillyard, the 'violence of jurisprudence', identifying thereby, with a position that refuses to see law as an antithesis to abuse of power and violence.[6] The violence of jurisprudence approach holds that the dichotomy between law and violence is false. It rather examines 'the awesome, physical

force that law deploys' and the 'effects of legal force',[7] unravelling in the process the legitimising discourses of 'national security' and 'democracy' that shroud it, to show the ways in which law becomes an integral part of the organisation of state violence.

As will also be seen in the debates that surrounded the enactment of POTA, extraordinary laws are not only erroneously associated with a 'strong state', it is perhaps in the paradoxical nature of such laws that they are justified as being indispensable for democracy. Debates on POTA in India were embedded within the 'dilemma of democracy' framework. In this framework, 'extraordinary situations' are seen as emerging due to the openness and freedom which democracy allows. Extraordinary laws are seen as serving important restorative functions and are integral, therefore, to the functioning of democracies. Yet, in their actual unfolding, as seen most recently in the case of POTA, extraordinary laws become a terrain where permutations in alliance politics and configuration of power politics are played out in significant ways. Two distinct and related trends may be identified in this process, each having important ramifications for institutional structures and norms of democratic governance: (*a*) a trend towards the 'executivisation' of law leading to the use of law as a 'political instrument', eroding thereby the basic principles of the rule of law, and (*b*) their imbrication in centre-state relations as an abrasive centralising force, counterproductive in a polity that sees federalism as a manifestation of democratic decentralisation and a means to preserve political/ideological and cultural plurality.[8]

For 'Reasons of State': Discourses on 'Exception'

Within the broad framework of the history and practice of law, drawing on the experience of the working of previous such laws, especially its immediate precursor TADA, this work will attempt to show, how the justification of security laws while rooted in the 'dilemma of democracy' framework, ultimately manifests the *raison d'etat* or 'reasons of state'. The existence of restrictions and limitations on governmental powers is a fundamental attribute of democratic regimes. Ideas of democracy, individual rights, legitimacy and the rule of law suggest that even in

times of acute danger, government is limited, both formally and substantively, in the range of activities that it may pursue to 'protect the state'. The concept of 'reasons of state' advocates the exercise of unrestricted panoply of measures by the state when faced with existential challenges.[9] Carl J. Friedrich suggests that 'reasons of state' are *considerations*, which exist 'whenever it is required to insure [that] the survival of the state must be done by the individuals responsible for it, no matter how repugnant such an act may be to them in their private capacity as decent and moral men'.[10] While analysing the U.S. involvement in Indo–China, Michael Bakunin averred that 'reasons of state' is in fact a manifestation of the organised authority, domination, and power of the possessing classes over the masses, and the most flagrant, and complete negation of humanity and universal solidarity. Bakunin sees this negation as constituting the very essence of the state, which, however, from the state's standpoint is its supreme duty and greatest virtue: 'Thus, to offend, to oppress, to despoil, to plunder, to assassinate or enslave one's fellow man, which are ordinarily regarded as crimes, get transformed from the standpoint of reasons of state, into things that are done for the greater glory of the State and for the preservation or the extension of its power. The history of ancient and modern states, is thus a series of revolting crimes, perpetrated by the representatives of the states, under no other pretext than those elastic words, so convenient and yet so terrible: 'for reasons of state'.[11]

The considerations of reasons of state are generally understood as emerging in exceptional or extraordinary conditions, which imperil the existence of the state. Theoretically therefore, notions of state sovereignty, the identification and delineation of an exceptional and imperiling condition, and its correlate—the definition of normalcy—are necessary derivatives of *raison d'etat*. Through an examination of the intricate legal procedures, political contexts, and discursive practices that surround extraordinary laws, this work will show how these considerations unfold in specific contexts, ironically in a way that works towards the preservation of particular regimes, the hegemonic structures of the nation-state, and externalisation and extermination of plural forms and sites of self-realisation, as extraordinary. It will, moreover, show how the quest for a legal determination of the exception, gives extraordinary powers to political decision-makers, and how the

extraordinary law becomes a terrain on which political contests play themselves out. The latter unravels in a manner that makes the exception-normal dichotomy irrelevant, preparing the ground for the permanence of the exception or as Oren Gross, puts it, 'normless exception' degenerating further into 'authoritarian exceptionless exception'.[12]

Central to extraordinary laws is the idea of 'exception', since extraordinary laws are manifestations of situations, which are not ordinary or 'normal', but 'emergent' and 'temporal'. A set of interrelated concepts and processes immediately get imbricated in this formulation, primarily, the notion of a sovereign authority, the manner in which the exception is legally and procedurally determined, and the ideas of 'national-security', 'emergency', and the 'political', which inform the discursive contours of the exception. A reasonable understanding of the exception would see it as comprising an unforeseen and sudden situation requiring immediate action. This assumes two things, first, the presence of an authority that decides on the existence of an exceptional situation, and second, the notion of a 'normal' situation, existing as a counter correlate of the 'emergent'. It is significant that it is in the context of and in relationship to the exception that sovereignty is authoritatively asserted. Despite their normative flaws, Carl Schmitt's works—generally seen as having produced a 'jurisprudence of crisis'—have continued to provide the resource for understanding the empirical and descriptive contours of the exception. Writing in the context of the state of emergency in the Weimar Republic, Schmitt defines the sovereign as 'he who decides on the exception'. For Schmitt, it was the exception rather than the rule, which was the determining principle of human reality since not only did it confirm the 'rule' or the 'norm', the latter in fact derived from the exception. The exception is, moreover, the *only* condition where the political is fully manifested, not only because it requires the assertion and affirmation of sovereign authority, but also because it assumes the existence of fundamental and intense antagonism of the nature of 'existential negation' between political entities, which compels/precipitates such assertion.[13]

The justification of states of exception derives, however, from an understanding of the relationship between exception and norm in terms of a 'dichotomised-dialectic' or what Oren Gross calls 'normalcy-rule, emergency-exception' paradigm, and the exception as a condition

of 'supreme necessity not covered by regular law'.[14] Within this framework of relationship, the normal is something, which stands outside and parallel to the exception, and yet is integrally related to it, in the sense that the exception cannot have any meaning unless there also exists a normal situation that offsets it. The normal, therefore, would be the general rule, the universally applicable principles and the ordinary state of affairs, while the emergency would be 'no more than an exception to that rule, lasting a relatively shorter time, and yielding no substantial permanent effects'. It is moreover, the preservation or re-establishment of the normal order—that is, the pre-emergency order—that forms the *raison d'etre* of dictatorship in this framework.[15]

This model of relationship between the normal and the exceptional, is the commonly projected framework in most justifications of extraordinary laws emphasising their temporality, the exceptional nature of the contexts in which they were generated, their constitutional validity, and their indispensability in the ultimate aim of restoring the normal order. Yet, it is the second paradigm of dictatorship, the model of 'sovereign dictatorship', proposed by Schmitt, which is useful for understanding the processes through which a state of exception becomes or threatens to become permanently entrenched. According to this model, an exception is characterised by 'principally unlimited authority, which means the suspension of the entire existing order', and significantly, the enhancement of 'the sovereign dictator's' power to actively change the existing legal order and transform it, in whole or in part into something else. In other words, the norm becomes subservient to the exception, reversing the relationship between the two…the exception gobbles up the normal case and becomes in and of itself, the ordinary, general rule'.[16] Underlying such a formulation is Schmitt's dissatisfaction with legal indeterminacy in liberalism, which either fails to account for the 'inevitability of the exception' or is 'structurally prevented from effectively separating the normal from the exceptional'.

The histories of specific states are replete with episodes of both the 'dichotomised-dialectical' and 'authoritarian dictatorship' models of variable intensity and duration. Ominously, these experiences have no longer remained episodic or sporadic, but through a prolonged identification of extraordinary conditions justifying the perpetual presence of extraordinary laws, have resulted in a gradual 'piling up' of

extraordinary measures, resulting in complex systems of emergency. Such complex systems have made themselves manifest either through states that endure as 'crisis states', or through the existence of a 'great number of parallel or simultaneous emergency rules' which accumulate, or linger on as remnants of former rules, or as this work shall show, as 'interlocking systems' of extraordinary and ordinary rules.

The emergence of a complex interlocking system of laws indicates a state of normalisation of exception. It suggests an approach, which looks at the processes of the unfolding of law, transcending the disparate ways in which the state of exception has largely been thought of in its relationship with law. Giorgio Agamben in his work *State of Exception* identifies two strands in the legal tradition, each subscribing to an 'inside/outside dichotomy' while examining the relationship of the state of exception with the legal-juridical order.[17] While one strand understands the state of exception as 'an integral part of positive law because the necessity that grounds it acts as an autonomous source of law', the other considers both the 'the state of exception and the necessity that grounds it to be essentially extra-juridical, de-facto elements even though they may have consequences in the sphere of law'.[18] For Agamben, however, the simple topographical opposition that the inside/outside approaches subscribe to, are 'insufficient' account for the phenomenon that they set out to explain. 'If the state of exception's characteristic property is a (total or partial) suspension of the juridical order, how can such a suspension still be contained within it?' he asks. Moreover, 'if the state of exception is instead only a de-facto situation, and is as such unrelated or contrary to law, how is it possible for the order to contain a lacuna precisely where the decisive situation is concerned?' Agamben sorts out the contradictions that each approach contains, by proposing that the state of exception is neither inside nor outside the juridical system, but essentially a threshold, and a zone of indifference, where 'inside and outside do not exclude each other but *rather blur with each other*'.[19]

The phenomenon of *blurred zone of indifference* between the state of exception and the juridical system, may well be thought of in terms of a border which does not limit or contain the two systems but rather suggests a permeability and frequent crossing over. It is this permeability and crossing over that the present work will focus on, showing especially

that much of this crossing and the subsequent intermeshing takes place in the context of a specific kind of politics that is largely adversarial and antagonistic, and intolerant of differences—ideological or cultural. Schmitt's framework of exception-normalcy and a quest for legal determination of the exception, emerging from his scepticism of the liberalism's incapacity to do so, made him primarily an apologist for perpetual exceptionalism. The latter was necessitated by a notion of politics, unfolding in the ever-present grouping of friend-and-enemy, with the rule of exception guided towards the existential negation of the enemy. Here again, Agamben's notion of 'law's threshold or limit concept' situating the state of exception 'in an ambiguous, uncertain, borderline fringe', 'at the limit between politics and law', 'at the no man's land between public law and political fact', becomes a useful tool of understanding the relationship between law, state of exception and politics. The notion of the borderline fringe yet again seeks to transcend the paradox that emerges if the state of exception is defined exclusively as a political contingency to the exclusion of law, or vice versa:

> The question of borders becomes all the more urgent: if exceptional measures are the result of periods of political crisis and, as such, must be understood on political and not juridico-constitutional grounds, then they find themselves in the paradoxical position of being juridical measures that cannot be understood in legal terms, and the state of exception appears as the legal form of what cannot have legal form. On the other hand, if the law employs the exception—that is the suspension of law itself—as its original means of referring to an encompassing life, then a theory of the state of exception is the preliminary condition for any definition of the relation that binds and, at the same time, abandons the living being to law.[20]

In the course of this work, we shall see how the politics of exception unfolds in India in all its manifestations, as the threshold where the legal and political blur, produced along the zone of indifference. The latter, however, indicates not apathy, but complicity, through a complex interlocking system of laws, eroding the political and institutional structures of democracy. Before we examine the specific strands and processes through which the blurring and interlocking occurs, its international dimensions and contexts need to be identified. The latter is important since the promulgation and unfolding of POTA was interwoven with the global discourse on the 'war against terror'.

A 'New Liberal Radicalism'? War on Terror and Securitisation of Liberty

The promulgation of POTO followed in the wake of 11 September 2001 attacks on the World Trade Center Towers in the USA, and the subsequent campaign for concerted and consensual global action against terrorism drummed up by the USA and a resolution to the effect passed in the Security Council of the United Nations.[21] Much has been said and written about what actually lies under the veneer of the international consensus—the neo-conservative agenda, U.S. global military, economic and strategic domination etc.[22] Yet, in the period that followed, the 'international consensus' against terror, along with the United Nations Security Council Resolution 1373 became the most frequently quoted justification for an anti-terror law in the USA, UK, Canada, Australia and elsewhere. A spate of anti-terror laws were enacted in several countries after the 9/11 events, manifesting both the increasing reliance of countries on extraordinary laws, and the repressive potential of these laws, especially for non-citizens, immigrants, and racial and ethnic minorities.

In approximately two dozen countries such laws were enacted either immediately after the 9/11 terrorist attacks; such as in the USA, U.K., Canada and India,[23] or after a period of debate as in New Zealand and Australia, namely, the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act* (USA PATRIOT Act), the *Anti-Terrorism, Crime and Security Act 2001* (ACSA) in the U.K., *C-36* of Canada, the *Security Legislation Amendment (Terrorism) Act 2002* of Australia, and the *Suppression of Terrorism Act 2002* in New Zealand. Almost all these countries already had anti-terror laws in place.[24] United Kingdom, has a long history of anti-terror Acts specific to Northern Ireland, beginning with the first *Prevention of Terrorism (Temporary Provisions) Act 1974* (PTA) which followed the bombings in the Birmingham pubs in November 1974. On 20 July 2000, the United Kingdom Parliament passed the *Terrorism Act 2000*, which replaced the previous anti-terror legislation. On 13 November 2001, the UK Government brought the ACSA, an emergency legislation in response to the 9/11 attacks and the UN Resolution 1373—finally approved by Parliament on 14 December 2001. The United States which had

depended on economic sanctions including curtailing the financing of terrorists and terrorist groups, set in process the passage of the USA PATRIOT Act a week after the 11 September terrorist attack. The USA PATRIOT Act provided for expanded wiretap authority and intelligence investigations, increased power to detain and deport suspected terrorists, strengthened civil and criminal forfeiture powers, and additional criminal provisions, higher sentences, and reduced statutes of limitations for terrorism related offences. In addition, it secured to the Justice Department new authority to detain suspicious immigrant indefinitely and without charge, and new powers for government agents to obtain financial and other records without probable cause.[25] In Australia, which did not have a law dealing specifically with terrorism before 9/11, two packages of anti-terrorism legislation were introduced in Parliament in March 2002, the *Security Legislation Amendment (Terrorism) Bill 2002*, and the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill* and passed in June 2003. On 17 April 2001, the *Terrorism (Bombings and Financing) Bill* was introduced in New Zealand's Parliament. The *Suppression of Terrorism Act 2002*, was finally passed on 8 October 2002, and came into effect on 18 October 2002. Another Bill to incorporate additional anti-terrorism measures, and supplementary powers, the *Counter Terrorism Bill* was introduced on 17 December 2002.[26]

All anti-terror laws brought into the statute books after 9/11, have lofty claims, drawing from the so-called 'international consensus' over the Bush doctrine of 'spreading democracy', assuring 'enduring freedom' and liberty, and 'making the world safe for democracy'. Significantly, the discourse on securing democracy is bolstered by an alignment of liberal political commentators, philosophers and historians who celebrate American interventionism as the only antidote to terror, and an extension of the beneficent role that the United States must play as the rightful inheritor of the liberal empire.[27] The assumption of this role, however, as the defence by the 'liberal realists' of United States' war in Iraq manifests, evidently, does not eschew the deployment of coercive force. This 'new radicalism' envisaged for the United States, as Michael Ignatieff outlines it, consists in abandoning the ambivalence of old liberalism in favour of coercive force, which Ignatieff construes as 'normal and necessary' for liberal democracies. The 'emergency suspensions of rights', and the 'admissibility' of torture 'in cases of necessity' were

the prerogative of liberal democratic governments, even if it trampled upon the rights of citizens. For Ignatieff, the willingness, and the necessity to 'defeat terror with violence' was indeed justifiable as the 'lesser evil' where the greater evil was the threat to liberal democracy itself. The question with which Ignatieff grapples, nonetheless, is whether at all the lesser evil could ultimately be kept 'under the control of free institutions'.[28] Ignatieff sees the 'moral order of liberty' and the 'morality' invested in liberal constitutionalism as the 'depository' guiding liberal democracies in times of emergencies and preventing excesses towards 'the legitimate rights of innocent citizens against the state's need to combat terrorism'. Neil Smith, however, sees little respite in Ignatieff's simultaneous commitment to the lesser evil of dictatorship and a liberal moral order written in law:

> The argument relies very heavily on faith, however, faith that the vaguely specified depository of 'liberal moral order' will somehow manifest itself, come to the fore in a fit of democracy and prevail over a state that cites security needs in support of a political clampdown…In fact Ignatieff defines the most critical issue away as he makes 'liberal democarcy' the backstop of his case. The argument rests on the assumption that 'liberal democracy' is inherently democratic when of course the central fear is that the resort to terror and the aggressive arrogation of global and local power by a strong 'democratic' state subverts precisely the democracy that represents the last line of defense, the supposed moral rudder of this liberalism.[29]

Neil Smith's rejection of the 'endgame' of American universalism/globalism and the liberal moral order, comes in the context of his discussion of American invasion of Iraq. Similar delineation of the moral community constitutive of the 'us' has figured in debates on anti-terror laws worldwide, which proliferated after 9/11. Significantly, 'liberty' and 'security' occur as the binary nodes that fashion the alignment of forces and arguments in the debate. Paradoxically, they also coincide to draw the lines between those who belong to the moral community—the depository of freedom and security—from those whose rights to be free and secure may be dispensed with. In his discussion of the 'double standards and constitutional freedoms in the war on terrorism', David Cole points out how foreign nationals being the 'paradigmatic others', bear the brunt of the 'overreaction' of societies to crisis situations.

A political process, he argues, that 'weighs everyone's security on one side of the balance, but weighs the rights and liberties of only a voiceless and often demonized 'alien' minority on the other, is a recipe for overreaction'. Moreover, overreaction is fed by the emergency measures that are made available and the state's capacity to label people as terrorists, or their sympathisers, placing them 'outside the moral community' as non-citizens, 'to whom human rights have no relevance'. In opposition to positions which defend emergency measures, holding that the Constitution 'is not a suicide pact',[30] Cole emphasises that the entire community has an 'immediate stake' not only in the security side of the balance, but also in the liberty side, requiring an equal respect of fundamental human rights of citizens as well as foreign nationals, 'holding us to a more calibrated and just response'.[31]

A search for possible ways of devising a calibrated and just response was attempted at a conference of leading academic experts in law, criminology and political science in Canada, following the introduction of the Canadian anti-terrorism legislation—Bill C-36—on 15 October 2001. The conference not only explored the impact of expanded governmental powers on individual rights and liberties, but also whether the enhanced powers being sought by the state through the Bill were congruent with core democratic traditions and values, and consistent with bedrock ideas of the rule of law. Questions of efficacy of the Bill were also raised, which were concerned primarily with whether the Bill was likely to achieve its avowed goal of 'reducing the risk of terrorism borne by citizens in and outside Canada'.[32] The crux of the arguments in the different essays constituting the volume that emerged out of the Conference is that while international terrorism manifests a global risk, the impact it has on the *capacity* of 'enhanced security states', is a matter of concern. The challenge, therefore, lay in designing laws and legal institutions and arrangements that do not undermine the democratic core of the state. It was important then, the volume argues, to 'temper the expansion of the security state' through 'heightened democratic deliberation and participation', in order to fashion new security arrangements.[33] To achieve 'security with democracy', it was necessary to give up the 'unfortunate tendency to reproduce unthinkingly the assumption that the relation between 'security' and civil liberties—or even worse,

security and freedom—is a 'zero sum game'. The essays ask for a shift in the perspective on 'security' from enhancing 'state security' which was the concern of Bill C-36, to 'citizen security', which could be achieved by dismantling and unraveling abstract security, through democratic processes of citizen participation in defining security needs and the measures to meet them.[34]

The debates around 'security laws' in the USA and the manner in which they have unfolded in practice show, however, that the dismantling of abstract security by substituting it with 'citizen-security' may not be sufficient to achieve 'security with democracy'. The so-called security laws manifest the almost unbounded ability of the state 'to label people as terrorists or terrorist sympathisers, no matter how far-fetched', placing them outside the moral community as non-citizens, without human rights.[35] This ability to excise non-citizens from the moral community that invests all persons the right to live with freedom and dignity, thrives under a regime of silence and passivity of citizens who are concerned about their own security rather than another's liberty. Thus, while a National Public Radio (NPR) poll taken almost a year after the 9/11 attacks revealed a nation experiencing a 'profound sense of vulnerability', yet, most Americans believed that no important rights or liberties had in fact been given up following the 9/11 attacks, and only 7 per cent felt that they 'personally had sacrificed any important rights or liberties in the war on terrorism'.[36] David Cole explains this not only in terms of citizen passivity, but also as a pointer to 'whose rights are actually at stake'. 'For the most part', he argues, 'the government measures have been targeted not at Americans, but at foreign nationals, both here and abroad', for whom 9/11 had in fact 'changed everything'.[37] The United States has, however, an enduring history of rendering its own citizens insecure, on grounds of racial, ethnic or ideological differences. In 1798, for example, amidst fears of 'infection' from the 'alien' radicalism of French Revolution, the Congress enacted the Alien, Sedition and the Enemy Alien Acts, respectively. The Alien Act allowed the President to deport any non-citizen without any judicial review and the Sedition Act made criticism of government a crime. While the former was never used, the Sedition Act was enforced between 1798 and 1800 against the Republican critics of the Federal administration.[38] The two Acts were not reenacted after they expired

under the sunset clauses in each, due to the protests they provoked. The Civil War of 1861–65 was yet another context for the suspension of civil liberties, when President Lincoln suspended the writ of habeas corpus in the name of national security. About twenty to thirty thousand persons were arrested and detained in military custody without charges because they were 'suspected of being disloyal, dangerous, or disaffected'.[39]

The Enemy Alien Act—the third act which was enacted in 1798—has survived on the statute books to this day and has been used repeatedly, the most notorious being the internment of Japanese and Japanese–Americans during 1942 and 1945 after the Japanese attacked Pearl Harbour on 7 December 1941. The Enemy Alien Act authorises the President to detain, expel or otherwise restrict the freedom of any citizen fourteen years or older of any country with which the US is at war, without any judicial hearing to determine whether the individual is in fact dangerous and disloyal. Apart from the procedural exception, the Act works with the irrefutable presumption that enemy aliens are dangerous 'based *solely* on their national identity'. The Supreme Court upheld the Act in 1948.[40] National security issues in the 1950s emerged in the context of the 'intolerant approach' towards the Communists and anarchist groups where association with such groups became the ground for exclusion and deportation. Congress removed the guilt by association clause in 1990, which was, however, revived six years later in the Antiterrorism Act of 1996 following the Oklahoma City bombing. Significantly, specific provisions of the Act had been or were about to be declared unconstitutional, and the Congress was about to pass a law repealing the secret evidence provisions of the Act when 9/11 events took place, paving the ground for the USA PATRIOT Act.[41] The latter thus follows the legacy of existing and expired Acts that have been invoked against immigrants, foreign nationals and political adversaries.

Debates on Extraordinary Laws in India: Extricating Issues and Unravelling Strands

Within the legal framework of constitutional democracy, the political community in India gets constituted in two ways: (*a*) through the

processes of standard application of rules by according a common legal status to all as citizens, and (*b*) through the inclusion of pluralities as special categories, or through special means, that is, as religious, linguistic groups, specially administered areas, scheduled lists, etc. The nature of the accommodation of pluralities within the legal/constitutional framework in terms of 'cultural categories' with special cultural rights, or as 'administrative units' requiring separate structures of administration has meant that any 'political' assertion of 'specificity' is more likely to be seen as 'disruptive' of the national consensus and a threat to change the 'given' political community. Consequently, such assertions have been followed by measures that seek to restore the consensus, putting it, however, into even greater pressure, as manifested in long drawn and violent conflicts.

As a result, therefore, extraordinariness can be seen as having a dual facet: (*a*) It demonstrates a normalisation process, whereby the 'mainstream' becomes 'ordinary', and the extraordinary is included through representations marking them as 'exceptional' or 'unusual'. (*b*) The language of extraordinary/ordinary becomes a means whereby specific conditions and situations, and ideological and cultural diversities are not merely represented as exceptional, it is also assumed that in matters of governance, the structures and institutions within the constitutional ensemble, they would require special arrangements.

In this chapter, we shall specifically examine how extraordinariness is delineated through law. Extraordinary laws are presented as problem-solving measures. They are usually surrounded by discourses asserting their indispensability and on the other hand, assurances that having come in response to specific situations, they are not, everlasting. Thus, if one were to identify some of the characteristic features of extraordinary laws, or alternatively, respond to the question, 'What makes laws like TADA and POTA extraordinary?' The following features could perhaps be listed:

(*i*) These laws come with objects and intents proclaiming the need to respond to specific problems of extraordinary nature.
(*ii*) It follows from the fact of extraordinariness that these laws are temporary and that their lives are coterminous with the extraordinary events they intend to overturn.

(*iii*) Since they are extraordinary measures in response to extraordinary events/situations, they are constitutive of extraordinary provisions pertaining to arrest, detention, investigation, evidence, trial and punishment.

While the debate on extraordinary laws may be historically specific and within each specific context, the debate may constitute diverse and conflicting strands, a close examination throws up certain significant points of argument which have a persistence and continuity defying contextual specificity. In the following pages, an attempt will be made to examine the debates on extraordinary laws in India, in order to show how the extraordinary gets delineated. The purpose of this exploration is not simply to articulate the relationship between democracy and extraordinary laws in terms of compatibility or incompatibility but rather to look at the various strands in the debate, to see how they define democratic politics and in the process, also the idea of the undemocratic and extraordinary.

An examination of the debates surrounding extraordinary laws from PDA (Preventive Detention Act) 1950, through TADA 1985, to POTO 2001 and POTA 2002, shows how the domain of citizen activity and participation and that of state power, get pitted against each other. Apologists for such laws, for example, see them as the necessary remedy for the erosion of political and civil institutions and significantly, integral to democracy. There are others, however, for whom 'legality' of extraordinary laws may ironically provide a safeguard against extra-judicial killings, encounters and disappearances. Moreover, a continuing debate on such laws, they feel, may result in the emergence of better detention regimes. For others, however, legality *per se* is no assurance, and has been used by states to keep uncomfortable political opponents in prison interminably.

Debating Security Laws: The Dilemma Within

The debates surrounding extraordinary laws in India show how people's struggles for rights are frequently imputed with extraordinariness, and pitted against notions of *national*-sovereignty, *national*-security, *national*-integrity and *national*-interest. Significantly, the incompatibility between people's rights and national security and interest encountered

in arguments by those in favour of these laws, is articulated in terms of a dilemma which democracy itself throws up and compels resolution through extraordinary measures. Extraordinary laws, it is argued, are a response to the 'extraordinary situations' that emerge primarily because of the openness and freedom which democracy allows. In other words, these laws are not inimical to democracy. They are rather integral to its functioning and as necessary correctives serve important restorative, curative and corrective purposes.

It is worth noting how this dilemma also figures, albeit in different forms, in the voices of those who oppose such laws. The National Human Rights Commission (NHRC), for example, while arguing that the battle against terrorism 'must be fought boldly and won', stressed the need for observing and defending 'national integrity' and 'individual dignity'—both central values of the Constitution. Significantly, the NHRC held that these values were not 'incompatible as objectives but entirely consistent with each other' and that there was 'a need to balance the two'.[42] Earlier, Justice Verma, the then Chairperson of the NHRC, while sounding a note of caution on POTO, suggested that within the constitution both 'national integrity' and 'individual [human] dignity' formed core elements, and therefore, one could not be sacrificed for the other. Strategies to counter terrorism, he suggested, should aim at reconciling human dignity with the country's integrity. In this process, he suggested that public interest could outweigh individual interest, but not to the extent that any one of them could be rendered totally redundant.

In the discharge of its statutory function of reviewing safeguards for the protection of human rights, the NHRC addressed itself first to two questions viz., was there a need for the enactment of the proposed law (POTA) and, if there was, what was the kind of new law that needed to be enacted. The NHRC's 'considered unanimous opinion' as stated in its annual report (2001–2002) was that there was 'no need to enact the above law' since the kind of actions that the Prevention of Terrorism Bill 2000 set out to identify in Section 3, were 'substantially taken care of under the existing laws'.[43] Moreover, the 'avowed justification' for the new law and the special procedures including special courts that the law prescribed, such as, the difficulty of securing convictions under the criminal justice system, and delay in trials, were not,

in NHRC's opinion, addressed by the proposed law. The problem, which the criminal justice system in India faced, according to it, related to (*a*) proper investigation of crimes, (*b*) efficient prosecution of criminal trials, and (*c*) the long delays in adjudication and punishment in courts. None of these problems, however, could be solved 'by enacting laws that did away with the legal safeguards that were designed to prevent innocent persons from being persecuted and punished', nor by 'providing for a different and more drastic procedure for prosecution of certain crimes'.[44]

The position of NHRC on the proposed Prevention of Terrorism Bill was consistent with its stand on TADA which it reviewed within the first two years of its establishment in October 1993. The NHRC set out to adopt 'a well-informed and unambiguous position' on TADA, from what it identified as its non-negotiable 'central preoccupation' of 'protection of civil liberties'.[45] It conducted from this premise, what it called a 'full-fledged examination of all aspects of TADA' especially as reports and complaints of its arbitrary and abusive use 'began flooding the Commission within weeks of its establishment'.[46] Inscribing the question of TADA on its regular agenda, the Commission 'invited periodic meetings' with officers of the Central and State governments, and visited various regional states on its own fact-finding investigations. As early as 6 June 1994, the Commission admitted in Srinagar that it had 'learnt enough to have serious doubts about the worth and terms of the Act', and began contemplating seeking a review of the Supreme Court judgement which had upheld the constitutional validity of TADA. The NHRC followed thereafter a 'three pronged strategy', whereby it continued to monitor the implementation of the Act, prepared a dossier for possible recourse to the Supreme Court and as the date for the renewal of the Act drew near, it resorted to a 'direct approach' of sending letters to Parliamentarians recommending that the life of the Act should not be extended when it expired on 23 May 1995.[47] The letter made it clear that the Act made 'considerable deviations from the normal law',[48] was 'draconian in effect and character', and, 'incompatible with [India's] cultural traditions, legal history and treaty obligations'. It concluded with the crucial observation that it was the Parliament which had 'entrusted the Commission with the charge of maintaining human rights'

and that 'the Commission found it difficult to do so unless the draconian law was removed from the statute books'.[49]

In a similar vein, K.S. Subramanian, a retired officer of the Indian Police Service (IPS) and former Director of the research and policy division of the Union Home Ministry, dismissed POTA as legally and philosophically flawed, manifesting 'narrowly defined' national security concerns and 'a conservative perspective on criminology' that relied on 'crime control' model of criminal justice. The complexity of the 'non-conventional crime' that POTO sought to address, he argued, was not taken into account by the Act, that is, the patriotic, ideological and revolutionary contexts of violations of criminal law, as well as 'state-terrorism' or 'the crimes committed under the cover of official and semi-official government positions'. Moreover, of immediate concern was not the inadequacy of existing law, but 'their lackadaisical, often corrupt, implementation compounded by poor supervision'.[50]

The voice of the NHRC, a statutory body and part of the institutional structure of the state, represents a discordant note in the official chorus of 'securing the state'. The position of the NHRC not only disrupts the cohesion of the official position, ironically it also becomes constitutive of the dilemma that democracy induces by opening up spaces for debate. Yet, arguments both in favour of and against extraordinary laws traverse common grounds in so far as both see extraordinary laws as the domain where issues of individual dignity and national security necessarily collide. While arguments in favour build up into a position that presents extraordinary laws as instruments essential for the resolution of the contest, the latter develops into a position of strategic opposition, attempting to strike a balance by introducing the notion of 'limits', or the 'extent' to which national or public interests could weigh down the individual.

The invocation of limits may however push concerns about civil rights in the realm of dispute, keeping alive the possibilities of their relegation when the so-called interests of the larger community were at stake. Thus, in 1950 when Sardar Patel introduced the Preventive Detention Act (PDA), he is said to have spent sleepless nights in his unease at introducing a measure that was 'repugnant to the ideal of free and democratic government'. Much of the anxiety also emanated from the realisation that the PDA was not merely a law being brought to deal

with an emergent or 'aberrant' situation. It was in fact the enunciation of a basic policy, making what has been termed by Upendra Baxi as the Preventive Detention System (PDS), a parallel yet integral component of the Criminal Justice System (CJS).[51] Sardar Patel's anxiety was resolved, however, by his conviction that the curtailment of the liberties of a few did not matter. At stake for him were the liberties of millions of people threatened by the activities of some individuals, the reference being to the 'Telengana disturbances', the recurrent 'labour troubles' and the fact that a large number of detenus under colonial laws were being released by the courts on the grounds that the laws were not consistent with the Constitution of independent India.[52]

Writing in the 1980s, Rajni Kothari saw this dilemma arise from the irreconcilability of a top-down bureaucratic-technocratic paradigm of conducting affairs with bottom-up democratic-political or participatory-democratic processes. Rajni Kothari sought to resolve this dilemma by suggesting 'a movement beyond the national security state syndrome' that had been the source of authoritarianism and hegemonism in Indian politics.[53] This dilemma, which was experienced at the time of the enunciation of the first preventive detention law in independent India, and rearticulated in the position of the NHRC, seems now to have reached a state of *impasse*. Through an exploration of the debates surrounding the extraordinary laws one hopes to identify some *significant aspects* of this *impasse*, and the trends that indicate a *movement towards* the security state syndrome.

Securing the State: Security Apparatus as Defenders of Democracy

In the interlude between the lapse of TADA and the enactment of POTA when there was no all-India anti-terror law, the most vociferous apologists for POTO/POTA were former Director General of Police (Punjab), K.P.S. Gill, intellectual and BJP leader, Arun Shourie, and lawyer and BJP leader, Arun Jaitley. The three can be broadly seen as arguing that POTA-like laws are a necessary element of functioning democracies. In other words, these laws may not be seen as inimical to democracy, but as crucial correctives that work towards the restoration and preservation of 'legitimate' political authority. K.P.S. Gill, for example, while listing the 'imperatives of a national security legislation in India',

argued that (*a*) there is a chronic crisis of national security in India, epitomised by terrorism, organised crime, criminalisation of politics, the growing numbers of poor and rootless, pressures of population and consumerism on the limited natural resources, (*b*) that matters have worsened by the fact that civil and judicial administration have abdicated their responsibilities with the judiciary taking recourse to arid legal formalism and the civil administration suspending their activities in the face of mass violence, and (*c*) that these are natural consequences of the gradual process of erosion which has set into all institutions of governance in the country.[54]

Gill's remedy for the erosion of political and civil institutions lay in setting up what could be called 'a police state' that would preserve political authority through an ideology of retribution. The uniformed services—the police, the paramilitary and the army—are seen by him as the only saving grace amidst the all-pervasive erosion of institutions, and it is this branch of administration that he wanted to see strengthened through a comprehensive set of counter-terrorist laws *as a permanent feature in the constitution*. It is not surprising that Gill was also at the forefront of the demand that began in 1997 for amnesty for officers of the Punjab police being tried for violation of human rights during the 'counter-terrorist' operations in Punjab. The invocation of 'legal formalism', especially the application of norms of equality in such cases was especially repugnant to Gill, as it treated police officers at par with the 'terrorists', and in the process, argued Gill, *discriminated against* them.[55]

Rejecting the arguments put forward by the 'obstructionists' as he calls them, as motivated and self-serving, Gill argued that POTO was not a reincarnation of TADA and 'contained far greater safeguards against the possibility of abuse', and 'significant penalties' for 'malicious prosecution'. Dismissing similarly, the 'curious false sociologies' that have become the 'stock source and justification of terrorism among muddled intellectuals', as 'purely theoretical positions' without 'even a shred of empirical evidence', Gill cautioned:

> … a time will come—and not very far in the future—when the people of this country will accuse those groups and parties who obstruct the State's initiatives to deal with terrorism within the ambit of the Constitution, of having betrayed the most fundamental and abiding interests, not only of the nation, but of civilization itself.[56]

Both K.P.S. Gill and Arun Shourie criticised the judiciary in particular, for their 'procedural correctness'. K.P.S. Gill accused the courts of turning the promise of justice into 'a leaden ritual that punished innocent and guilty alike, severing in the process, the link between crime and punishment'.[57] Arun Shourie saw such judgements as 'isolated from the context of society', not only looking at each event as a whole by itself, but also independent of the consequences the judgements may have on society.[58] It is, however, the 'weak political class' and the 'rights-mongering' civil libertarians and leaders 'looking for issues', who are especially blamed by Shourie for impeding the country's 'life and death struggle against terrorist invasion'.[59] Launching a diatribe against them for their campaign leading to the lapse of TADA, Shourie glorified TADA as *the* 'vital instrument' (of democracy), asking simultaneously the question, 'How did this [the lapse] happen?' Claiming privileged knowledge he informs the reader: 'I was in touch those days with officials in the Home Ministry as well as with persons who were in direct combat with the terrorists, and *I remember the sequence vividly*'.[60] It is surprising, however, considering the proximity he claims to have had with those in charge, and the vividness of memory he admits, that while *reconstructing* this *sequence*, Shourie ventures only to 'surmise'. Almost predictably, Shourie's sequential reconstruction begins with the Bombay blasts:

> *I surmised that the sequence had been as follows*. After the Bombay blasts TADA at last began to touch those who wield real influence in India. They activated their agents. A din was created. 'Leaders' and civil libertarians on the look out for issues, saw an opportunity. A campaign in the name of Islam and human rights was launched.[61]

It is significant how champions of extraordinary laws single out the Bombay blasts which followed the demolition of the Babri Masjid in Ayodhya on 6 December 1992, for both criticising those who oppose such laws, and also for launching an appeal for a fresh 'anti-terror' law. The Criminal Law Amendment Bill, 1995, for example, was drafted by the Central government before TADA lapsed, and sent in 1999 with some amendments to the Law Commission by the Ministry of Home Affairs with the request to 'undertake a fresh examination of the issue

of a suitable legislation for combating terrorism and other anti-national activities'. This *fresh examination* of issues of 'terrorism' and other 'anti-national' activities had in the eyes of the Ministry become imperative for reasons of 'national security', a concern which had acquired 'utmost urgency' in view of a 'legal vacuum' that had emerged with the lapse of TADA in 1995.[62] Drawing sustenance from similar laws in other countries, citing the example of U.K. in particular, which, 'with a far less threat perception' (as compared to India) was contemplating a 'permanent law to fight terrorism', and professing their duty towards future generations, the Law Commission agreed that India too required a 'permanent' anti-terror law and that too, 'without any further loss of time'.[63] Lamenting that the criminal justice system was not 'designed' to deal with the 'heinous crimes that have appeared' in the last fifty years, nor were the laws 'intended to deal with terrorism', the law commission went on to cite the serial blasts which 'wrecked' Mumbai in 1993. Reviewing the 'security situation in the country' in the introductory section of its Working Paper, the Commission, yet again showed remarkably selective memory, citing the bomb blasts in Tamil Nadu as forming another 'disquieting feature' of the security situation.[64] 'Religious fundamentalist militancy, *first* raised its head' claims the Commission, with bomb explosions in Mumbai, and since then 'continued to make its presence felt', the latest (February 1998) being the blasts by Al-Ummah, 'the principal fundamentalist militant outfit' of southern India, in different regions of Coimbatore'. The other ingredients of the security situation persisted in the form of 'militant and secessionist activities' in Jammu and Kashmir, 'insurgency-related terrorism' in the North–East and 'extremist violence' in Andhra Pradesh and Bihar. What is significant about the Commission's assessment of the security situation and the chronology of events which made an 'anti-terrorist' law immediately imperative, was the blatant disregard of the fundamentalism of the Shiv Sena and other components of the Sangha Parivar which predated the violence cited in the working paper in both the regions, and were visible even earlier in Ayodhya.[65]

It is this *selective amnesia* in official pronouncements, which reverberated in Shourie's tirade against the 'civil libertarians' and 'secularists', the *non-application* or *selective application* of such laws against the Hindu right in comparable situations, which earned the laws the label of being

anti-minority. The fact that POTA was immediately applied after the Godhra incident, to be deferred only as an afterthought, bears evidence to the selective and uneven application of such laws. Thus the argument made by Shourie and others that Muslims formed a mere 4 per cent of the total arrests under TADA does not, therefore, make the laws any less anti-minority.[66]

Given the fact that Indian statute books have always had extraordinary laws, and that terrorist activities that these laws purportedly addressed have not abated, it is indeed astonishing that they should have continued to be thought of as 'the last straw' for Indian democracy. Participating in the debates in Parliament on POTO, Arun Jaitley, the Law Minister echoed Shourie's conviction about TADA, when he reminded the MPs opposing POTO of their responsibility: 'because posterity eventually will decide that this country, for its integrity, certainly needs this law'.[67] Earlier, writing in support of the Ordinance, the Minister criticised 'the concerted effort to dilute the national determination against terrorism', exhorting that India had to 'wage its battle [against terrorism] *not as a soft state* but as *a determined nation* with its security, investigative and legislative systems *well equipped*'.[68] Surprisingly, Arun Jaitley whose party (the BJP) had not supported TADA at the time when it came up for renewal in 1995, not only asserted that POTO countered terrorism by 'necessary, legitimate means', but also appealed to Sonia Gandhi to ask the 'large number of eminent lawyers' that the Congress Party had inducted, to read the Supreme Court judgement in Rajiv Gandhi assassination case, which was tried under TADA. 'But for these special rules of evidence under TADA', he pointed out, not a single conviction would have been possible. India would then have appeared '*a pathetically soft state*, where terrorist groups kill a former prime minister and no one is convicted'.[69]

'Legality' as a Preferred Alternative to Extra-judicial Killings!

Another line of argument proposes that proper and judicious exercise of preventive detention powers, within the boundaries of 'legality', is likely to lead to the observance of human rights. It argues that having such laws and debating their intricacies, at least ensures that the power to detain is exercised fairly, leading to better regimes of detention, fewer extra-judicial killings, encounters and disappearances. An article

published in January 2002 in *Economic and Political Weekly*, argued that the specific contexts obtaining in Jammu and Kashmir make even a preventive detention regime desirable and justifiable, 'if only to reduce the number of illegal killings' that occur.[70] The article elaborates that in the mid-1990s the number of detenus in Jammu and Kashmir was around 3,000, divided equally between the PSA and TADA. In early 2002, official sources reported 500 detenus, while non-official sources placed the numbers at about 1,500. These are no doubt, very small numbers considering that official figures state that around 35,000 people have been arrested since January 1990. It is evident to the author that the number of detenus cannot increase since instead of being detained, people are killed extra-judicially. In the context of Kashmir then, if detention were the only choice, for all its abuses, it seems positively benign. The focus of human rights groups, therefore, suggests the author, should be on preventing custodial deaths, even if in the short term it meant accepting greater use of detention.[71]

It may indeed be admitted that keeping the debate on extraordinary laws alive is important even if it works only towards assuring safeguards, as governments are more likely to resort to clandestine methods of enforcing their will rather than submit to a strict rule-of-law regime in detention cases. The emergence of a trend towards 'extraordinariness' in independent India has shown that legality ceased to be indispensable for legitimation and continuation of government. Frequently, as in the case of CPI (ML) (Communist Party of India [Marxist-Leninist]) in the late 1960s, the government deployed extra-constitutional measures, euphemised as 'encounters' and 'disappearances', manifesting ways in which the state circumvents legality, setting aside 'parliamentary procedures and constitutional myths…to make room for…explicit forms of terror'.[72] There are others, however, who do not think that legality *per se* can ever be an assurance, showing how the state uses legal measures to keep uncomfortable political opponents in prisons interminably. A major government strategy of controlling the Naxalite movement relied on keeping them in prolonged imprisonment. 'Lawful' procedures were employed to entwine a person in a maze of arrests and re-arrests, until he crossed the line beyond which his 'freedom became a threat to the Security of State, Public Order and the rest of the ritual chant that has justified all repressive legislation in India'.[73] While

Balagopal quizzed his readers in the 1980s, 'how long can a person be kept in jail without being convicted of any crime?', Ashok Rudra exposed in 1973 the mask of legality, by tracing a sequential description of the 'legal' harassment of political opponents:

> …the police file one or more cases; this makes the family members arrange for legal defence; the police prolong the detention of the prisoner by asking for more time to prepare the case; usually not much of a case is made and the bail petition is granted. But no sooner is bail given than the police file a few more cases and re-arrest the released person. By this, the police achieve three results, in addition to that of continued detention, namely (*a*) the pretence of legality is kept up; (*b*) the police get the chance of having the victim in *thana* once again so that further torture could be carried out; (*c*) by dragging on the court proceedings, economic pressure is exerted on the families of the accused….This could mean in many cases economic ruination of the family.[74]

Nehru is said to have experienced a shock in 1951, at the manner in which A.K. Gopalan was arrested 'within a few yards of the High Court building' immediately after being acquitted by the Madras High Court under the same PDA extended for another year in 1951. More recently, the acquittal and immediate re-arrest of Hurriyat leader Yasin Malik shows how such laws have become instruments for prolonged detention of uncomfortable political opposition.[75] The case of Iftikhar Gilani, the Delhi Bureau Chief of the *Kashmir Times* and the Indian correspondent for the Pakistan-based daily, *The Nation*, is another such instance. Iftikhar Gilani was arrested on 9 June and for three months thereafter he was denied bail, while the police kept making up its mind on the relevant law to be used against him after the case under Official Secrets Act (OSA) that was initially brought against him, started looking not only weak, but also preposterous. Iftikhar Gilani was charged under Section 3 (spying) and 9 (attempt to abet in the commission of offence) of the OSA, which is like many other relics of colonial rule thoroughly governed by reasons of state.[76]

Moreover, such laws serve only to shroud extraordinary measures under the mask of legality. The extraordinary measures that POTA legalised, for instance, made a mockery of claims by politicians that the force of evidence would justify a person's arrest under the Act. It must

be emphasised first of all that the rationale behind having such laws, is the lack of evidence to convict persons who are accused of terrorist attacks. In the absence of evidence, such acts legalise and transpose onto a modern society, the anachronistic medieval system of inquisitorial justice that is based on the assumption of guilt, and compels the accused to implicate himself through confessions. POTA, like TADA, allowed confessions to a police officer of a specified rank, to be submitted in court as evidence. Bail provisions under the Act were such that they practically allowed preventive detention of the accused for a year. Under the provisions of the Act, suspects could be detained for three months without the charges being brought against them and three more months if allowed by a special judge. Section 49(6) and (7) lay down that bail might not be granted if the prosecution opposed the bail petition, or until the court was satisfied that the accused was not guilty, which no court can be till the trial is over. Moreover, Section (7) through a peculiar ambivalence of words and subsequent mis-interpretations that will be discussed in the next chapter, allowed for consideration for bail only after a year from the date of arrest. Provisions pertaining to both evidence and bail made trials under POTA as in other extraordinary laws, heavily tilted in favour of the prosecution. The judgement in the Parliament Attack Case, the first POTA Case to have been decided under the Act, showed how even in the absence of credible corroborative evidence, the charge of conspiracy against the four accused, was upheld by the special POTA Court, merely on the basis of circumstantial evidence and 'confessions' made by two of the accused.

Passing POTA: Reading between the Dividing Lines

The debates that followed immediately after the promulgation of POTO on 24 October 2001 showed that lines were primarily drawn along political divides and existing electoral arrangements. In order to become a law, the Ordinance had to be approved by Parliament in the winter session, which was to commence on 19 November 2001 and continue till 21 December. However, the BJP and its allies in the NDA government were especially perturbed about their lack of strength in the Rajya Sabha. While the NDA was under pressure to justify bringing the proposed law first through an Ordinance,[77] and also to give evidence of safeguards that existed in it, the Congress which vehemently opposed

it, was hard pressed to explain the existence of an extraordinary law like the Maharashtra Control of Organised Crimes Act (MCOCA) in the Congress-ruled state of Maharashtra.[78] The Congress was, moreover, itself implicated in the enactment and implementation of MISA and POTA's predecessor TADA.[79]

The Opposition criticised in particular, the manner in which the NDA government used the situation after 9/11 to promulgate an Ordinance and subsequently push through a draconian law in Parliament.[80] It may be pointed out that POTO, which the NDA government wanted everyone to believe was the draft Bill that the Law Commission had prepared following prolonged consultations with the government and political parties, incorporated two chapters, which were not part of the original draft Bill. The two chapters that were added to the original draft provided for banning of groups as terrorists[81] and interception of electronic communication.[82] These two provisions were not present in TADA and gave extensive powers to investigating agencies and the government.[83] The strict bail provisions, and admissibility of confession to police officers as evidence, along with the broad and ambiguous definition of terrorist acts continued to evoke comparisons with TADA and were therefore open to wide criticism.[84] While justifying the inclusion of the provision allowing interception as enabling the 'intelligence agencies to beat the terrorists at their own game',[85] the apologists pleaded that POTO not only had more teeth but also substantial safeguards. These safeguards were identified as (*a*) under POTO an accused could approach the High Court, while in TADA appeals against the Designated TADA Court lay only with the Supreme Court, (*b*) bail provisions were simpler in the sense that normal bail provisions could apply after the expiry of one year unlike five years in TADA, and (*c*) the maximum police remand in POTO was 30 days as against 60 days under TADA. The deletion of the expression 'or to alienate any section of or to adversely affect the harmony amongst different sections of the people', which was part of the definition of terrorist and disruptive activities under TADA and had been extensively misused against minorities, was especially pointed out as a safeguard.[86]

The Congress justified its position on POTA vis-à-vis MCOCA by emphasising that there was no need for a *national law* on terrorism, stressing that the party's decision to oppose the central law was binding

on all Congress Chief Ministers.[87] 'What is the need for such law in Kerala, Madhya Pradesh, or Orissa?', asked a senior Congress leader.[88] The Congress, moreover, alluded to the 'communal agenda' of the BJP and the pattern that was clearly emerging in the run-up to the Assembly elections in Uttar Pradesh (UP).[89] A similar defence of state law came from the West Bengal Chief Minister whose Left Front government was in the process of promulgating an Ordinance (Prevention of Organised Crime Ordinance) in the state.[90] Within the BJP itself, there seemed to be two strands, one of which, represented by the Prime Minister Atal Behari Vajpayee, preferred to evolve a consensus on POTO to facilitate its ratification in the Parliament, and the other, represented by the Home Minister, L.K. Advani, who hoped to make POTO an 'election issue'.[91]

By the end of the first week of the promulgation of POTO, the battle grounds were clearly drawn, with the Opposition including the Congress, the Left parties, and the Samajwadi Party (SP), 'vowing to defeat' the 'draconian' Ordinance when it came for ratification in the Parliament. Organisations representing religious minorities,[92] several civil rights organisations,[93] and sections of the media,[94] warned against the possible 'misuse' of POTA against minorities, socio-economically disadvantaged groups, political opponents, trade union activists and popular struggles.[95] On the other hand, the BJP and its allies built up arguments to show the immediate urgency for an anti-terror law. With the frequent invocation of Pakistan and the ISI in these arguments, and the LTTE thrown in episodically, notions of nationalism and patriotism came to define and guard the dividing lines. Predictably, the President of the Janata Party threw the challenge to the Congress: 'if the Congress claimed to be "patriotic", it should help in making the Ordinance into an Act'.[96] The BJP president M. Venkaiah Naidu, similarly criticised 'the few who were raking up a controversy' without thinking of the 'nation's interest'.[97] In a similar vein, addressing the BJP's National Executive Committee on 3 November 2001, L.K. Advani accused the Congress of allowing politics to come in the way of national security.[98] In what was widely seen as an attempt to make POTO *the* issue in the forthcoming state elections and monopolising thereby 'the fight against terrorism', Advani's speech drew sharp lines between those who were with them, and those who by 'ensuring the defeat of the Ordinance

(in Parliament) will wittingly or unwittingly help terrorists'.[99] Significantly, around the same time, in an effort to elicit support for POTO, Venkaiah Naidu was dismissing apprehensions raised by human rights organisations as 'elitist statements of misplaced sympathy'.[100] Simultaneously, L.K. Advani was handing out assurances at a Conference that POTO would 'protect' policemen from being hauled for 'technical violation of human rights', elaborating that if some 'mistakes' were committed while taking action in 'good faith', the judiciary should take a lenient view of the matter.[101]

The state governments followed suit, taking sides, with the dividing lines, coinciding with political affiliations. Yet, the arguments that were advanced raised significant issues pertaining to the exclusive domains of authority of the centre and the state governments. The Government of West Bengal, for example, rejected POTO saying that law and order was a state subject: 'It is not mandatory for the states to impose the new Central Ordinance. After all, law and order is a state subject. In our state, we never used the TADA'.[102] Again, the dividing lines became blurred when POTO became a matter of contention among regional parties. Thus, the DMK, a major constituent of the NDA alliance, rejected POTO, which as shall be seen in the discussions later in the book, emanated from the specific political context of Tamil Nadu and its immediate political adversary in the state, Jayalalitha-led AIADMK.[103] The latter, following the same logic, supported the NDA government on POTO and the Bill in Parliament.[104] Further, an ally like the Shiromani Akali Dal (Badal) with a predominantly Jat/Sikh social base, which had borne the brunt of TADA during the days of militancy in the state, avoided giving public statements in support of the Ordinance. Yet, the Akali Dal leader and Union Minister Sukhdev Singh Dhinsa was present in the cabinet meeting, which gave its consent to POTO, before its promulgation. While the Prime Minister bonded with the Akali Dal praising its 'patriotism' at the 200th year of Maharaja Ranjit Singh's coronation celebrations, with a joint Akali Dal–BJP rally on 18 November 2001 to observe the event promising to be a public statement of the bond, the party's own compulsions of partnering with the BJP in the Assembly elections not-withstanding, the Akali Dal was simultaneously put under pressure by various religious and political organisations and parties in the state to abstain from supporting POTO.[105]

By 19 November 2001, when the Winter session of the Parliament commenced, the 'floor coordination' in the two Houses had been dictated by the political configurations around POTO, which in turn was informed by the specific political contexts of the states, and the forthcoming Assembly elections in Uttar Pradesh, Himachal Pradesh and Punjab. The non-Congress Opposition parties, including the Left Parties, the Samajwadi Party, Nationalist Congress Party, Rashtriya Janata Dal, Janata Dal (United), Indian Union Muslim League and the Janata Dal (Secular) bridged the communication gap with the Congress, and identified issues for which coordination was required. The AIADMK was conspicuous by its absence, however.[106] The meeting of NDA allies witnessed similar pledges of support, peppered, however, with expressions of 'apprehensions' over misuse of POTO, absence of Trinamool Congress and the Akali Dal, both of whom had reservations on POTO, and the DMK leader and Commerce Minister in the NDA government Murasoli Maran, raising concern over the Ordinance citing his own experience of detention under MISA.[107] A couple of days before the commencement of the session, the NDA government appeared to have moved to a position where it appeared more conciliatory rather than 'riding roughshod over POTO', presenting itself as open to debate and 'reasonable suggestions' for 'necessary changes'.[108] A public articulation of this position came from Prime Minister Atal Behari Vajpayee at the Conference of Chief Minister's on Internal Security on 17 November 2001 in New Delhi, where Vajpayee stressed that the need of the hour was to produce a 'robust, practical consensus', asking the Chief Ministers to keep an open mind when they met to discuss 'an enabling legislative framework' to meet the threat of terrorism.[109] The Congress on the other hand, geared itself up to oppose the Ordinance, and the first indications of the confrontation which was to ensue in Parliament came at the meeting of Congress Chief Ministers with the party president Sonia Gandhi, a day before the Chief Minister's Conference. The Congress Chief Ministers were asked to spell out the party's opposition to POTO and a statement issued after the meeting explained that the Congress believed that a 'larger consultative process involving all political parties was necessary to put in place an appropriate legislation'.[110] At the Chief Minister's Conference, the differences emerged starkly and a number of NDA partners backed the Act but called for 'adequate safeguards', with the Punjab Finance Minister opposing it.[111]

While there was no consensus among states on POTO, there was no consensus within states either. There was, moreover, no uniform pattern in the nature of contest within states. In UP, the BJP government of Rajnath Singh favoured it,[112] and the Samajwadi Party of Mulayam Singh Yadav and the Bahujan Samaj Party of Mayawati opposed it. In Tamil Nadu, the NDA ally DMK opposed POTO, while the AIADMK which was governing the state, pledged its support to it. Vaiko, the General Secretary of MDMK, a significant regional party in Tamil Nadu and an NDA ally, supported the Ordinance but also warned against possible misuse, suggesting that Section 3(8) be scrapped and the definition of 'meeting' under its provisions be reconsidered.[113] In Madhya Pradesh, the Congress Chief Minister felt that his government did not object to the Ordinance as such, but to the manner in which it was promulgated.[114] In Bihar, both the NDA allies and the opposition, were against it. If the RJD chief Laloo Prasad Yadav categorically ruled out the possibility of POTO being implemented in the state, Rashtriya Lok Dal (RLD) leader and Union Minister for Coal and Mines, Ram Vilas Paswan, wary of his own precarious position in the alliance, called POTO draconian and felt that the allies should have been taken into confidence before the promulgation of the Ordinance. The Samata Party leader and the Union Minister for Railways, Nitish Kumar maintained a discreet and strategic silence.[115] In Maharashtra, the Nationalist Congress Party (NCP), Congress' coalition partner in the state government, in an obvious reference to MCOCA, accused the Congress of 'doublespeak', and indicated its decision to support the Ordinance.[116] In Kashmir, the National Conference (NC) after an initial position of opposition, supported POTO and on 28 November 2001, it was enforced in the state with the arrest of Ghulam Mohammad Dar on the charge of harbouring militants. The entire opposition including the People's Democratic Party (PDP), and the Democratic Freedom Party opposed its implementation calling for a *bandh*.[117]

A meeting of the NDA's Coordination Committee on 19 November adopted a resolution which acknowledged the need for a tough law, but at the same time called for 'necessary steps' to remove the apprehensions expressed in different quarters before bringing it to the Parliament. It was also decided that a meeting of the Parliamentary Consultative Committee chaired by the Home Minister be held giving the opportunity

to both the allies and the opposition to state their specific objections, followed by an all-party meeting.[118] At the Parliamentary Consultative Committee's meeting, the Deputy leader of the Congress Party in Parliament, Shivraj Patil, made suggestions for modifying POTO, adding, however, that the acceptance of these suggestions would not by itself guarantee his party's approval of the Ordinance.[119]

As the winter session progressed amidst uncertainty over the precise manner in which POTO would be presented for the consideration of Parliament, before it came up for ratification, and the determination of the Opposition parties to challenge it, the attack on Parliament on 13th December by a group of armed men, brought the session to a premature close. Subsequently, the President promulgated the Prevention of Terrorism (Second) Ordinance on 31 December 2001 and the debate over ratification was temporarily suspended. With the commencement of the Budget session on 25 February 2002, and the prioritisation of POTO's ratification on the agenda, the debate resurfaced. When the Ordinance was tabled in Lok Sabha on 25 February 2002 by the Parliamentary Affairs Minister, along with four other Ordinances awaiting ratification, the Congress was quick to comment on the persistence of the government with the Bill despite the four states that went to polls in the intervening period (Uttar Pradesh, Himachal Pradesh, Punjab and Manipur) having voted against it.[120] When the Bill was presented in the Lok Sabha on 8 March 2002 by the Home Minister, L.K. Advani, the entire Opposition barring the AIADMK walked out in protest. The Home Minister tried to press upon the House the necessity of an anti-terror law in the country and also assure them that the law would be used only for tackling terrorism, 'sparingly and not casually'.[121] On 18 March 2002, the Prevention of Terrorism Bill was passed in the Lok Sabha with 261 members in favour and 137 opposing it. While the voting pattern followed the political divisions discussed in previous paragraphs with both the AIADMK of the opposition and its rival the DMK despite being critical of the Bill voting for it, Mamata Banerjee's Trinamool Congress, an NDA coalition partner with nine members in Lok Sabha, sprung a surprise by abstaining from the vote along with the NCP and BSP.[122] Evidently, coalition compulsions affected different parties differently, and specific political configurations within the state were equally influential.

With the improbability of a safe passage of the Bill in the Rajya Sabha when it came before it on 21 March looming large, owing to the numerical strength of Opposition parties in the Upper House, the government began preparing for a joint session of the Parliament on 26th March even before the Bill came before the Upper House for voting. At the same time, with the NCP expected to vote in favour of the Bill in the Rajya Sabha, the margin of opposition victory was likely to be slimmer than the Congress and other parties opposing the Bill had anticipated. Both the sides, therefore, tried hard to ensure that their MPs attend the proceedings in full strength, issuing calls to those who were indisposed and hospitalised.[123] The Bill was eventually defeated in the Rajya Sabha by a margin of fifteen votes after a debate that lasted about eight hours.[124] The opposition parties interpreted the rejection of the Bill by the Rajya Sabha as an indication that the states were not in favour of the Bill. Having voted against the Bill in the House they would not apply it in their respective states.[125] The projection of this resolve was significant, since the NDA government (unsure of the fate of the Bill in the Rajya Sabha), had for quite some time been planning towards the drastic measure of calling a joint session of the Parliament to push the Bill through, sending out a message to the Opposition that the rejection of the Bill in Rajya Sabha will eventually be inconsequential.[126] Yet, the slim margin of defeat in the Rajya Sabha belied the intensity of the resolve, and even the final score against the Bill in the Lok Sabha, did not reflect the actual strength of the Opposition.[127]

In the meantime, there were heated exchanges in the Lok Sabha between the ruling party and the Opposition over the events in Gujarat following the burning of a coach of the Sabarmati Express in Godhra by a Muslim mob on 27 February 2002.[128] Amidst large-scale killing of Muslims by Hindu mobs with, what was widely believed and established through fact-finding investigations by civil rights groups, the complicity of the state government, the Gujarat government booked large numbers of Muslims under POTO in the Godhra train burning case.[129] In this context of unbridgeable differences and ambivalent positions over the Bill, the rise in vitriolic hate statements by Hindutva organisations, and the application of POTO against Muslims in Gujarat, the NDA government made 'its third attempt to introduce POTO in violation

of constitutional norms' by calling a joint session of Parliament and using its combined strength in both the Houses to pass the Bill.[130] While promulgation of Ordinances and convening of joint sessions are constitutional provisions, they are extraordinary measures and expected to be rarely used.[131] Joint sessions provided for under Article 108 of the Constitution were convened on two previous occasions. Both were considered free from the political acrimony and manoeuvrings witnessed in this case.[132]

The passage of the Bill in the joint session was a foregone conclusion. Yet, it was not devoid of political intrigues, strategies and surprises. The Trinamool Congress which had abstained from voting in Lok Sabha, announced its continued abstention in the joint session. Trinamool leader Ajit Panja declared, however, that he would vote in favour of the Bill in defiance of the party's decision to abstain.[133] The NC, which had abstained from voting in the Rajya Sabha in protest against the invocation of POTO in Gujarat, was brought back to the fold and persuaded to vote in favour of the Bill in the joint session. The NDA was able to pull itself out of the embarrassment of NC's non-cooperation by effecting what was then being projected as 'withdrawal' of POTO against the accused in the Godhra case in Gujarat.[134] As the discussions later in the book on unfolding of POTA in specific states would show, POTO was not withdrawn, but held in 'abeyance' till a more opportune moment presented itself. At the joint sitting, however, the façade of withdrawal was important for restoring the government's credibility, and buttressing the case for POTO.

As predicted, the Bill was pushed through in the joint sitting with 425 votes in favour and 296 against it. The events of Gujarat and the implementation of POTO in the state inevitably dominated the opposition's attack on the government in the over 10-hour debate telecast live by Doordarshan, the national television channel. Not a single NDA member referred to Gujarat, and L.K. Advani presenting the government's case referred to state-sponsored terrorism from across the border, the attack on Parliament on 13 December 2001, and the need for the anti-terror law in the war against terrorism. Manohar Joshi, Shiv Sena member and NDA ally, ventured to add that the law was the 'minimum' required, and in fact too mild a measure in the fight against terrorism. Sonia Gandhi, as leader of the Opposition condemned the government

for 'exploiting a sparing constitutional provision to achieve its narrow and controversial end', and for arming itself with the 'menacing power of POTO' to pursue its own ideological agenda. To the Prime Minister she addressed the question, 'Will [he] be submissive and weak in his leadership or will he uphold the prestige of the high office he holds?'. The question provoked a vigorous personal offensive against her from Vajpayee who was away from the House for most of the proceedings and had read the written text of the speech.[135] Over the two days that intervened the rejection of the Bill in Rajya Sabha and the joint sitting, newspapers carried write ups by MPs who had voted against the Bill in the Rajya Sabha, namely, the eminent jurist Fali S. Nariman, who explained why he voted against the Bill, and Pritish Nandy, the Shiv Sena MP in Rajya Sabha who voted in favour of the Bill 'because he had to', but was happy that the Bill was defeated and felt compelled to show why POTO was 'dangerous' and 'risky' and a totally 'unnecessary law'.[136]

The Unfolding of Extraordinary Laws: Politics of Exclusion, Suspicion and Erosion

Politics of Exclusion and Extraordinary Laws

As stated earlier, the legal-normative frameworks within which modern democracies situate themselves, have unfolded in a manner that work towards the dominance of the nation-state as a hegemonically constituted political community. Extraordinary laws, anti-terrorist laws in particular, have become an integral part of this framework as the instrument through which the hegemonic structures of the nation-state are maintained, by externalising plural, diachronous and contending structures, forms and sites of self-realisation as 'extraordinary'.

From the Preventive Detention Act, (PDA) 1950 through TADA to POTA, apart from laws that are operating in different parts of the country viz., the *Armed Forces Special Powers Act* (AFSPA) 1958 and the *Public Safety Act* (PSA) 1978, which have been applied in parts of the North–East and Jammu and Kashmir, restrict the 'political' by determining who (group/collectivity, individual) belongs to the 'people'. By externalising parts of the population from the political community, they attempt to

iron out diversity, and in the process effect a greater distancing and conflict between plural collectivities and the general laws floating on them. Their unfolding in specific contexts has shown that the targeting of minority communities (TADA in Punjab, TADA and POTA in Gujarat and Maharashtra) and tribals and peasants associated with Marxist–Leninist groups (TADA and POTA in Jharkhand and Andhra Pradesh) is a prominent feature of such laws. These contexts have provided lessons on how these laws ultimately feed into state power, which can easily be mutated into the denial, destruction and elimination of difference through violent means. The Acts foreground the notion of 'harmony' or 'consensus', articulated in terms of 'national integration' and 'national security' and reflect intolerance for any assertion of 'specificity'. Such assertions are more likely to be seen as not amenable to 'resolution' within the 'normal' or 'ordinary' course. Thus 'extraordinariness' is imputed to them, which means that not only are these assertions seen as extraneous to the political community, the manner in which they are to be addressed by the state is also seen, therefore, as 'legitimately' extraordinary. The legitimacy of the latter stems purportedly from the fact that it aims eventually to 'normalise' the assertion, and restore the harmony of the consensus.

A significant aspect of the debates surrounding extraordinary laws is the manner in which they are seen as an essential and appropriate response to various popular/identity struggles and political/ideological diversity. Depending on who is perceived as the immediate adversary of the dominant/ruling political configuration, different groups have found themselves 'identified' and 'marked' under these Acts as undesirable and outside the dialogical domain of politics. When the Preventive Detention Act was extended for another year in 1951, C. Rajagopalachari, who had become the Home Minister after Patel's death, advocated a rigorous implementation of the Act against 'mischievous and violent elements', the latter included an assorted group of 'fanatical communists, blackmarketeers, and communalists'. Through Maintenance of Internal Security Act (MISA), the Defence of India Rules (DIRs) and National Security Act (NSA), the repeatedly articulated concern with 'national security' involved a simultaneous other-ing of entire groups of people from the national-political or the politically constituted *demos*. The discourses surrounding TADA for example, from its introduction

in four states and two Union Territories, through each periodic extension, and its expansion by 1993 to most of the country (22 states), were constitutive of the 'enemy within', the 'us' under threat by the constitutive outsider.

TADA was brought in 1985 with the primary purpose of curbing the movement for Khalistan. At the time of its introduction, the Act was meant to be a temporary measure for two years. It was, however, regularly extended every two years, four times, the last being the two-year extension in 1993. It is significant that at this penultimate stage of its journey, TADA became so 'routine' and part of the 'ordinary' that only eight members of Parliament (excluding the minister presenting/defending the Bill) participated in the discussion which lasted merely an hour and ten minutes.[137] The first extension of TADA through the promulgation of an Ordinance on 23 May 1987, the day TADA 1985 was to expire, also brought with it more stringent measures. The Statement of Objects and Reasons declared, 'on the basis of experience, it was felt that in order to combat and cope with terrorist and disruptive activities effectively, it is not only necessary to continue the said law but also strengthen it further'. Strengthening was sought by 'making punishment for terrorist and disruptive activities' 'more deterrent', and by giving powers to the Central Government 'to constitute Designated Courts' and 'make rules for carrying out the provisions of the Ordinance'.

During the course of the extensions, TADA also assumed a more general application, as its area of operation, which began with just one state and two union territories, covered most of the country by 1993. In 1985, the government cited two Union Territories and four states in its statement of objects and reasons. Two years later, two more were added. In 1991 the total states became seventeen. In 1993, TADA was in force in twenty-two out of the twenty-five states and two out of the seven Union Territories. The exceptions were Kerala, Orissa, Sikkim, Andaman and Nicobar, Dadra and Nagar Haveli, Daman and Diu, Lakshadweep, and Pondicherry.[138] While immediate events formed the context for the introduction and continuation of the Act (bomb blasts in Delhi and other places in 1985 and Bombay blasts in 1993), the expansion of terrorist activities from Chandigarh and Punjab to Delhi, Haryana, UP and Rajasthan and specific states like Punjab, Kashmir and Assam, were cited as justifications for subsequent extensions of the Act.

Significantly, however, states that did not figure in the official list of 'problem states', most notably Gujarat, used the Act extensively.

It may be pointed out that TADA could come into force in a region when a state or central government notified an area as affected [Section 2(1)(f)]. Whereas no criterion for the notification was laid down in the Act, the definition of terrorist acts (Section 3) and disruptive activities (Section 4) was wide enough to cover a wide range of activities. Thus Section 4(2) included as disruptive 'any action taken, whether by act or by speech, or through any other media or in any manner whatsoever', ostensibly to protect 'the unity and integrity of the country'. While the Act itself had features which defied 'due process', giving scope for gross violation of human rights, the most significant pattern which emerged in its implementation was the creation and reproduction of extraordinariness in relation to specific identity struggles. Most movements of ethnic self-determination in their various manifestations were subsumed under the generic label 'terrorist' and 'disruptive'. The explanations of both these labels within the text of TADA, reduced these struggles to *acts*, designated as terrorist and disruptive. These descriptions, as the pattern of detentions under TADA would show, depoliticised identity struggles dismembering them into specific acts of violence, demanding extraordinary legal solutions, procedures, and punishments. Section 3 of TADA while laying down the punishment for 'terrorist acts', defined a terrorist as someone having the *intent* both, 'to overawe the government as by law established', and 'to strike terror in the people'. Similarly, Section 4, laying down the punishment for a disruptive activity defined it as 'any action taken, whether by act or by speech or through any other media or in any other manner' which 'questions, disrupts or is intended to disrupt', whether directly or indirectly, 'the sovereignty and integrity of India' or which 'intends to bring about or supports any claim, whether directly or indirectly, for the cession of any part of India or the cession of any part of India from the Union'. Thus identity struggles were conceived in the Act as occupying an 'outside' space, where they were not only against the government which embodied the democratic will of the people, but also against the people themselves. These struggles, through subsumption under the Act, were reconstituted as 'terrorist' and 'disruptive', exhibiting the 'intent' to 'adversely affect the harmony against different sections of the people', and thereby edged out of the dialogical space of the political community.

The manner in which TADA was implemented shows how the 'prevention of terrorist and disruptive activities' became effectively an instrument to contain and repress identity struggles. More significant perhaps is the manner in which the Act came to be perceived widely as communal and sectarian, not only because of its use against identity struggles of the Sikhs in Punjab and the Kashmiri Muslims, but also because it came to be used generally against minorities not associated with these movements, and who were arrested under the Act simply because they were Muslims or Sikhs. A large number of those arrested in Delhi[139] and Uttar Pradesh were also Sikhs.[140] In Gujarat[141] and Rajasthan,[142] the majority of those arrested were Muslims. The Sikhs were the first to come under its purview, almost all the accused in Punjab being Sikhs, not all of whom were necessarily connected with the Khalistan movement. Large numbers of Sikhs, who had settled in the Terai region of Uttar Pradesh from the time of partition, became victims of the generalised repression in the wake of Khalistani violence in the area. Again, a significant number of Muslims were arrested in Jammu and Kashmir for their association with the struggle in the region. Rajasthan was among the four states mentioned in the initial 'Statement of Objects and Reasons' and the arrest of Muslims under the Act was commonly reported. In 1991, the Home Minister Digvijay Singh reported in Rajasthan Assembly that of the 228 arrested, 101 were Muslims, 96 Sikhs, and 3 Hindus. No charges were established in 178 cases. In July 1993, the government withdrew cases against 72 persons. By 1993, Gujarat had climbed ahead of Punjab (14,457) in the number of TADA detenus with 3452 more TADA arrests adding to its 1992 total of 14,094. In Gujarat, arrests under TADA was applied in cases associated with communal violence where most of the persons arrested were Muslims. In Bombay, in the large-scale organised violence against Muslims and linguistic minorities, TADA was not invoked. But soon after the Bombay blasts, Muslims were brought under its purview.

The selective application of the Act against minorities was apparent from the fact that whereas TADA was not brought into force when large-scale violence against Muslims took place in Bombay riots, Muslims became the first to be brought under the purview of TADA after the bomb blasts. Kashmiri Muslims were yet another ethnic group that bore the brunt of the Act. Whereas the use of TADA against ethnic

minorities has almost inextricably attached the epithets 'extremists', 'terrorist' and 'anti-national' onto them, turning them into objects of suspicion, assertions of democratic self-determination—for example, tribal movements[143] in Vidarbha, Telangana, Godavari and Bastar Forests—were also brought under the scope of the Act.[144] In the North–Eastern states, the assertion of ethnic specificity, was characterised as a threat to national security, sovereignty and integrity. In Tripura, the Act was brought into force in the wake of violence by the All Tripura Tribal Force (ATTF) in October 1991. In Assam, three MLAs of Bodoland Legislature Party were arrested in connection with the bomb blasts in Guwahati and Dispur. The Asom Gana Parishad government used the Act extensively against Bodos and Karbis.[145] In the wake of the riots that followed the demolition of Babri Masjid in December 1992, a number of people were arrested in Nowgong. Around 100 persons were arrested in Jamunamukh Police Station limits alone. Among those arrested was Abdul Khaleque, who was accused of having participated in the riots on 8 December 1992. It turned out, however, as pointed out later by the Designated Court, that Khaleque was in jail since 9 September under a different TADA case.[146]

The implementation of POTO/POTA similarly saw that the investigation and trial in cases of violence against Muslims in Gujarat following the burning of a coach of the Sabarmati Express in Godhra in February 2002 languished, while POTA was invoked in the coach–burning case. Six chargesheets were filed in the POTA case that was brought against the 131 accused, all of whom were Muslims and most of the accused remained in prison, without having been brought to trial for over a year.[147] Significantly, as shall be discussed in the course of subsequent chapters, the Review Panel set up to review POTA cases under the POTA Repeal Act, found no *prima facie* case under POTA in the Godhra case and in May 2005, it recommended that POTA cases against the accused be dropped.

The above account shows how extraordinary laws become part of the specific practices of rule of the state, congealing in the process the 'us' even as the 'other' persists as an indispensable constitutive element of a collective political identity. The discussions on the Criminal Law Amendment Bill which was expected to take the place of the lapsed TADA, for example, constantly referred to the 'besieged us', reiterating

the 'urgent need' for a 'fresh examination' of issues of 'terrorism' and other 'anti-national' activities. It is significant that while the TADA-like Bill was being entrusted in 1999 for the perusal of the Law Commission of India, and contemplations were rife that India perhaps required a permanent anti-terrorist law,[148] within the Parliament questions were being raised about the prolonged judicial process TADA entailed, and the manner in which it was used against minority communities. The debates unleashed at the time when a second edition of TADA was sought to be introduced reiterated that TADA had been the most abused peace-time non-emergency legislation of independent India.[149] Suggestions for making extraordinary laws more foolproof, poured in, however.

The Law Commission in its 173rd Report dealing with Prevention of Terrorism Bill, 2000, continued to mark out the dangerous 'outsiders'. What was significant about the Commission's assessment of the security situation and the chronology of events that made an anti-terrorist law immediately imperative, was the manner in which it disregarded other forms of fundamentalism in particular that of the Shiv Sena and other components of the Sangh Parivar which predated the violence cited in the Commission's working paper.[150] While this selective identification of the enemy within resonates, the manner in which TADA was used in contexts of communal conflict predominantly against the Muslim community, the Commission's understanding of 'terrorism' as a 'crime' which was 'extraordinary' since the ordinary law of the land was not designed to handle it, lent weight to the argument that identity struggles in all their manifestations, are more likely to be seen as outside the 'normal', 'ethical' space of the political community. Extraordinary laws may therefore be seen as symptomatic of the legitimacy and democratic deficits that characterise modern states. They manifest the contradictory pulls that exist between the democratic aspirations of the people and the tendency within modern practices of rule to resolve them hegemonically.

Extraordinary Laws and the Redefinition of Democratic Politics

Another significant aspect of the debates, which can be seen as having historical continuity, is the manner in which the discursive practices

surrounding these laws, seek to define democratic politics. Unfolding within the framework of 'colonial difference', colonial practices of rule had justified laws of preventive detention by stating that they were made necessary by the social conditions obtaining in the colonies. By the same token, these laws were not seen as an essential part of governance in the metropole. The latter is evident from the response of the Home Member on suggestions that colonial laws were of an 'arbitrary nature' and, therefore, 'un-British': 'It is to *us* that the odius nature of an arbitray law is most apparent. It is *we* who in *our* country enjoy the utmost liberty…that are shocked that such laws should have been made'. The Home Member's troubled mind was, however, set to rest by reconciling this *necessity* however disagreeable, with the assurance that:

> …*our* system can never see these laws; we shall never see them in England. But England is a settled civilized country. These laws are applicable in India and the colonies where a handful of white people have to maintain themselves against lawless, sometimes, violent people.[151]

The colonial state attributed an inherent 'lawlessness' and 'violence' to the subject populations pointing thereby at the difference in racial and civilisational time in which the colonisers and the colonised existed. This denial of coevalness not only justified the latter's 'disciplining' and repression, it also conjured a scenario whereby an inversion of the victim-oppressor positions took place. Thus by referring to respect for liberty as a civilisational trait, the coloniser presented himself as the victim, who was 'compelled' to apply these *odious* laws in contravention to his natural self.

It may be recalled that popular struggles in the colonial period took recourse to the liberal principle that people had the right to rebel against an unethical government. Narratives of national liberation struggles are replete with stories where such right was claimed successfully and the force of truth established. The right of the people to remonstrate with the government continues, however, to be rejected by governments. Moreover, the colonial government's justification for such laws in the gullible and excitable psyche of the Indians, easily incited to participate in demonstrations, strikes and other violent activities, has reverberated frequently in independent India. With independence, the moral right of the people to resist and criticise the government was

rendered illegitimate by legal-political discourses that persisted in defining democratic politics hegemonically, drawing at the same time on notions of popular will for asserting national sovereignty. In the debates on the Preventive Detention Act, Nehru stuck to a general position that 'rule of law concepts' could not apply in any given situation in India.[152] While defending preventive detention in December 1954, the Deputy Minister of Home Affairs emphasised that the conditions in India were different from the 'hearty democracies' of the West. The 'infant [Indian] democracy', he felt, needed guidance and discipline to produce the 'democratic habits of mind and procedures', 'widely learned and understood' in the West. For the development of democracy as a 'habit of mind', asserted the Minister, it was essential that the state should *demonstrate intolerance* for 'lawlessness', through a 'forearming' of the state. Such laws were also presented as important safeguards against the political and cultural elements that threatened to derail the 'consensus', which the infant Indian democracy was pursuing.[153] It is interesting how expressions like 'consensus' and 'mainstream' continue to define the boundaries of democratic politics. The delimitation of this boundary necessitates the identification of the 'outsider', the 'other', the 'irritating and antagonistic loyalties', which could give way to social instability.

When the state takes upon itself to define what constitutes democratic politics, it also abstracts in the process what constitutes the extraordinary, the undemocratic and the extra-political. It is interesting also, to see how, while defining democratic politics the state assumes a moral high ground. Not only does it assume the responsibility of 'speaking for the people', in most cases it is only the state that speaks. In this process of claiming the responsibility of retrieving the democratic and political, the state emerges as the sole custodian of the rights of the people, and excludes from the public/political, people and movements who are also laying claims to representing popular aspirations. It is also interesting to note how by doing this, the state manages to blur the division between the victim and the aggressor, making it difficult to identify who the actual aggressor is.

In the course of acquiring this moral high ground, the state draws a wedge between people—between the 'citizen patriots' and the 'anti-nationals' and 'traitors'. The images of 'crimes against people', brings

forth the notion of people against people, with the state as a neutral arbiter, engaged in rejuvenating the ethical and moral space of democratic politics. POTA itself lays down what has been called the 'citizen spy' provision[154] making it imperative for citizens to reveal 'evidence' or suffer greatly accentuated punishment.[155] While not going into the legal intricacies of the provision, it may suffice to emphasise here that the provision replaces trust as a social and political value providing cohesion and harmony among people, with suspicion and backstabbing as a test of loyalty towards the government. Certain provisions in the Act, especially Section 21, assume a civil society found on suspicion and distrust. Section 21 pertains to offences relating to support given to a terrorist organisation, laying down that a person commits an offence under this section if 'he invites support for a terrorist organisation', 'if he arranges, manages, or assists in arranging or managing a meeting which he knows is to support a terrorist organisation' and so on. Significantly, for the purposes of this section, the expression 'meeting' means 'a meeting of *three or more* persons whether or not the public are admitted'.

The Act thus, squeeze out spaces of freedom and liberty, stifling voices of political dissent. It aimed at ushering in a depoliticised mass society, where elements of publicness, freedom and democratic dialogue are silenced. This narrowing of democratic spaces of dialogue and deliberation, breeds a politics of fear and intimidation, the hallmark of the days of the Emergency.

Universalising Discourse on Terrorism and the Construction of a 'Suspect Community'

With the events of 11 September 2001 in the USA, followed closely by the attack on the Indian Parliament on 13 December the same year, the discourse on terrorism in India accommodated itself in the burgeoning idea of global risks. The Preambles of extraordinary laws worldwide are steeped in the idea of global risks, pressing for concerted, and consensual efforts against global terrorism. The analysis in this section shows that this 'consensual' effort against global terrorism is rooted in a universalising and essentialising discourse on Islamic fundamentalism, which marks entire communities as 'suspect'.

The debates in Parliament—from October 2001, through March 2002, show that POTA was being justified as part of the international effort to fight terrorism. The 'statement of objects and reasons' of POTA clearly identifies the 'global dimensions' of challenges to 'internal security'. The Report of the *Committee on Reforms of the Criminal Justice System* (March–April 2003), commonly referred to as the Malimath Committee,[156] too, while looking for ways to include permanent legal measures against terrorism identifies 'terrorism as a global problem' and traces its origins to the decimation of the army of Middle–Eastern countries in the Sinai War of June 1967: 'The Arab World has since then been simmering with anger and rage leading to the contemporary wave of terrorism in the Middle-East'.[157] This preface on Terrorism is followed a few pages later by a paragraph (19.3) on 'Pakistani Link with International Terrorism' and another on 'Pakistan's Proxy War Against India' (19.4). This linkage not only reveals the Committee's subscription to a global network of Islamic terrorism, it also offers the explanation for some of the reforms that the Committee seeks to effect in the Indian Criminal Justice System, which is discussed later.

TADA judgments that have come in the last couple of years, as well as the few POTA judgements that have been delivered since its enforcement similarly allude to Islamic terrorism. In a POTA judgement, delivered on 21 July 2003, in the case *State vs. Mohd. Yasin Patel alias Falahi and Mohd. Ashraf Jaffary*, the POTA court sentenced both the accused Falahi, an American national and Ashraf, an Indian national for five years under Section 20 (membership of a terrorist organisation] of POTA and for seven years under Section 124-A (sedition) of the Indian Penal Code (IPC). The prosecution's case against the two was that on 27 May 2002, both the accused, who were members of the Students Islamic Movement of India (SIMI), an organisation banned in September 2001 under Section 3 of the Unlawful Activities Prevention Act 1967, 'were present on the road near Jamia Milia Islamia University library and were pasting stickers on the eastern wall'. The stickers carried the following notation in English: 'Destroy Nationalism Establish Khilafat', accompanied by a picture of a closed fist. 'In the fist', reads the judgement, 'was shown a missile with Indian sign, and flags of several countries like Russia, America, including that of India, crushed. At the bottom of the fist were several Muslim youths raising

hands and thereafter was the name of the organisation—'Students Islamic Movement of India' written. In the bag, the police found 33 more stickers.'

While the veracity of evidence and the procedure of investigation that were followed in the case is not the concern of this chapter, it is significant that the POTA court also found the accused guilty under Section 124-A of IPC that deals specifically with charges of sedition.[158] While sentencing under this section, the judgement reads, 'The motive of SIMI as stated in the Constitution of SIMI is to bring into force Islamic Order and to destroy nationalism in India and other countries'.[159] Given that Section 124-A explicitly removes 'criticism of government' from its purview, the judgement goes on to say '…a person may affix posters criticising the Government. He can do it freely and liberally but it must be without an effort to incite the people to break the nation or to destroy the nation. Nation and government are two different things. When one criticises the government, he criticises the manner in which government functions or apathy of government to the public in general or to specific class. But when a person attacks the very nationalism [sic], he acts as a fundamentalist and his motive are [sic] not to criticise the government but to act against the very fabric of society'.[160]

The fact that one of the accused Mohd. Yasin Patel, was an American national, that both the accused had received education in a *madarsa*, and had chosen India as their 'workshop' and 'hatchery', was cited as evidence corroborating guilt: 'Another factor which is important in this case', the judgement reads, 'is the nationality of the accused. He is an American national. He has chosen American nationality by volition. He possesses American Passport. All his brothers, sisters and parents are settled in USA. Unless his intentions were to indulge in anti-national activities through organisations like SIMI there was no need for him to make India his workshop' (p. 35). The fact that 'he got education in a *madarsa* and not in a regular college recognised by the state' and that 'both of them possess education only in *Kuran* and Islamic studies' were cited as further evidence. Sentencing Falahi, the judge pronounces: 'He is a person who believes in international Islamic order and wants to destroy nationalism of the people here. He instead of working in USA for his aims, of which country he is a citizen, has chosen India as

his workshop. I consider that a person who chooses to become a USA national and works for destruction of other countries does not deserve leniency'.[161]

A similar spectre of an Indian nation threatened by transnational-Islamic terrorism is raised in the opening paragraphs of the judgement in the case *State vs. Mohammad Afzal*, commonly known as the Parliament Attack case.[162] The judgement begins by identifying terrorism with a specific religion without naming it: '…terrorism is a scourge of all humanity. It is being perpetuated and propagated by religious fanatics, to poison the minds of their followers and generate mercenaries and terrorists to kill innocent persons'.[163] That the reference here is to Muslim fundamentalism is clear from the fact that page 3, paragraph 4 specifically mentions three instances of terrorist attacks, namely, the attacks on World Trade Centre, on a theatre in Russia and on Akshardham temple: 'Strike by terrorists on World Trade Center or at a theatre in Russia and at Akshardham temple in Gujarat and other temples in the country show the reach of terrorists to destroy innocent lives'.[164] Care is taken thereby to show that the attack on Parliament was part of global network of terrorism that thrived on its nexus with 'under-world criminal organisation' and 'obvious technical advantage'. It is not surprising then that much of the prosecution's case projected the attack on Parliament as part of a larger conspiracy, designed and dictated by unseen forces, linking up through a network of mobile telephones and laptop computers.

More significant perhaps is the manner in which the new contexts of 'global Islamic terrorism' were cited in a recent judgement in a TADA case pertaining to Sikh militancy of the 1990s. On 22 March 2002, the Supreme Court judgement in the TADA case *Devender Pal Singh vs. State of NCT of Delhi and Another*,[165] coming several years after the institution of the case, took recourse to the *new contexts* of terrorism to justify the stringent interpretation of provisions pertaining to 'confession', and sentenced the accused to death.[166] 'The menace of terrorism', the judgement states, 'is not restricted to our country, and it has become a matter of international concern and the attacks on the World Trade Center and other places on 11 September 2001 amply show it. Attack on Parliament on 13 December 2001 shows how grim the situation is…'[167] The spectre of the besieged nation and the perception of global risk affirmed by an international consensus, form the context of the judgement that

is temporally removed from the circumstances in which the 'terrorist act' in the case was originally committed and brought to trial. This synchronisation, or gloss of historical specificity feeds into the seemless, universalising discourse of global terrorism.

A significant distinction between TADA and POTO/POTA, indicative of the political context within which POTA has been brought, is that while TADA did not carry a central image of the nation or national security, the latter carries an image that is part of the Hindutva agenda of the nation and national security. TADA, as mentioned earlier, was enacted in May 1985 in the context of militancy in Punjab, specifically a series of bomb explosions in the Delhi. While the immediate events formed the context for the introduction and continuation of the Act (bomb blasts in Delhi and other places in 1985 and the Bombay blasts which followed the demolition of the Babri Mosque), the expansion of terrorist activities from Chandigarh and Punjab to Delhi, Haryana, U.P. and Rajasthan was cited as reasons for extension. Later, specific states like Punjab, Kashmir and Assam, were cited as justification for the continuation of the Act. POTA on the other hand, does not mention specific states or regions as problem areas. The statement of objects and reasons, refer to the 'upsurge in terrorist activities', 'intensification of cross-border terrorist activities' and 'insurgent groups in various parts of the country'. The challenge the nation especially faced, it states, was from 'global dimensions' that terrorism 'had now acquired'—'the modern means of communication and technology using high-tech facilities available in the form of communication systems, transport, sophisticated arms and various other means'.[168]

Moreover, while identifying 'terrorist activities', TADA specifically mentioned 'threatening harmony between communities' as an act of terror.[169] Following widespread allegations of its targeted use against religious minorities, POTA removed 'threatening harmony between communities' from the ambit of 'terrorist activities', purportedly as 'a safeguard'. Far from being a safeguard, the removal translated in practice into a deflection of attention from the communal activities of Hindu fundamentalist organisations, while the Act continued to be used selectively against the Muslim community. Perhaps the most prominent selective use of POTA is in Gujarat where out of 250 persons against whom POTA has been imposed, 249 are Muslims. The majority of

POTA cases in Gujarat have resulted from its application in the Sabarmati train burning case in Godhra.[170] Curiously, while the circumstances of the tragic train burning incident were and still continue to be pieced together, the Chief Minister of Gujarat, Narendra Modi, declared it a 'terrorist act' immediately after it occurred. In the midst of the unbridled brutalities unleashed against Muslims in different parts of Gujarat, on 2 March 2002, Prevention of Terrorism Ordinance (POTO) was applied in the train burning case.[171] Contrary to popular perception, POTO was not subsequently 'withdrawn'. It was only 'kept in abeyance', that is, deferred, till more suitable circumstances presented themselves. The fact that POTO, still an ordinance, was to come up before the Parliament for approval before it became an Act, was perhaps an important consideration. POTA got enacted in an extraordinary joint session of Parliament on 26 March 2003, and almost simultaneously, the Act was reinvoked in the train burning case. The entire pattern of invocation, abeyance and deferral, followed by its re-invocation later, shows the exclusionary nature of the politics extraordinary laws represent and thrive on.

The above account not only shows how an entire community comes to be perceived in law as 'suspect', the manner in which the investigation and trial of most of these cases progressed, shows how the wide powers of arrest, interrogation, detention, and surveillance, submits them to a perpetual state of fear. The selective proscription of organisations, the fact that once the Act is applied the cloud of suspicion remains even upon acquittal, the range of acts that the vague definition of 'terrorist activities' subsumes, and provisions that implicate through association, create the legal framework of suspicion. When such an Act is selectively applied to members of a specific community, the entire community is seen as potentially dangerous and a threat to national-security.

Extraordinary Laws: Exceptions or Norm?

The justification of extraordinary measures, as pointed out at the beginning, rested on the assumption that such measures are unavoidable, and necessary responses to specific crimes of extraordinary nature. They are, therefore, temporary in nature, and their lives are coterminous with the extraordinary events they intend to overturn. The section that

followed, showed how the discursive practices surrounding extraordinary laws, while designing a separate system for dealing with extraordinary events, have emphasised, alongside assurances of temporal controls and legis-lative oversight, the indispensability of such laws. This section shall show how the persistent lament of a pernicious internal enemy and the threat of a potential legal vacuum, produce the context within which a normalisation of extraordinary laws takes place. Through constant re-enactions and extensions, these laws cease being a temporary feature. Moreover, through a subtle process of symbiosis, laws pertaining to the so-called 'ordinary crimes' and those claiming to deal with extra-ordinary situations, intertwine and interlock in specific contexts. Not only is this interlocking evident in the letter of the laws, and unfolds in judicial pronouncements, but also at the level of their effect on ordinary laws, so much so, that much of the extraordinary gets accepted, ideo-logically and procedurally, in jurisprudence. The following points identify the different ways by which extraordinary laws have not been transitory, either in terms of their temporality, or in terms of their out-come on the legal system.

(a) An Unending String of Extraordinary Laws

There has been an unending string of extraordinary laws in India, which were either enacted after independence or continued from the colonial period.[172] The *Preventive Detention Act* (PDA), 1950, used against the communists in Telengana, was the first detention law after the Constitution was enforced. The Sino-Indian War of 1962 provided another occasion for the vigorous use of preventive detention by the government. The declaration of emergency due to the war enabled the government to promulgate the *Defence of India Ordinance*, 1962 and frame rules under it. The *Defence of India Act*, 1962, which replaced the Ordinance, empowered the Central government to make rules, ostensibly for securing the defence of India, civil defence, public safety, public order, the conduct of military operations, or for maintaining supplies and services essential to the community.[173] The official state of emer-gency persisted till subsequent wars with Pakistan in 1965 and 1971 and the government continued to detain people under the Defence of India Act, 1962.[174] The *Unlawful Activities (Prevention) Act* was passed in 1968. Under this Act, any organisation could be declared illegal and any individual

imprisoned for questioning India's sovereignty over any part of its territory. The PDA, renewed seven times, lapsed in 1969 owing to lack of support for Prime Minister Indira Gandhi in Parliament. There were no Central laws of preventive detention for two years. The states, however, continued operating their own preventive detention laws.[175]

The 1971 general elections gave Indira Gandhi sufficient strength in Parliament to pass MISA.[176] MISA had been modelled broadly on the PDA, 1950, containing provisions which gave broad application to Article 22(4), and 22(5) of the Constitution pertaining to disclosure of the grounds of detention and opportunities to make representation against the order. The Defence of India Act, 1971, introduced some changes in MISA making it more stringent.[177] The National Emergency of 1975 suspended the right of access to the courts for the restoration of the fundamental freedoms of the people. Under such conditions MISA assumed formidable proportions. Certain amendments were subsequently made by the government which virtually rewrote the Act.[178] The Constitution (39th Amendment) Act placed MISA in the ninth schedule of the Constitution taking it beyond judicial review. On 29 April 1976, the Supreme Court upheld the validity of MISA as amended and refused writs of habeas corpus under Article 226 of the Constitution, which had withstood suspension owing to a state of Emergency.[179] The Constitution (42nd Amendment) Act 1976, further strengthened the powers of the Central government by providing that no law for the prevention of anti-national activities could be declared invalid on grounds that it violated the fundamental rights in Part III of the Constitution. In 1977, MISA was repealed by the Janata Party government. The Janata Party government, however, did not repeal the other extraordinary laws that were also enacted by the earlier governments, including the *Armed Forces Special Powers Act*[180] and the Unlawful Activities (Prevention) Act. Preventive detention laws were, however, enacted by different political parties in power in the states of Madhya Pradesh, Jammu and Kashmir, Bihar and Orissa. A subsequent attempt made by the Janata government to bring in a mini MISA in the form of a Criminal Procedure (Amendment) Act proved futile.[181] When the Congress returned to power, the *National Security Act* (NSA), 1980 was brought onto the statute books. The NSA was followed

by *Terrorist and Disruptive Activities* (Prevention) *Act*, (TADA) 1985 and 1987, through efforts to bring in the Criminal Law Amendment Act and Prevention of Terrorism Bill, after TADA expired in 1995, to POTO and POTA, 2002.[182]

(b) Procedural Continuities: Self-Perpetuating Provisions

Extraordinary laws come with self-perpetuating provisions. The life of the PDA 1950 was for a year, that is, till 1 April 1951. In March 1951, C. Rajagopalachari who had succeeded Sardar Vallabbhai Patel as Home Minister piloted a Bill extending the life of the Act to 1 April 1952. In March 1952, an amendment was passed extending the Act from 1 April to 1 October. Another amendment Act was passed in 1952 (Act LXI of 1952) extending the life of the Act not for the usual one year but until 31 December 1954. In November 1954, the Act was further extended not for two years but for three years that is, up to December 1957. Again in December 1957, 1960, 1963 and in 1966, extensions were made for periods of three years at a time. By Act 48 of 1966 passed on 15 December 1966, the life of the *Preventive Detention (Continuance) Act* was extended up to 31 December 1969. Thus the PDA became a normal feature of Indian political life, with the number of persons detained under this Act each year gradually decreasing. In 1950, as many as 10,962 persons were detained. In 1951, the number was 2, 316. Next year, the number decreased to 1,116. In 1953, 736, over the next two years 325, and in 1956, 200 persons were under detention. In 1957, the number increased to 292 but fell to 177 in 1958.[183]

TADA provided for its extension every two years, and continued to exist on the statute books through extensions till 1995. In 1993, when TADA was extended for what turned out to be the last time, the extension had became so much 'routine' and part of the 'ordinary' that only eight Members of Parliament (excluding the minister presenting/defending the Bill) participated in a discussion that lasted an hour and ten minutes.[184] It is significant that the period after which extension could be sought was increased in POTO to five years.[185] The second Ordinance promulgated in December 2002, following a wave of criticisms, reduced the period to three years. The increased period, for

which such an Act can remain on the statute books without being subjected to legislative review, is indicative of the longevity that is sought to be attributed to them.[186] This quest for a longer life is frequently justified through articulation of the risk of running into a 'legislative vacuum', in the absence of effective anti-terrorist laws. In its 173rd report, for example, the Law Commission of India, alluded to the 'request' it received from the Home Ministry to 'undertake a fresh examination of the issue of a suitable legislation for combating terrorism and other anti-national activities', a subject of 'utmost urgency', in view of the fact that 'while the erstwhile Terrorist and Disruptive Activities (Prevention) Act, 1987 had lapsed, no other law had been enacted to fill the vacuum arising therefrom. The result [was] that today there [was] no law to combat terrorism in India'.[187] The Malimath Committee in its turn, recommended that 'a comprehensive and inclusive definition of terrorist acts, disruptive activities and organised crimes be provided in the Indian Penal Code, 1860 *so that there is no legal vacuum* in dealing with terrorists, under-world criminals and their activities after special laws are permitted to lapse as in the case of TADA, 1987'.[188]

(c) Anti-Terror Laws: 'Life After Death'

Extraordinary laws come with the provision that the expiry of the law shall not affect 'any investigation, legal proceeding' etc., that may have been initiated when the Act was still in force, which shall continue 'as if this Act has not expired'.[189] The experience with TADA has shown that the provision of continuation after expiry, imparts a prolonged 'life after death' to the Act. Cases under TADA continue to be tried in various designated courts and the Supreme Court several years after it has expired. While confirmed figures of the number of TADA detenus under trial and imprisoned are not available, newspaper reports and fact-finding investigations by civil rights groups show that there are thousands of such detainees in various jails all over India. A 1999 newspaper report suggests that 3,000 to 7,000 cases still remained to be decided.[190] While a large number of TADA cases have resulted in acquittals, judgements in some other cases are still to be delivered. By one account, three years after TADA was revoked, the state of Assam

had nearly 1,000 TADA detenus in prisons. Until 2000, five years after the lapse of TADA, trials had yet to be completed in 4,958 cases, of which 1,384 were still being investigated.[191] Since 1991, only fourteen persons had so far been convicted under TADA in the state, despite a total of 26,000 arrests having been made. Considering that only four out of 1,237 TADA-related cases have ended in conviction orders, it is quite possible that the majority of those still languishing in jails would probably be acquitted.[192]

The point one is making here is that the 'prolonged life after death' of the law has serious implications for the rights of detenus. The delay in judicial proceedings, resulting in many cases in acquittal from charges after a long-drawn trial has meant wasted lives. This is brought out most poignantly in the case of the release of 44 TADA detenus from Mysore Jail, in October 2001, who had been picked up by the Special Task Force in 1994 on the suspicion of providing food to the dacoit Veerappan. Among these 44 were entire families, including daughters, mothers, mother-in-laws, and a 14-year-old boy Muruga who was picked up while returning from school. Twenty years old at the time of release, Muruga feels too old to pursue his studies.[193] Similarly Mantru Rudropal, a daily wage labourer residing in Karimnagar sector near Indo–Bangladesh border was picked up while he was doing his routine work—cutting grass—and put behind bars, charged under TADA. Rudropal remained in prison, in detention for five years, because there was no one to bail him out. Arjun Sharma, an aged milkman was booked under TADA and put in jail in 1992, because he happened to be near an ULFA camp stacked with ammunition. His two co-accused—both ULFA activists—are still to be nabbed and until that happens, the law does not permit Sharma's release.[194]

On 21 July 2003, a TADA Court in Jehanabad district of Bihar convicted 26 activists of CPI (ML) under TADA, and on 28 July 2003 awarded life sentence to them. Vakil Ram, one of the accused in the case was adjudged not guilty by the TADA Court, but only after having remained in prison for 15 years since 1988. Five others—Mahendra Chaudhry, Roop Naraun, Nanhe Rajvanshi, Ajit Kumar and Shyam Chaudhry—arrested in the same case in 1988, when they were 12–15 years old, have not yet been released, nor tried, because according to

the Court they can only be tried by a juvenile TADA Court, and there is no such court in Jehanabad.

The unending string of extraordinary laws, provisions assuring decreased legislative overview, and self-perpetuation so that such laws continue to cast their shadows long after they have ceased to exist in statute books, have made such laws part of the lives of people. The section which follows shows that the notion of their existence as a parallel system of laws that exists alongside and independent of ordinary law is not true anymore. Almost imperceptibly much of the extraordinary is creeping into ordinary law with the development of a complex and interlocking system, so that laws pertaining to the so-called 'ordinary crime', and those claiming to deal with extraordinary situations intertwine in specific contexts.

(d) The Ordinary and the Extraordinary: From Parallel to Interlocking Systems

Ever since the enactment of the PDA in 1950, as Upendra Baxi points out, the Indian Legal System has managed the co-existence of the Preventive Detention System (PDS), an institution authorised by the Constitution of India itself, with the fundamental right to personal liberty. The preventive detention legislation has been increasingly used not just to deny fundamental rights to political opposition but also as a parallel legal system in aid of the Criminal Justice System (CJS).[195] The most striking distinctions that Upendra Baxi marks out between the two systems—the PDS and CJS—as evident from the table below pertain to the object, models of justice, and patterns of power-sharing that they espouse. The CJS is based on the assumption of primacy of social defence as the object of law, the maximisation and optimisation of due process as its strategy, and the pre-eminence of courts that are legalistic and pro-accused in their disposition. The PDS on the other hand, is primarily geared towards repressing (primarily political and ideological) opposition, thrives on minimal due process, and gives pre-eminence to executive decision-making and 'satisfaction' in the initiation and affirmation of extraordinary proceedings. The prioritisation of the executive becomes instrumental in relegating the pro-libertarian aspects of adjudication, and the subsequent predomination of a 'jurisdiction of suspicion'.[196]

Paddy Hillyard similarly identifies the 'dual system of criminal justice' which was created in Britain following the enactment of the *Preventive Detention Act* of 1974. The *Police and Criminal Evidence Act* (PACE), the ordinary law of the land which deals with 'ordinary' crime which comprises a large numbers of 'horrific offences including murder and rape', is considered inappropriate to deal with political violence. Not only are the 'principles and procedures' which the two systems assume different, the 'mere use of PTA helps to construct *a different view of and orientation* of the case'. An arrest under PTA is surrounded by 'a very different culture and atmosphere' as compared to an arrest under PACE, so much so that even before a shred of evidence is heard by jurists, the behaviour of the authorities suggest that the person is an active terrorist.[197]

While laws like TADA and POTA are *not* preventive detention laws, despite the long periods of detention they permit, the principles they espouse, correspond with Upendra Baxi's illustration of the PDS. In fact it is in the insidious nature of such laws that they masquerade as substantive laws, bypassing thereby the constitutional safeguards and procedural safeguards provided by the Supreme Court for detenus. Arrests, detention and trial under extraordinary laws like TADA and POTA demonstrate an unfolding of the dual and parallel systems of justice, as Hillyard and Baxi have termed it, respectively. As the table below shows, some of the key provisions of POTA already existed in the ordinary law.[198] Arrests under POTA, however, enabled the investigating agencies and prosecution to bypass the procedures and safeguards provided under the ordinary law and subject the accused to special procedures prescribed under extraordinary laws. Thus confessions made to a police officer (Section 32) and telephone interceptions (Sections 36–48) were considered valid and reliable evidence under the Act. Under Sections 25 and 26 of the Evidence Act, ordinarily applicable, confessions to police are not admissible as evidence because they can be easily extracted by torture. Similarly, under the ordinary legal procedure, telephone interceptions may not be produced as primary evidence against an accused. Moreover, several clauses under POTA did away with the personal safeguards that are normally available to an accused. Once a person is detained, he/she is denied bail for what came to be interpreted as a minimum of one year (Section 49).[199] Moreover bail could not be given if the prosecution opposed it, and unless the

court was satisfied of the detenu's innocence. This withdrawal of existing safeguards and dilution of evidence, decreased the threshold of proving guilt, encouraged shoddy investigation and tilted the trial disproportionately in favour of the prosecution.[200]

A distinctive pattern has emerged, however, in the operation of extraordinary laws, lending to its normalisation—that of an interlocking between the ordinary and extraordinary laws. Interlocking takes diverse forms. Anti-terror laws may amend specific statutes of the ordinary law, or there may be a mutual sharing of provisions between the ordinary and extraordinary laws. As a result of this symbiotic relationship between ordinary criminal law and emergency legislation, as Paddy Hillyard calls it, there is a general tightening up throughout the statutory law.[201] This standardisation of law as it is called, becomes symptomatic of a 'an insidious circular process in which draconian laws soften us up to similar laws which become the desired standard for further measure'.[202] The repeal of POTA accompanied by the 'strengthening' of UAPA is a manifestation of this circular process whereby the extraordinary and the ordinary become enmeshed.

The unfolding of POTA reveals, however, a distinctive pattern of concurrence and interlocking between the extraordinary and ordinary. While there is continuity in the nature of claims justifying anti-terrorist laws, a close examination of the legal-juridical discourses unfolding after 11 September 2001, shows a distinct shift. In particular, POTA and TADA judgements that have come after 9/11, as well as the Report of the Committee on Reforms of the Criminal Justice System submitted in April 2003 show the development of a complex and interlocking system of laws, so that laws pertaining to the so called 'ordinary crimes' and those claiming to deal with extraordinary contexts, intertwine and come to traverse common grounds.[203] Moreover, the procedural changes and a separate system of dispensation of justice that extraordinary laws espouse, both in terms of assumption of guilt as well as procedures for gathering and admitting evidence, creep into ordinary law, making permanent, measures that had been brought in as temporary.

Extraordinary laws often carry specific provisions whereby the accused may be simultaneously charge-sheeted and tried for violation of other (ordinary) laws in a common trial.[204] The parallel structure of courts set-up for the dispensation of justice under extraordinary laws,

gives effect to such interlocking systems. Special or designated courts with expansive and overriding powers simultaneously try cases under the ordinary law in a common trial, and hand out enhanced penalties on the basis of evidence that is considerably diluted under extraordinary laws. TADA, for example, allowed the inclusion of penal offences under the provision of other Acts if they are committed in aid of terrorist and disruptive activities. The most wide-ranging powers in this respect were given in relation to the Arms Act [TADA Section 5].[205] As a result of this inclusion, the trial procedures in all such cases become different and the punishments are enhanced [TADA Section 6]. In other words, an accused under ordinary law would get different treatment if TADA provisions were added to the charges. Sukhdev Singh (Sukha) and Harjinder Singh (Jinda), two Khalistani militants who were hanged in October 1992 on the charge of General Vaidya's assassination, were tried by the TADA Designated Court on charges of murder and conspiracy under sections of IPC [Sections 120-B (criminal conspiracy), 302 (murder), 307 (attempt to murder) among others] and under TADA [Section 3 (terrorist activities) and Section 4 (disruptive activities)]. The court, however, found inconsistencies in the prosecution's case and dismissed all charges against the accused including TADA charges, except the charge of murder of General Vaidya and attempt to murder his wife. Although acquitted of TADA offences, the trial continued in the Designated Court since TADA explicitly required trying of other offences by the same court, and the two accused were sentenced to death. Ordinary law relating to death sentence makes it mandatory for the High Court to confirm it. Under TADA, the role of the High Court is eliminated and an appeal was therefore made to the Supreme Court, which confirmed the death sentence.[206]

Similarly while identifying terrorist acts for punishment, POTA (Section 3[1(b)] brings under its purview the Unlawful Activities (Prevention) Act, 1967,[207] the Arms Act, 1959, the Explosives Act, 1984, the Explosive Substances Act, 1908, the Inflammable Substances Act, 1952, for trial under POTA with enhanced penalties (Section 5).[208] In the case *State vs. Mohd. Afzal* (Parliament attack case), which was the first POTA case to be decided by the Special POTA Court set up in Delhi's Patiala House Courts, the accused were charged and found guilty under various

sections of POTA, IPC, and Explosive Substances Act. Like other anti-terror laws, POTA worked on the principle that terrorist acts could not be proved in the normal course and they required therefore extraordinary measures. POTA, therefore, permitted the inclusion of evidence that could not otherwise be admitted under the ordinary law, that is, confessions to a police officer and telephonic interceptions. A comprehensive chapter (Chapter V—Sections 36–48) defined electronic interceptions and lay down the various steps for their authorisation, approval by a competent authority, duration, etc. for interception.[209]

In the Parliament attack case, telephonic interceptions and their interpretation formed a crucial part of evidence. The defence for the accused challenged successfully the admissibility of this evidence in the High Court on the ground that the safeguards laid down in POTA were not followed.[210] Significantly, the judgement by the POTA court, while submitting to the decision of the High Court, concluded that 'the taped conversation, having been collected in violation of POTA [was] inadmissible as prosecution evidence for offences under POTA but its admissibility [could] be considered for other offences' i.e., pertaining to offences under other Acts.[211] The POTA Court subsequently considered the interceptions under the *Telegraph Act*, and along with confessions admitted them as evidence against the accused, sentencing three of the four accused to death under Section(s) 302 read with 120 B IPC and 3(2) of POTA read with 120 B IPC.

This brings us to yet another instance of interlocking, again in the Parliament attack case. It is important to note that while one of the accused, S.A.R. Gilani, had made no confession, the confessional statements of two other accused Afzal and Shaukat had been collected under POTA. While admitting that confession by co-accused was not 'evidence against Gilani' [under POTA], the judge nonetheless used it against the latter, giving the following grounds: 'This confessional statement is not a piece of evidence against Gilani but u/s 30 of Evidence Act the court can look into this confessional statement to lend assurance to other circumstantial evidence'.[212] Interestingly, while confession by co-accused could be used as evidence under TADA, POTA had come with a safeguard whereby confession by co-accused could no longer be used as evidence against the accused. Under Section 32 of POTA, there was conscious omission

of the portion 'or co-accused, abettor or conspirator', which was to be found in Section 15 of TADA. The portion had been added to TADA by the Amending Act no 43 of 1993, that is, two years before it expired. Before this amendment, a confession of a co-accused was not to be used against another co-accused unless the latter was found in possession of arms.

Another instance of interlocking, and consequent occlusion of safeguard relates to Section 3(4) of POTA. While specifying the punishment for terrorist acts, Section 3(4) of POTA states:

> Whoever voluntarily harbours or conceals, or attempts to harbour or conceal any person knowing that such person is terrorist shall be punishable with imprisonment for a term which is not less than three years but which may extend to imprisonment for life and shall also be liable to fine:
>
> *Provided that this subsection shall not apply to any case in which the harbour or concealment is by the husband or wife of the offender*. [emphasis added]

Overriding the safeguard against implication through association by marriage that was provided in this provision, the judgement found Afsan Guru alias Navjot, the wife of Shaukat Hussain Guru, another accused in the case, guilty under Section 123 of IPC. Outlining the case against Afsan Guru under IPC, the judgement pitted her matrimonial duties against her constitutional obligation and patriotic duties to the state:

> The conversation between her and her husband, intercepted by the investigating agency, also shows that she was aware of the entire conspiracy hatched up for waging war against India by attacking the Parliament. It was her constitutional obligation to uphold the sovereignty of India. She was duty bound to inform the state about the impending attack on Parliament. Section 123 makes concealment of existence of design to wage war against India as an offence. *She is not protected from this offence merely because of her being wife of Shaukat. Her matrimonial duties towards her husband could not have stood in the way of her constitutional obligations and her duty towards the state*….I consider that when the husband or wife is indulging in such a heinous crime as this, it is the duty of the other spouse not only to stop him from indulging in such a heinous crime, but if the spouse persists in carrying out his horrendous intentions, to inform the authorities so that preventive action could be taken in time. Had Afsan Guru alias Navjot Sandhu not concealed the designs of her husband, Afzal, Gilani and other deceased terrorists, and informed the police in time, fourteen lives would have been saved…'.[213]

The judgement further sites Section 39 of CrPC before holding Afsan guilty of offence under Section 123 IPC.[214] While finding Afsan Guru guilty under the ordinary law, the Special POTA Court took recourse to the evidence produced in the court relating to the conspiracy under POTA, specifically, the conversation between her and her husband that was intercepted under the extraordinary procedures provided under POTA.

Apart from occlusion of safeguards, also significant is the manner in which this interlocking allowed the expansion of the scope of POTA, reflecting the ideological contexts within which the Act was unfolding. We may recall here that TADA was widely criticised for its communal use and selective targeting of Sikhs in Punjab, Delhi and U.P. and Muslims in Gujarat and Rajasthan, and Bombay after the 1993 blasts. Most of these arrests were under Section 3 of TADA which included acts that 'alienated any section of the people' and those that 'adversely affected the harmony amongst different sections of the people' in its definition of terrorist activities. While these grounds for defining terrorist activities were removed from POTA, ostensibly as a safeguard against possible abuse, the targeting of Muslims under POTA, as mentioned earlier, continued. As the following illustration will show, this targeting was facilitated by an interlocking between POTA and the Unlawful Activities (Prevention) Act, 1967.

As mentioned earlier, Section 3[1(b)] of POTA lay down that 'whoever is or continues to be a member of an association declared unlawful under the UAPA, 1967', committed a terrorist act. In the POTA case *State vs. Mohd. Yasin Patel alias Falahi and (2) Mohd. Ashraf Jaffary*, which has been discussed earlier, this interlocking allowed the discarded ground of 'disturbing peace and communal harmony' to sneak almost im-perceptibly into POTA, broadening thereby the scope of the Act. On 21 July 2003, the Special POTA Court in Delhi, sentenced the two accused Mohd. Yasin Patel alias Falahi and Ashraf Jaffary for five years under Section 20 of POTA and for seven years under Section 124-A IPC. Section 20 of POTA is part of Chapter III of the Act titled 'Terrorist Organisations', and lays down the procedures through which an organisation may be declared terrorist, and the offences and punishments relating to membership in such an organisation.

The two accused in the case were members of Students Islamic Movement of India (SIMI), an organisation banned under the UAPA.[215] Under Section 2(g) of UAPA 'unlawful association' means 'any association which (*i*) has for its objects any unlawful activity or which encourages or aids persons to undertake any unlawful activity, or of which the members undertake such activity, or (*ii*) has for its objects any activity which is punishable under Section 153-A [promoting enmity between different religious groups]. The government notification banning SIMI stated that the latter had been indulging in activities that were *prejudicial to the security of the country* and had the potential of *disturbing peace and communal harmony* and *disrupting the secular fabric* of the country [emphasis added].

What is to be noted here is that the accused were arrested on 27 May 2002 under UAPA. Since SIMI was also a banned organisation under Section 18 of POTA, four days later the accused were booked under POTA. Investigations against them were conducted under POTA, and they were subsequently sentenced under Section 20 of the Act. The explanation in the judgement reads:

> On finding that both accused persons were closely associated with SIMI and were members even after banning of SIMI, they had continued the activities of SIMI, they were arrested under Unlawful Activities (Prevention) Act, 1967…. Since SIMI was also an organisation banned under Section 18 of POTA and its membership and activities were prohibited and continuation of activities and membership amounted to violation of Section 20 of POTA, both the accused persons were booked under Section 20 of POTA and investigation was done against them under POTA.[216]

The proceedings against SIMI under POTA effectively made communal disharmony a punishable offence under POTA. Apart from the fact that this proxy inclusion enabled legal action against specific organisations under POTA, it also kept alive the possibility of selective targeting of communities.

In the chapters that follow, the themes that have been taken up in this chapter can be seen unraveling in specific contexts of the unfolding of the Act. The next chapter is provocatively titled 'cutting down trees', referring to the dismantling of the limits on governmental powers by laws that define and determine exceptions to the 'rule of law' that ordinarily applies to both the government and the governed. The rule of

law has been understood in various ways, narrowly, as a framework of fixed rules applicable to all, and more expansively and connotatively as a framework of equality and justice, rather than simply institutions and procedures. The next chapter shows how exceptions are written into rules and procedures, through an exercise of sovereign authority in deciding conditions of emergency wherein the normative universe of the rule of law may be 'legitimately' intersected with rules that deal with the unexpected and extraordinary. Since the exceptions are legally determined and justified through delineations identifying 'a situation of factual danger', they bring into practice principles and procedures that 'suspend the normative universe of the rule of law', upholding at the same time the sovereign authority of the state.[217] While examining specific procedures that extraordinary laws bring into the statute books, the chapter will show how the legal inscription of the exception has ramifications not only for the procedural aspects of the rule of law, but also its connotative dimension, indicating shifts in political and democratic ideals. Nowhere is the latter more evident than in the manner in which extraordinary laws unfold in specific contexts, that is, the peculiar political and socio-economic structures and processes, and in a way so as to sustain dominant ideological practices and regimes. Chapters Three and Four examine specific POTA cases to show the complex ways in which POTA unfolded in different states, exhibiting not only the politics of intolerance and negation that extraordinary laws are embedded in so that specific ideological groups and religious communities are rendered suspect, but also the ways in which the Act becomes the terrain across which political contests are played out, in a way that the parties in the contest, lock horns in an irritating legal impasse. The concluding chapter takes the discussion forward to look at the scenario that unfolds in the wake of POTA's repeal in a somewhat similar vein as the afterlife of TADA. It traces, therefore, the continuing violence of the Act, in the form of its lasting effect on existing laws, political and legal structures, and the lives of people. The jubilation over POTA's repeal, it cautions, should not deflect the attention from other laws that continue to be in operation in parts of India, namely, the *Maharashtra Control of Organised Crime Act* (MCOCA), the *Disturbed Areas Acts* in the states of the North–East and the *Armed Forces Special Powers Act* (AFSPA). While MCOCA

is generally construed as the precursor of POTA for contributing to it some of its more 'effective' features, the AFSPA is particularly significant as an example of a permanent legislation that was at the time of its enactment justified for *merely* shifting, under logistical compulsions, powers of ordinary policing to the army.

Notes

1. On the night of 21 September 2004, the President promulgated two Ordinances. One of these repealed POTA a month before it was to come up for legislative review, and the other amended the provisions of the Unlawful Activities (Prevention) Act 1967, (UAPA). In its winter session both Houses of Parliament gave the Ordinances their approval. This means that POTA is no longer on the statute books and UAPA 1967 has been replaced by UAPA 2004.
2. In an article, A.G. Noorani points out that unlike the nearly dozen inquiries into the operation of emergency legislation since the eruption of violence in Northern Ireland in Britain, we have had in India 'a pathetic and illiberal report on TADA's replacement by a Law Commission, of uninspiring membership, and a stinging rebuke by the National Human Rights Commission'. A 'detailed report' on the operation of POTA, he points out, 'is yet to come'. This work is in the nature of an enquiry into POTA's operation from the vantage point of justice and democracy. See A.G. Noorani (2003).
3. The expiry of a law does not affect 'any investigation, legal proceeding' etc., that may have been initiated when the Act was still in force, which continues 'as if this Act has not expired'. Thus even after a law expires it does not 'die', in the sense that trials under it continue, which as the experience of TADA discussed later in the chapter, and POTA discussed later in the book shows, continue to raise contentious issues.
4. 'Advani for temple in Ayodhya', *Indian Express*, 9 July 2005.
5. 'Terrorists rush in where…', *Indian Express*, 9 July 2005.
6. Hillyard's own work demonstrated how the *Prevention of Terrorism Act, 1974* functioned in Britain, unfolding a pattern familiar to all extraordinary laws, viz., arrests often of unknown numbers of persons, following a pyramidal pattern on the basis of suspicion through association, long periods of detention, expansion of the role of special investigating agencies, the invocation of special methods of investigation and surveillance, and powers of exclusion from Britain, turning the entire Irish community living in Britain into a 'suspect community'. Paddy Hillyard (1993).
7. Ibid., p. 263.
8. For details of the manner in which POTA figures in Centre-State relations, see Ujjwal Kumar Singh (2004).
9. See Oren Gross 'Cutting Down Trees: Law Making Under the Shadow of Great Calamities', in Ronald J. Daniels, Patrick Macklem and Kent Roach (eds), *The Security of Freedom*, 2001, p. 41.

10. Carl J. Friedrich, 1957, *Constitutional Reason of State—The Survival of the Constitutional Order*.
11. See Michael Bakunin, *Federalism, Socialism and Anti-Theologism*, cited in Noam Chomsky's *For Reasons of State*, 2003.
12. Oren Gross, 2000, 'The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy', *Cardozo Law Review*.
13. Carl Schmitt's works, reflect the historical context of the crisis of liberalism and parliamentarism in the early twentieth century Germany. Schmitt rejected the liberal assumption that it was possible to have a legal universe that could reflect and regulate all aspects of reality. This legal world view based on generalities and utopian normativeness, did not allow, he proposed, for the possibility of exceptions. His ideas spread over his several works including *The Dictatorship* (1921), *Political Theology: Four Chapters on the Concept of Sovereignty (1922)* and *The Concept of the Political* (1932, trans. 1976). For Schmitt it followed from his analysis of the relationship between legal norm and political exception that a state committed to the rule of law could not limit its response to an emergency. An effective response had to be outside the rule of law so that liberal democratic states could not respond effectively to fundamental challenges, unless they gave up their fundamental commitment to the principles of liberal democracy. In his early works Schmitt makes a distinction between two kinds of 'dictatorship'—rule outside the rule of law—which a society faced with an emergency might opt—a 'sovereign dictatorship' where the government is unconstrained by any limits, and a 'commissarial dictatorship' or dictatorship on commission of the people, corresponding to the reference model of emergency, which seeks to bring the response of the emergency into line with democratic principles. In his later work, *The Concept of the Political*, coinciding with the disintegration of the Weimar Republic, Schmitt's arguments reject the distinction, as he proposes that in a state of emergency, the state is faced with an imperiling condition, threatening its existence, which make the ordinary law and order mechanisms ineffective. The nature of politics that such a response espouses is embedded in a fundamental distinction between friend and enemy, where the basis of distinction viz., race, religion, ethnicity, class is not important as much as the intensity of difference. The distinction arises when one political entity regards the other as its 'existential negation' so that the appropriate response can only be one which brings about the death of the enemy. See David Dyzenhaus, 'The Permanence of the Temporary: Can Emergency Powers be Normalised' in Ronald J. Daniels, Patrick Macklem and Kent Roach (eds), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, 2001, pp. 21–38.
14. For a discussion on this theme see Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law*, 2003, and Oren Gross, 'The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the 'Norm-Exception' Dichotomy', *Cardozo Law Review* p. 1825.
15. Oren Gross calls this the 'normalcy-rule, emergency-exception' paradigm characterized by a dichotmised-dialectic between the normal and the exception. In Schmitt's framework, as discussed in his work *The Dictatorship*, this paradigm is called the commissarial dictatorship which is a traditional paradigm of constitutional dictatorship going back to republican Rome, where dictatorship is grounded in the existing legal order and follows its legal dictates, both procedural and substantive,

and can be justified only if it is directed towards establishing or defending the existing legal order. Oren Gross, 2000, 'The Normless and Exceptionless Exception', *Cardozo Law Review*.

16. Ibid., p. 1840.
17. Giorgio Agamben, *State of Exception* (translated by Kevin Attell), 2005, p. 1.
18. Those who subscribe to the approach that the state of exception is itself a source of law are Santi Romano Hauriou and Mortati. Another set of scholars who see the state of exception as 'inside' the juridical order in the sense of 'a state's subjective natural or constitutional right to its own preservation are Hoerni, Ranelletti and Rossitter. Those who see the state of exception as located outside the juridical order are Biscaretti, Balladore-Pallieri and Carre de Malberg, See Agamben, ibid., p. 23.
19. Ibid.
20. Ibid., p. 1. Here one can see how the notion of law and power in Giorgio Agamben's work *State of Exception* ties up with his central work '*Homo Sacer*: *Sovereign Power and Bare Life*' (1998). Under the Roman Empire a man who committed a certain kind of crime was banned from society and all his rights as a citizen were revoked. As a consequence the Roman law no longer applied to him, yet he was 'under the spell' law, i.e., he was excluded from law, while at the same time included in it. The figure of the *homo sacer* was the exact mirror image of the sovereign—who stood on the one hand within law in the sense that as a natural person he could be condemned, and outside of law since as a body politic he has the power to suspend law for an indefinite time. Agamben argues that we continue to live under the auspices of the classical state, and its lingering capacity to define and occasionally erase the boundary between 'normalcy' and 'emergency', thereby transforming society into a 'camp' or *lager* populated by citizens reduced to bare life. The exceptional legislation by executive decree, Agamben suggests, has become a regular practice in European democracies and liberal democratic regimes, and the national security state formalises this, while the war on terror normalises the exception. See Volker Heins, 2005, 'Giorgio Agamben and the Current State of Affairs in Humanitarian Law and Human Rights Policy', *German Law Journal*.
21. On 28 September 2001, the Security Council of the United Nations, unanimously adopted a strongly worded Resolution 1373 which mandated that all member States: (*a*) Prevent and suppress the financing of terrorist acts; (*b*) Criminalise the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or the knowledge that they are to be used, in order to carry out terrorist acts; (*c*) freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property controlled directly or indirectly by such persons and associated persons and entities; (*d*) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons. The resolution

created a Security Council Committee to monitor the situation and called on all member states to report to it within ninety days on the actions they had taken to implement the mandate of the resolution. See UN Resolution 1373 at www.un.org/Docs/scres/2001/sc2001.htm.

22. See William K. Tabb, 'After Neoliberalism?', *Analytical Monthly Review*, 2003, p. 24.
23. Pakistan's *Anti-Terrorism (Amendment) Ordinance*, came into force in November 2002, allowing for the detention of suspected persons for up to twelve months. The Human Rights Commission of Pakistan has lobbied for an end to illegal detentions as also on the issue of suspects extradited to the USA without due process. In Mauritius, the Prevention of Terrorism (Special Measures) Regulations were introduced on 25 January 2003. The bill was enacted only after two Presidents stepped down rather than give their assent to it. See for details, Antonio Tujan, Audrey Gaughran and Howard Mollett, 'Development and the 'global war on terror', *Race and Class*, 2004, p. 69.
24. John E. Smith, 'New Zealand's Anti-Terrorism Campaign: Balancing Civil Liberties, National Security, And International Responsibility', Report of a project under the Ian Axford Fellowship in Public Policy, 2003, p. 42.
25. American Civil Liberties Union, *Insatiable Appetite: The Government's Demand for New And Unnecessary Powers After September 11*, Washington, 2002, p. 3.
26. The Foreign Affairs, Defence and Trade Committee, 'Counter Terrorism Bill' and 'Select Committee Report on Counter-Terrorism Bill' located at www.clerk.parliament.govt.nz/Content/SelectCommitteeReports//27bar2.pdf.
27. See Neil Smith, *The Endgame of Globalisation*, 2005, pp. 170–76.
28. Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror*, Princeton University Press, 2004, p. 141 and 'Lesser Evils: What will Cost Us to Succeed in the War on Terror', *The New York Times* Magazine, 2004, p. 48, both cited in Smith, ibid.
29. Smith, ibid., pp. 173–74
30. Justice Arthur Goldberg's statement cited in David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism*, 2003, p. 13.
31. In response to Justice Goldberg, those defending constitutional safeguards quote Senator John Potter Stockton who in 1871 stated: 'Constitutions are chains with which men bind themselves in their sane moments that they may not die by a suicidal hand in the day of their frenzy'. See Cole, ibid., p. 229.
32. See Ronald J. Daniels, 'Introduction' in Ronald J. Daniels, Patrick Macklem and Kent Roach (eds), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, 2001, p. 4.
33. See David Schneiderman, 'Terrorism and the Risk Society' in ibid.
34. See Mariana Valverde, 'Governing Security, Governing Through Security' in ibid.
35. See Jude McCulloch, '"Either You Are With Us, or You Are With The Terrorists": The War's Home Front' in Phil Scraton (ed), *Beyond September 11: An Anthology of Dissent*, 2002, p. 54.
36. Civil Liberties Update, NPR/Kaiser/Kennedy School Poll, conducted 7–11 August 2002, cited in David Cole, *Enemy Aliens*, 2003, pp. 18–19.
37. Ibid.
38. Although no one was ever formally prosecuted under the Alien Act, its mere existence forced many aliens, including many editors of the critical press, to leave the country and go into hiding. The Sedition Act led to at least 25 arrests, 15 indictments,

and 10 convictions—all against Republicans. See for details, William J. Brennan, Jr., 'The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises', 22 December, 1987, p. 2.

39. Ibid., p. 3.
40. David Cole, 2003, *Enemy Aliens*, pp. 88–92.
41. See James X.Dempsey and David Cole, Terrorism and the Constitution: Sacrificing Civil Liberties in the name of National Security; Jennifer Van Bergen, 'The USA PATRIOT Act Was Planned Before 9/11' at http://www.truthout.org/docs_02/05.21B.jvb.usapa.911.htm
42. See NHRC's position of on 'major human rights issues' ten years in retrospect as presented in its annual report (2002–2003: pp. 16).
43. In its opinion on the Prevention of Terrorism Bill, the NHRC pointed out that 'any action which threatens the unity, integrity, security or sovereignty of India' was already covered by Section 153–B of the Indian Penal Code (IPC). 'Offences against the State' was dealt with in Chapter VI of IPC, especially sections 121-A (conspiracy to overawe by means of criminal force or show of criminal force), 122 (collecting arms and ammunitions with the intention of waging war against the Government of India), 124-A (sedition). Chapter XVI likewise dealt with 'Offences against the Human Body'. Apart from the IPC, the Arms Act 1959, Explosives Act, Explosive Substances Act and the Armed Forces (Special Powers) Act, 1958 were other existing laws that were available to deal with specific situations (Annual Report, 2001–2002: 322–23).
44. Ibid., 323–24.
45. NHRC, Annual Report (1994–95), p. 8.
46. Ibid., p. 9.
47. Ibid.
48. The 'principal' deviations the NHRC listed were (*i*) raising the presumption of guilt and shifting the burden on the accused to establish his innocence; (*ii*) drawing the presumption of guilt for possession of certain unauthorised arms in specified areas; (*iii*) making confessions before a police officer admissible in evidence; (*iv*) providing protection to witnesses such as keeping their identity and address secret and requiring avoidance of the mention of their names and addresses in order or judgement or in any records of the cases accessible to the public; (*v*) modifying the provisions of the Code of Criminal Procedure particularly in regard to the time set for investigation and grant of bail. Letter dated 20 February by Justice Ranganath Mishra, the then Chairperson of NHRC to all Parliamentarians, Annexure, NHRC Annual Report (1994–95), p. 54.
49. Ibid., p. 55–56.
50. A study conducted in the eighties on the implementation of the National Security Act, for example, showed that in all states, most of those picked up did not deserve to be in jail. 'Poto is no answer to terrorism', *Indian Express*, 6 November 2001.
51. The parallel and opposite natures of the two systems of justice as presented by Upendra Baxi (1982: 31). Will be discussed in a later section in this chapter.
52. See the discussion on 'Individual Liberty and Preventive Detention', in Granville Austin, *Working a Democratic Constitution*, 1999, pp. 53–62.
53. See for details, Rajni Kothari (1986: 210–16).
54. See Gill (2002: 14–19).
55. For details of Gill's position on the issue see 'Gill hits out at Punjab Government for indifference towards policemen', *The Sunday Times of India* (1997: 11).

56. 'Fight terror; not POTO', *Hindustan Times*, 5 November 2001.
57. See Gill (2002: 15).
58. See Shourie (2001: 239).
59. The political class is blamed in particular for not preventing the demise of TADA, in spite of the judiciary having upheld its constitutional validity (Shourie 2002: 246).
60. Ibid.: 240.
61. Ibid.: 244, emphasis added.
62. The Law Commission of India undertook a study of the security situation, with the objective of assessing the need for a 'comprehensive' anti-terrorism law. It took into consideration similar legislations in other countries, prepared a Working Paper for circulation, and held two seminars on 20 December 1999 and 29 January 2000, to 'elicit opinions on the proposals'. See Chapter I: Introductory, *173rd Report of the Law Commission of India on Prevention of Terrorism Bill* (2000: 1–4).
63. See Annexure I, 'Working Paper on Legislation to Combat Terrorism', *173rd Report* (2000: 32).
64. Ibid.: 1.
65. A discussion on the Working Paper can be found in K. Balagopal (2000).
66. Also, Shourie's insinuation that civil rights groups raised a 'high-decibel' campaign *only after* the blasts, when TADA started touching 'the networks' of 'those who exercise real power' is unfair. The campaign against extraordinary laws by civil liberties and democratic rights groups has been long drawn and consistent, and predates TADA. It has steadfastly stuck to the principle that such laws are not democratic and has criticised *all* arrests under them (including L.K. Advani's arrest under NSA and Vaiko's arrest under POTA) precisely because such laws ultimately inhibit popular aspirations and restrict the dialogical space of the political community. On each occasion of criticism civil rights groups have tried to remind the government that misuse and abuse is built into Acts like TADA and POTA.
67. See Jaitley (2002: 63).
68. Emphasis added. 'Ask your lawyers, Ms Gandhi', *Indian Express*, 5 November 2001.
69. Emphasis added. Ibid.
70. See Ghate (2002).
71. Nazir Ahmed Ronga, a human rights activist and President of the J.K. Bar Association is reported as having said that many persons he got released under PSA were later rearrested and killed in custody. For this reason, he very often, did not seek the actual physical release of the detenue. See ibid.: 313–22.
72. See Guha (1971: 13).
73. See Balagopal (1988: 102–104).
74. See Rudra (1973: 4).
75. For details see Chapter Three.
76. By a strange logic, through an interpretation made in 1986, Section 3 of OSA, makes a 'secret' anything that may be public. Thus, the mere possession of a published document downloaded from the internet, made Gilani a threat to national security, national sovereignty, national interest etc. It is significant that even when the Military Intelligence later certified that the information in Gilani's possession was not secret, the certification was kept from the knowledge of the court, and bail proceedings delayed as the prosecution bided time to press other charges instead. See *Freedom Fettered*, PUDR 2002.

77. The 'indecent haste' in bringing an Ordinance in October when the Parliament session was commencing on 19 November was seen as unjustifiable and politically motivated. Articles 123 and 213 of the Constitution conferred the Ordinance making power on the President/Governor, as explained by the Supreme Court, was 'in the nature of an emergency power, for taking immediate action'. 'POTO, the Government's excuse for abuse', *Indian Express*, 2 November 2001. The Home Secretary's letter addressed to the Chief Secretaries of the state governments explained the need for POTO as follows: 'Anti-terrorism law was already on the cards. However, a paradigm shift in the existing and emerging threat perceptions has advanced the time table, making it imperative to promulgate POTO without any further delay….After the September 11 terrorist strikes in the United States, the locus of a major international conflict has suddenly shifted to our neighbourhood'. 'If POTO fails, we'll try again: Home Secretary', *Indian Express*, 4 November 2001. The general assertion of the government, while supporting POTO was that under the U.N.Security Council resolution 1373 of September, they were merely carrying out an international obligation to put in place an anti-terror law. 'Government defends POTO, says it is focussed', *Hindu*, 3 November 2001.
78. MCOCA, widely believed to have inspired POTO/POTA, was being used 'effectively' in Maharashtra since 1999. A similar law was in force in Assam, and another such law enacted by the Congress-ruled Karnataka government was awaiting Presidential assent. West Bengal's Left Front government which was opposing POTO, was also in the process of approving a similar law in the state.
79. M.Venkaiah Naidu, BJP leader and the Rural Development Minister in the NDA government, for example, reminded the Congress of how it had 'used and misused' the provisions of MISA, Defence of Indian Rules, TADA, PDA etc: 'The Congress should look back [at its own role] and move forward', he said. 'No going back on POTO: Venkaiah', *Hindu*, 5 November 2001.
80. The government, however, dismissed the arguments that POTO was introduced in haste or that it was not preceded by consultations and that the states were not taken into confidence. Venkaiah Naidu said that the Prevention of Terrorism Bill was recommended by the Law Commission after an in-depth study, and was discussed by the consultative committee of the Home Ministry in August 2000 where several members had acknowledged the need for an effective law. The Bill was further discussed at the conference of chief ministers and several states had expressed views in its favour 17 of them responding positively to the need for such a Bill. 'Centre won't go back on POTO', *Hindu*, 9 November 2001.
81. The Law Commission's 173rd report mentions that some participants suggested that a new chapter be included in the Bill providing for banning of organisations. Since the UAPA 1967, already provided for declaring an organisation unlawful, the Law Commission did not think it necessary to make such a recommendation itself. In case, however, the government wanted such a provision, the Law Commission suggested that the act of persons rendering any assistance to such banned organisations, including the raising of funds, should be made an offence. Law Commission of India, *173rd Report on Prevention of Terrorism Bill*, April 2000, p. 99.
82. This provision empowered the Government to 'intercept' all manner of communication, 'wire, electronic, or oral' in cases related to terrorist acts or 'holding of proceeds of terrorism', and the evidence collected thus would be admissible as evidence in courts.

83. A day after the promulgation of POTO the Government banned 23 organisations across the country including the groups already banned under the UAPA 1967. The difference in the bannings under POTO and the UAPA was that while under the UAPA, an organisation could be banned for only two years, under POTO an organisation could be banned for the life of the Act. While the UAPA required a tribunal to decide on the ban within six months, no time limit had been specified for the Review Committee provided under the Ordinance. 'POTO may be harsher than TADA', *Indian Express*, 26 October 2001. As pointed out Rajinder Sachchar, former Chief Justice of the Delhi High Court, the provision interfered with the judicial procedure. In the cases of Deendar Anjuman and SIMI, two organisations banned under the UAPA and now under POTO, the former's case was being heard by the High Court under UAPA 1967 which had reserved its judgement, and the latter's case, was to come up for hearing. Even if the two were to win their cases under UAPA 1967, they would continue to be banned under POTO. Moreover, there was always the danger that even if POTO was disapproved by the Parliament, under a Supreme Court decision of 1985, which ruled that 'an ordinance shall not become void from the commencement of if its ceasing to operate was a result of the legislature's disapproval of it', they would continue to be banned as terrorists. 'POTO, the Government's excuse for abuse', *Indian Express*, 2 November 2001.
84. In particular Section 3(8) of POTO which required disclosure to the police by any person 'receiving or in possession of information' related to terrorism, read with Section 14 which empowered the police to demand any information related to terrorism from anybody, any violation punishable with imprisonment upto three years, drew apprehensions from journalists that the provision could be used to target them and subject them to surveillance. 'To get you the news, we'll have to break the law', *Indian Express*, 27 October 2001.
85. 'Ask your lawyers, Ms Gandhi', *Indian Express*, 5 November 2005.
86. I. D. Swami the Union Minister of State for Home Affairs, in 'POTO is a must to tackle terrorism', a write-up in support of POTO in the *Tribune*, 11 November 2001.
87. The Congress, however, set out to study the POTO-like laws in Maharashtra, Karnataka, and Assam, and Chief Ministers of the three states were asked to send copies of their laws to the policy planning cell of the party. 'Congress to review similar laws in its states', *Indian Express*, 4 November 2001. Kapil Sibal, Congress MP and a lawyer, while rejecting the position that stringent bail provisions, admissibility of confessions before police as evidence, and interception of communication made POTO and MCOCA/KCOCA alike and equally draconian, emphasised that there were significant differences between them. Unlike POTO, he pointed out, these Acts were precise in their definition of what constituted organised crime and had been passed by the respective state assemblies after 'due discussion'. 'MCOCA and POTO are as alike as apples and potatoes', *Indian Express*, 9 November 2001.
88. The Congress pooh-poohs Jaitley's claim on POTO', *Hindu*, 8 November 2001.
89. The Congress spokesperson Jaipal Reddy explained his party's position on POTO. The patterns in an emerging communal agenda was identified as the banning of SIMI, the rampage by BJP's youth wing activists at the Taj Mahal in Agra, and finally the entry on 17 October 2001, by Bajrang Dal activists into the make-shift temple erected at the site of the demolished Babri Masjid, in defiance of the Supreme Court order. 'Opposition strikes at new terror law', *Indian Express*, 19 October 2001. Kuldip Nayar, Member of Parliament (Rajya Sabha), while cautioning against

POTO, questioned why Home Minister L.K. Advani was reluctant to take action against the Bajrang Dal which was another version of the SIMI banned by the gov-ernment in early October. 'Individual Freedom at Stake', *Hindu*, 20 October 2001.

90. The CM emphasised: 'It is different. It has been framed to counter the spread of communal hatred and operations of criminal/terrorist groups (in the state)'. 'Anti-POTO Chorus', *Indian Express*, 30 October 2001. By October end, the Left Front government abandoned its plans of promulgating the Ordinance resorting instead to bringing out a Bill 'without the debatable issues of POTO'. See 'Bengal drops POTO twin after CPM rap', *Indian Express*, 1 November 2001.
91. At a two-day national executive committee meeting (2–3 November) at Amritsar, the decision to observe 18 November as a national unity day against terrorism was seen as conveying two conflicting meanings. While one strand felt it necessary in order to mobilise public opinion in support of POTO which was expected to face stiff opposition in the Winter session of Parliament, there were others including senior BJP leaders and Union Ministers, who were in favour of making terrorism an election plank to 'sway majority vote in favour of the party'. 'P.M. wants consensus on POTO', *Tribune*, 4 November 2001.
92. The Shiromani Akali Dal (Amritsar) termed POTO an assault on minorities. The Dal Khalsa and All India Shiromani Akali Dal (AISAD) dubbed the Ordinance a new form of defunct TADA. 'POTO is an assault on minorities: SAD(A)', *Indian Express*, 28 October 2001. Gurcharan Singh Tohra, former president of the Shiromani Gurudwara Prabandhak Committee (SGPC), appealed to the Akali Dal president and then Panjab Chief Minster, Prakash Singh Badal to oppose the passage of the Bill in Parliament, stating that his own party would oppose it. Tohra pointed out that only organisations of religious minorities have been banned, some of whom were not even active, but might be compelled to prove their existence following the ban. 'Tohra calls POTO, anti-minority, asks CM to oppose it in House', *Indian Express*, 30 October 2001; Lok Sabha member and President of the Shiromani Akali Dal (Amritsar) Simranjit Singh Mann cautioned that POTO would have far reaching ramifications on the communal arithmetic of the region. 'Oppose POTO, Akali MPs told', *Hindu*, 1 November 2001. Similarly Syed Shahabuddin, president of the All India Muslim Majlis-e-Mushawarat, said that the weaker sections and minorities continued to nurse deep concern at the possible misuse of the legislation against them. 'Opposition vows to defeat POTO in Parliament', *Hindu*, 27 October 2001.
93. K.G. Kannabiran, the national president of the People's Union for Civil Liberties (PUCL) emphasised that the activities of banned organisations some of whom are defunct, will fall under the 'category of cession or secessionist', 'more now than before because we are no longer secular and we are being slowly transformed into a Hindu state'. The provisions of POTO, Kannabiran pointed out, were repressive giving the executive discretion to invade every right including the right to free speech, association, assembly and free movement. This symbolised a trend in the denigration of the judiciary, which had started with the nineteen seventies, particularly the supercession of judges and the Emergency. 'A blow to human rights', *Hindu*, 30 October 2001. The All India People's Resistance Forum (AIPRF), among others, said that the Ordinance gave wideranging arbitrary powers to the investigating police officers. See 'AIPRF against move on anti-terrorism ordinance', *Tribune*,

21 October 2001. The People's Union for Democratic Rights (PUDR) pointed out that the definition of terrorism in POTO as in TADA was 'extremely vague', collapsing the difference between different kinds of crimes covered in ordinary law, bringing into its ambit many activities that are not crimes. 'A law to terrorise innocent citizens', *Times of India*, 26 October 2001. The Forum Against Imperialist Globalisation bringing together activists from various organisations, accused the Home Minister of pushing the law amidst war euphoria, and of supporting 'the on-going one-sided Anglo–American war on Afghanistan in the name of rooting out international terrorism'. 'Advani accused of pushing POTO amid U.S. war euphoria', *Hindu*, 30 October 2001.

94. A range of newspapers carried editorials that were openly sceptical of the need for a new law. Drawing from the experience of TADA, and the specific provisions of the proposed law and POTO, they explained the futility of such a law and warned against possible misuse. *The Times of India* editorial of 26 October 2001, for example, asked whether India 'needed a specific anti-terror law in the first place'. Moreover, it argued, that the experience of the war against terrorism since the mid-eighties had shown that 'TADA was a demonstrable failure'. While it did lead to a large number of arrests, hardly one percent was convicted: 'What the low conviction rate suggests is that the purpose of TADA was not so much to punish terrorists or criminals but often they were simply farmers, trade unionists, students, opposition party activists, and minorities. There could be no more compelling evidence about TADA's misuse than the fact that Gujarat—a state not known to have suffered from a terrorist problem—had the highest number of detainess under the law. So far, all indications are that the new anti-terrorism ordinance is designed primarily as a preventive detention measure rather than as an instrument to convict and punish terrorists'. 'TADA's POTOstatus', *Times of India*, 26 October 2001. Pamela Philipose pointed out in the *Indian Express* that while during the Emergency people knew that 'arbitrary arrest was a part of life', what was alarming about a TADA or POTO in the statute books was that people were clueless that they 'might as well be living through an emergency', 'A kinder TADA? Take another look?', *Indian Express*, 23 October 2001.
95. See CPI(M) opposes move to amend RS laws', *Hindu*, 31 October 2001, 'AIPRF against move on anti-terrorism ordinance', *Tribune*, 21 October 2001,
96. 'Ordinance essential, says Swamy', *Hindu*, 27 October 2001.
97. 'Venkaiah defends ordinance', *Indian Express*, 31 October 2001.
98. 'PM wants consensus on POTO', *Tribune*, 4 November 2001.
99. 'Siren call from Amritsar', *Indian Express*, 6 November 2001; 'Advani: You're in terror camp if you defeat POTO', *Hindustan Times*, 8 November 2001.
100. 'Civil rights are for civil people and human rights are for human beings', he declared. 'No going back on POTO; Venkaiah', *Hindu*, 5 November 2001.
101. 'POTO will protect policemen acting in good faith', *Hindu*, 8 November 2001.
102. 'Anti-POTO chorus', *Indian Express*, 30 October 2001.
103. While some other BJP allies in NDA, like the Telugu Desam and Janata Dal (United), did not outrightly reject POTO, they showed concern about some of the criticisms being made. The JDU spokesperson Mohan Prakash stated his party's position: 'We support the POTO in principle because there is need for a tough law against terrorism in the present global context. But if it is felt some amendments

are required, they can be incorporated'. Similarly K. Yerran Naidu, leader of the Telugu Desam Parliamentary Party declared: 'By and large we support the Ordinance. But if we feel there are any lacunae in it, we will say it in Parliament'. 'POTO: BJP allies too have problems', *Indian Express*, 31 October 2001.

104. Jayalalitha issued a statement on 6 November 2001 in Chennai that a stringent anti-terrorism legislation is 'not only essential but also inevitable', advising the government, however, for evolving consensus on the issue to gain 'wider acceptability'. She recalled in this context, the 'extremism of the LTTE" during her first term as Chief Minister from 1991 to 1996. Jayalalitha's support to POTO and to the NDA government on the issue came in the wake of emerging strains in the relationship between the BJP and the DMK evident in the municipal elections in Tamil Nadu and DMK leader M. Karunanidhi's criticism of Vajpayee's government's inaction on his arrest by the AIADMK government in Tamil Nadu and subsequent police 'excesses' against DMK rallyists. 'NDA gets surprise backing for POTO: Jaya speaks up', *Indian Express*, 7 November 2001; 'Jayalalitha for consensus on POTO', *Hindu*, 7 November 2001.
105. 'POTO: PM tries to cool Advani's hot air', *Indian Express*, 4 November 2001. Parakash Singh Badal, Punjab Chief Minister and chief of the Shiromani Akali Dal (Badal) which had been a vehement critic of TADA, in a 'chat' with the media in Jalandhar assured that he would take a final decision on POTO 'after deep study'. 'SAD to take final decision on POTO after deep study: Badal', *Indian Express*, 5 November 2001.
106. 'Opposition chalks out strategy', *Hindu*, 20 November 2001.
107. 'BJP allies for safeguard against misuse of POTO', *Hindu*, 20 November 2001.
108. 'POTO: We won't ride roughshod, says I.D.Swami', *Indian Express*, 16 November 2001.
109. 'Vajpayee seeks consensus on POTO', *Hindu*, 17 November 2001. 'BJP allies in Bihar fidgety over POTO', *Indian Express*, 20 November 2001.
110. At a meeting with Sonia Gandhi a day before the Conference, the Congress Chief Ministers were briefed about the party's position by Kapil Sibal. At the end of the meeting a brief statement was released where POTO was described as 'anti-democratic, suffering from legal infirmities and liable to abuse'. 'Congress readies for POTO burial', *Indian Express*, 17 November 2001.
111. 'Punjab opposes', *The Tribune*, 18 November 2001.
112. On 9 November Raj Nath Singh, Uttar Pradesh Chief Minister announced the enforcement of POTO in the state. 'POTO introduced in UP', *Hindu*, 10 November 2001.
113. 'Government has a closed mind on POTO: Opposition', *Hindu*, 24 November 2001.
114. 'Digvijay backs POTO, but wants discussions first', *Hindustan Times*, 20 November 2001.
115. 'BJP allies in Bihar fidgety over POTO', *Hindu*, 20 November 2001.
116. Support by both the AIADMK and NCP were important in so far as they helped add to the numbers in support of the NDA in the Rajya Sabha where it was in minority. 'NCP drops hints of support for POTO', *Indian Express*, 22 November 2001; 'They support it here, oppose it there', *Hindu*, 22 November 2001.
117. 'Good response to bandh call against POTO in Kashmir', *Hindu*, 29 November 2001; 'Row over implementation of POTO in J&K', *Hindustan Times*, 29 November 2001.

118. 'Rework POTO, allies tell government', *Hindustan Times*, 20 November 2001.
119. Patil suggested that the definition of the word 'terrorism' be made 'crisp and definitive' with the help of experts and drew attention to the fact that the duration of POTO was five years as compared to two years of TADA. 'Keep scribes out of POTO: PM to Jaitley', *Indian Express*, 28 November 2001.
120. Jaipal Reddy stated that since the BJP had made POTO the main theme of its election campaign, and had lost, it showed that 'POTO as a piece of legislation has not been favoured by the people at all'. 'POTO tabled in Lok Sabha', *Hindu*, 26 February 2002.
121. 'Bill on POTO rapped', *Hindustan Times*, 9 March 2002.
122. Mamata Banerjee explained that her party had always opposed such measures and had also opposed TADA, and as part of the NDA they could not vote against the government. The abstention was widely interpreted as a strategic move taken in consideration of West Bengal politics. 'POTO: After LS nod, government mulls joint sitting', *Indian Express*, 19 March 2002; 'Lok Sabha passes POTO Bill', *Hindu*, 19 March 2002.
123. 'Parties brace for POTO battle', *Hindu*, 21 March 2002. While the Congress reportedly arranged for its MPs out of the Delhi to fly back, and persuaded the hospitalised and ill MPs, including then Congress M.P. Manmohan Singh to come for the voting, and the CPI(M) ensured that all its MPs who were attending a party Congress in Hyderabad would return, the Samajwadi party issued a whip on its eight MPs to forestall any last minute change of heart. 'POTO: Opposition wants a win in RS for whatever it's worth', *Indian Express*, 21 March 2002.
124. Of the total strength of 239 in the Rajya Sabha, 212 members were present to vote, of which 113 voted against and 98 for the Bill. 'POTO falls, moral victory for Opposition', *Hindustan Times*, 22 march 2002.
125. 'Don't use POTO, CPI(M) tells Opposition-ruled states', *Hindu*, 22 March 2002.
126. 'Government mulls joint sitting on POTO', *Hindustan Times*, 19 March 2002; 'Government prepares for joint session on POTO', *Hindu*, 20 March 2002.
127. 148 MPs voted against the Bill whereas the total strength of the Opposition was 200. Nearly 30 Congress MPs reportedly absented themselves during the vote. 'Pushing POTO', *Times of India*, 21 March 2002.
128. Significantly, while newspaper reports, fact findings by independent groups, and the NHRC in particular noted the sense of insecurity and fear that continued to haunt the Muslims of Gujarat, the Home Minister L.K. Advani not only defended Modi but also commended him for achieving the incomparable feat of having brought the communal violence under control. 'A sharp indictment', *Hindu*, 27 March 2002.
129. Figures cited in newspapers showed that 62 persons, all of them were Muslims, arrested for the Godhra carnage under POTO, while not one of the 800 arrested for the violence against Muslims thereafter had been booked under the Ordinance. 'Partisan POTO', *Indian Express*, 21 March 2002; 'Opposition sees red in Gujarat's saffron bias', *Indian Express*, 21 March 2002. The Gujarat arrests were largely seen as illustrative of the arbitrary powers conferred on the executive by vague definitions of terms like 'terrorism'. While those arrested for the Godhra carnage were charged under POTO for committing a 'terrorist act', the killing of hundreds of Muslims was dismissed as a 'spontaneous reaction'. 'Saffron experiments with truth', *Hindustan Times*, 21 March 2002. The details of the selective application of POTO/POTA in Gujarat have been discussed in Chapter Three.

130. The promulgation of POTO I on 24 October when the session was to start a few days later on 19 November, the promulgation of POTO II after the first Ordinance lapsed and the recourse to a joint session to bulldoze opposition to the Bill were the three attempts being identified. In the case of TADA, the Act lapsed in 1995 because the BJP was opposed to its renewal. The TADA Bill of 1995 was subsequently referred to a Joint Committee whose recommendations were not accepted. 'The joint session', *Hindu*, 22 March 2002.
131. The genesis of a joint session of Parliament is traced to The Parliament Act of 1911 which gave the House of Commons overriding powers over Money Bills, a provision which is retained in the Indian Constitution (Article 109). The provision emerged in the context of the budget crisis in England in 1909–11, when the House of Lords blocked a welfare budget. While under the Act of 1949 Britain has adopted legislative procedures that avoid joint sessions, the Constituent Assembly of India retained joint session as an extra option, deriving from the Government of India Act of 1935, the normal procedure being careful consideration of Bills by both the houses, and if necessary through a Joint Committee. Article 108 lays down that the President may convene a Joint Session 108(1), if after a Bill has been passed by one House and transmitted to the other House—(*a*) the Bill is rejected by the other House; or (*b*) the Houses have finally disagreed as to the amendment to be made to the Bill; or (*c*) more than six months elapse from the date of reception of the Bill by the other House without the Bill being passed by it. Constitutional experts have seen this as an enabling measure if all discussions fail rather than a measure to intimidate and subdue dissent.
132. The two previous occasions when the Joint Session procedure was used included the Dowry Prohibition Bill in April 1961 and the Banking Service Commission (Repeal) Bill in December 1977. In 1961 when the joint session was convened during the Prime Ministership of Jawaharlal Nehru, the Congress was in majority in both the Houses, and the Bill had been through both. But there was disagreement between the two Houses and among Congress MPs on certain amendments and the joint session was convened with the purpose of sorting out theses disagreements. On the second occasion Morarji Desai's Janata Party was in majority in the Lok Sabha while the Congress dominated the Rajya Sabha. The joint session was convened after the Rajya Sabha rejected the Banking Service Commission (Repeal) Bill that had come before it after passing through the Lok Sabha. The Bill became a matter of contest between the two parties and the two Houses, as it sought to repeal the Congress-sponsored 1976 law which established a centralised Banking Service Commission for recruitment to public sector banks. The Janata government was keen to repeal the Act and the Bill was passed in the Lok Sabha on 5 December 1977, but three days later the Rajya Sabha rejected the Bill. But the matter was incomparable with the present case in terms of its implications for democracy in India. 'Shaky coalition', *Hindustan Times*, 23 March 2002; 'POTO: rejection and resurrection', *Hindu*, 23 March 2002; 'Joint session reminiscent of 1978', *Hindustan Times*, 25 March 2002.
133. The Trinamool Congress had reportedly been sent a government emissary making it clear to its leaders in Kolkata that the negative stance of Mamata Banerjee would mean that her party was not with NDA. Alternatively, the govern-ment reportedly pledged support for her opposition to the Left Front government in West Bengal in return for her support for POTO. 'Panja rebels, will vote for POTO', *Hindustan Times*, 26 March 2002.

134. 'Government may have cakewalk over POTO', *Hindu*, 26 March 2002.
135. 'POTO passed amidst PM–Sonia showdown', *The Times of India*, 27 March 2002.
136. See Fali S. Nariman, 'Why I voted against POTO', *Hindu*, 24 March 2002 and Pritish Nandy, 'POTO: An unnecessary law', *Hindustan Times*, 27 March 2002. 26 March was observed as a 'Black Day' by organisations representing sections of journalists, teachers, academics, social activists, lawyers, writers and artists, who converged on Jantar Mantar to protest against 'inherently undemocratic character and anti-secular character' of those behind POTO and regretting that 'democratic' and 'secular' allies of the BJP were willing to become instruments in the hands of the BJP. These included the Delhi Union of Journalists, Janwadi Lekhak Sangh, All India Lawyers Union, Progressive Writers Association, Janwadi Mahila Samiti, National Federation of Indian Women, Democratic Teachers Forum, Janwadi Shikshak Manch, Forum for Peace and Secularism, SAHMAT, and Delhi University Forum for Democracy. 'POTO anti-Democratic', *Hindu*, 27 March 2002.
137. See *Lawless Roads: A Report on TADA 1985–1993*, People's Union for Democratic Rights, Delhi, September, 1993, p. 5.
138. Ibid., p. 4.
139. While the majority of people arrested under TADA in Delhi were ordinary criminals and members of dacoit gangs, a number of persons suspected of involvement with Khalistani groups, Kashmir insurgent groups, political leaders belonging to the Akali Dal groups and a case of Naga 'extremist' were also arrested. Ibid., pp. 36–7.
140. In Uttar Pradesh, the Act was used against Sikhs in the Terai region.
141. By May 1993, Gujarat came to have the largest number of TADA prisoners in the country at 17546, with Punjab following at 14457. While the reason for its use in Gujarat was ostensibly on account of 'security problems in the sensitive Kutch border district', TADA in Gujarat was primarily associated with communal violence which provided the immediate context for the use of the Act. Over time the Act also acquired a communal image for its use in communal riots, especially against Muslims. *Lawless Roads*, PUDR, 1993, pp. 37–40.
142. The Act was first used in Rajasthan in November 1989 in Kota riots. By March 1990, with the BJP forming the government, the use of the Act against Muslims came to be widely reported. PUDRs investigations regarding arrests in the period November 1989–90 in specific police stations in Jaipur, Kota and Jhalwara showed that all of the 84 arrested under TADA in this period were Muslims. On 18 March, the Home Minister Digvijay Singh informed the Rajasthan Assembly that of the 228 persons arrested under TADA till 1991, no case could be established against 178 persons. Of these 128, 101 were Muslims, ninety-six Sikhs and three Hindus. Ibid., pp. 45–56. More recent reports from the state, describe the protests of the TADA Relief Committee against 'unjust' imposition of TADA on those arrested during communal riots. The Committee claimed that all of those arrested under TADA during the communal violence from 1989 to 1992 were from the Muslim community and their trial under the law continued even after its repeal in 1997. The police had slapped the TADA cases on these persons on the vague grounds of recovery of knives or fighting the rioting mobs in self defence. Some of the accused, even after being released on bail after incarceration for two years, still have to present themselves in the Designated Court in Ajmer in every hearing. Some of these accused who presented themselves in the meeting of the TADA Relief Committee included 76-year-old Mohammed Hafeez who could barely

walk, 65-year-old labourer Babu Khan and 60-year-old Mohammed Hanif, who felt that justice was not in sight even after a prolonged legal struggle of eleven years. 'TADA cases: no end in sight for accused', *Hindu*, 10 January, 2001. Another report claims that the Congress (I) led government in Rajasthan under pressure from the Muslim community, withdrew on 10 January, 2001, all cases registered under the 'defunct' TADA against 41 people in Jaipur, Kota and Bikaner districts. The majority of these cases pertained to communal violence in the state in 1989 and early 1990s. The Rajasthan TADA Relief Committee had demanded release of 13 detenus in Jaipur belonging to the Muslim community and had threatened to launch a statewide protest if the government failed to meet its demand. 'Rajasthan withdraws TADA cases', *Hindu*, 11 January 2001.

143. Five years after TADA lapsed, the Congress Government of Digvijay Singh in Madhya Pradesh brought the Madhya Pradesh Special Areas Security Bill, 2000 on the lines of a law in Andhra Pradesh, and justified it as a step taken to curb Naxalism that was spilling over from the borders of Andhra Pradesh and Maharashtra into Madhya Pradesh. Activist groups including the Kisan Adivasi Sangathan from Hoshangabad, the Shramik Adivasi Sangathan from Betul, the Narmada Bachao Andolan from Badwani, the Ekta Parishad from Bhopal and the Khedyut Mazdoor Chetna Sangathan from Jhabua, however, in an appeal to the National Human Rights Commission, expressed serious apprehensions that the general terms of the Bill may result in its use against any opposition to government policies. In particular, the groups were concerned that the new law could be used primarily in Betul and Hoshangabad where several groups had been organising *adivasis* and displaced communities. In the *adivasi* dominated forest areas of Betul a long resistance has been waged over several years to the World Bank funded Madhya Pradesh Forestry Project which has prevented poor tribals from cultivating what are known as 'newad' lands or untitled lands. 'Draconian Shades', *Hindu*, 21 January 2001.
144. In Andhra Pradesh, which was among the first southern states to be notified as 'disturbed' in 1985, TADA was used extensively against the Marxist–Leninist movement, especially in the tribal areas of the Telangana region and the Agency areas of Vishakhapatnam and East Godavari forests. While the more dramatic forms of Naxalite violence took place in the plains and the urban areas, the tribals constituted the single largest category of TADA detenus in the state. From 1985 to 1989 for instance 5,415 persons were charged under the Act. Nearly 50 percent of them were from Adilabad, and the rest from tribal areas of Karimnagar, Warangal, Khammam, Vishakhapatnam and East Godavari. In 1990 during the drought, TADA was used extensively against agitating tribals in Adilabad. In Warangal, in December 1990, about 5000 people gheraoed the police station at Nermeta demanding the release of a naxalite leader detained illegally. Police opened fire in which two persons were killed. In this instance, three TADA cases were launched in which altogether 658 people were charged. Upto the end of August 1991, 224 cases were launched in Warangal in which at least 1,542 people were charged. See *Lawless Roads*, pp. 32–3. For details of the invocation of TADA in the Vidarbha region see Punya Prasun Vajpayee, *'TADA': Vidarbha Mein*, New Delhi, 1995.
145. *Lawless Roads*, ibid., pp. 29–30.
146. Ibid., p. 35.
147. *Terror by Proxy*, People's Union of Democratic Rights, Delhi, 2003.

148. Law Commission of India. 2000. 'Working Paper', *173rd Report on Prevention of Terrorism Bill*, p. 32.
149. The failure of extraordinary laws to bring about any significant number of convictions has been pointed out by their opponents. The statistics concerning TADA are quite startling. As of June 30, 1994 total persons arrested under TADA had crossed 76,000 people. Of these 25% of cases were dropped by the police itself without any charges being framed. Trials were completed in about 35% of the cases that were actually brought to trial, of these 95% ended in acquittals. So that finally about 1% of those arrested were actually convicted. By the year 1999, i.e., four years after TADA had lapsed in 1995, 1,344 cases were yet to be investigated and 4,958 trials to be completed (Rajeev Dhavan, 'POTO: An Assault on Democracy', *Hindu*, 6 November 2001). The debates on POTO saw the fears of abuse resurface. While for some, notably Arun Shourie, POTO had important safeguards for preventing abuse, others felt that by giving a wide definition to what constitutes a terrorist act, and providing for review after every five years (three years in repromulgated POTO, now POTA), instead of two as was the case in TADA, POTA has more promise for abuse.
150. K. Balagopal, 'Law Commission's View of Terrorism', *Economic and Political Weekly*, 2000.
151. Srinivas Shastri, *The Indian Citizen: His Right and Duties*, p. 43.
152. Nehru, however, referred specifically in the 1952 debates to 'anti-social activities… [with] communal purposes' and 'jagirdari activities' in Rajasthan and Saurashtra. See *Parliamentary Debates*, Vol. 8, part 2, cols. 2677ff, cited in Austin (1999: 60).
153. See Bayley (1962: 23).
154. Rajeev Dhavan, 'POTO: An assault on Democracy', *Hindu*, 16 November, 2001.
155. Ordinarily the punishment for not revealing evidence is punishment for three months and fine of Rs 300 with bail. Under POTO, the punishment was three years and unlimited fine.
156. The *Committee on Reforms of the Criminal Justice System* was constituted in November 2000 to identify areas for reform in the Criminal Justice System. The Committee started working in January 2001 and submitted its report on 21 April 2003, with 158 recommendations for changes in the Code of Criminal Procedure (CrPC), 1973, the Indian Evidence Act, 1872, and the Indian Penal Code (IPC), 1860.
157. *Report of the Committee on Reforms of Criminal Justice System*, Vol. I, Government of India, Ministry of Home Affairs, March 2003, p. 212.
158. Article 124-A of IPC states: 'Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.
    Explanation 1: The expression 'disaffection' includes disloyalty and all feelings of enmity.
    Explanation 2: Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3: Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

159. Judgement dated 21 July 2003, *State vs. Mohd. Yasin Patel alias Falahi and (2) Mohd. Ashraf Jaffary,* p. 36.
160. Ibid., p. 37. Emphasis added.
161. Ibid.
162. The case is commonly known as the Parliament attack case. On 13 December 2001, five armed men drove into the precincts of the Parliament House, killing nine members of the Parliament Watch and Ward staff and injuring sixteen others, before they fell to the bullets of the security men. This attack was widely portrayed as an attack on Indian democracy. The investigation into the attack was handed over to the Special Cell of the Delhi Police the day of the attack which implicated four persons: (1) Mohammad Afzal, a former JKLF militant who had surrendered in 1994, (2) his cousin Shaukat Hussain Guru, (3) Shaukat's wife Afshan Guru (Navjot Sandhu before marriage), (4) SAR Gilani, a lecturer of Arabic at Delhi University. In addition to the four accused there were three others charged in the case including Jaish-e-Mohammed chief Maulana Masood Azhar, who had been released by the NDA government in response to the hijacking of the Air India plane IC 814 and Azhar's aides, Ghazi Baba and Tariq Ahmed. The latter were declared proclaimed offenders and were not part of the trial. The accused were tried under Sections 121 (waging war), 121 A (conspiracy), 122 (collecting arms etc. to wage war), 123 (concealing with intent to facilitate design to wage war), 302 (murder), 307 (attempt to murder) read with 120 B (death sentence for waging war). The charges under POTO added later pertained to Sections 3 (punishment for terrorist acts), 4 (possession of certain unauthorised arms), 5 (enhanced penalties for contravening provisions or rules made under the Explosives Act 1884, Explosive Substances Act 1908, Inflammable Substances Act 1952, or the Arms Act 1959), 6 (confiscation of proceeds of terrorism) and 20 (offences dealing with membership of a terrorist organisation). The case was brought before a Special POTA Court in Patiala House, Delhi, under Justice S.N. Dhingra on 22 December 2001. The trial started on 8 July 2002 and continued on a daily basis. Arguments concluded on 18 November 2002, the conviction took place on 16 December 2002 and on 18 December three of the accused were sentenced to death, and the fourth (Afshan Guru) given five years rigorous imprisonment. After their conviction by the Special Court, the accused went on appeal to the High Court. The High Court gave its verdict on 29 October 2003, upholding the death sentence on Mohammad Afzal and Shaukat Hussain and enhancing their punishment under Section 121 of IPC. It exonerated SAR Gilani and Afshan Guru. The Supreme Court Judgement delivered on 4 August 2005 on the appeals by the prosecution and Shaukat Hussain and Mohammad Afzal, against the exonerations and sentences respectively, dismissed the former, sustained Afzal's death sentence, upheld the acquittals of Gilani and Afshan Guru, and commuted Shaukats death sentence to ten years of rigorous imprisonment. The review petitions filed against the order by the Delhi police and Afzal were dismissed by the Supreme Court on 22 September 2005. The Bench which dismissed the review petition consisting of Justices K.G. Balakrishnan and P.P. Naolekar, declined to interfere in the judgement delivered by the bench of Justices Naolekar and Reddi. The reviewing bench is normally the same as the bench that delivered the judgement. In this case, however, the retirement of Justice Reddi since the judgment

was delivered, necessitated the induction of Justice Balakrishnan. The scheduled hanging of Afzal on 20 October 2006, was deferred as his plea for 'mercy' is lying with the President of India.

163. Judgement of the Special POTA Court dated 18 December 2002, *State vs. Mohd. Afzal and others*, p. 1
164. Ibid., p. 3.
165. In this case, an explosion of a car bomb, on 11 September 1993, near a place from where the car of the then president of the Indian Youth Congress (I) was passing, resulted in the death of nine persons and injury to several others. The investigations implicated 5 persons, all members of the Khalistan Liberation Front (KLF), in a conspiracy to assassinate the Youth Congress leader. Devender Pal Singh was awarded the death sentence by the Designated TADA Court on 24 August 2001, which was upheld by the Supreme Court by 2:1 majority, in the above judgement. See *Supreme Court Cases (Criminal)*, Part 7, July 2002, pp. 978–1014.
166. Like POTA (Section 32), Section 15 of TADA permits certain confessions made to police officers to be taken into consideration. Unlike POTA, however, TADA allows under Section 21 (c) that a confession made by a co-accused that the accused had committed the offence, shall be considered as 'Presumption as to offences under Section 3 (Punishment for terrorist acts)'.
167. *Devender Pal Singh vs. State of NCT of Delhi*, *Supreme Court Cases*, op.cit., p. 978. [emphasis added]
168. The Prevention of Terrorism Act, 2002, Objects and Reasons.
169. TADA Section 3: Punishment for terrorist acts: (1) Whoever with intent to overawe the government as by law established or to strike terror in the people or to alienate any section of the people or to adversely affect the harmony against different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of property or disruption of any supplies of services essential to the life of the community, or detains any person and threatens to kill or injure such persons in order to compel the government or any other person to do or abstain from doing any act, commits a terrorist act.
170. On 27 February, 2002, coach S6 of the Sabarmati Express was burnt in Godhra, Gujarat, leading to the gruesome death of fifty-nine persons, some of whom were 'karsevaks' returning from Ayodhya. This was followed immediately by a communal onslaught against Muslims in several districts of the state for over more than three months. The Sabarmati train burning incident at Godhra is being investigated and tried under POTA, with 125 Muslims already chargesheeted. *Terror by Proxy*, People's Union for Democratic Rights, September 2003, p. 2.
171. A confidential government order No. S.B.V/POTA/202003/477, dated 11 March 2003, Government of Gujarat, Home Department, Sachivalaya, Gandhinagar, authorised the Godhra Railway Police Station under Section 50 of POTA to carry on investigations in ICR no.9/2002, under the provisions of POTA. The grounds for invocation of POTA were that the accused, *with an intent to threaten the unity and integrity of India and to strike terror in the people*, had used 'inflammable substance' and 'lethal weapons', causing the death of fifty-nine persons and injuries to forty-eight

persons, 'damaged public property and disrupted essential services' like the movement of trains. The accused committed thereby a 'terrorist act' under the provision of Section 3, sub clause 1(a) of POTA. The Gujarat government took the position that there existed *prima facie* evidence against the accused persons, indicating their involvement in the commission of the offences under sub clause (2) and (3) of Section 3 of POTA as well. The order elaborates that 'a criminal conspiracy was hatched' during two meetings held on the night of 26 February 2002.

172. The essential form of the two main codes of law—the *Code of Criminal Procedure* of 1898 (amended in 1973) and the *Indian Penal Code* of 1860—drawn up during colonial rule, continue to operate in independent India. The *Official Secrets Act* of 1923 (an amendment in 1967 enhanced most of the offences punishable under the Act with greater sentences of imprisonment) and the *Dramatic Performances Act* of 1876 are other examples. For a detailed study see Sumanta Banerjee, 'Colonial Laws—Continuity and Innovations' in A.R. Desai (ed.) *Expanding Governmental Lawlessness and Organized Struggles*, 1991, pp. 226–35.
173. Section 3(1), *Defence of India Act*, 1962. Section 30(I)(b) dealt with preventive detention. The Act and the rules were modelled on the lines of the *Defence of India Act*, 1935. The Supreme Court declared the Act intra vires in the *Mohan Singh vs. State of Punjab* case. *All India Reporter* (henceforth *AIR*), 1964, SC 381.
174. The Act was used for example, to crush the language riots in Tamil Nadu in 1965.
175. On 10 August 1970, the West Bengal government applied the *Bengal Suppression of Terrorist Outrages Act* of 1936—a colonial law used against the revolutionaries—giving the police extraordinary powers of arrest and detention for terrorist activities and possessing arms or literature propagating such thoughts. In November 1970, the *Prevention of Violent Activities Act*, directed towards debilitating the mass organisations of the CPI(ML) and CPI(M) was promulgated.
176. On 7 May 1971 the President promulgated the *Maintenance of Internal Security Ordinance*, 1971. Two months later, the Parliament passed the *Maintenance of Internal Security Act*, 1971 which became effective from 2 July 1971, authorising the Central government to order the detention of a person, if satisfied, that such person is acting in a manner prejudicial to: (1) the defence of India, the relations of India with foreign powers, or the security of India, or (2) the security of the state or the maintenance of public order, or (3) the maintenance of supplies and services essential to the community. *MISA*, Section 3(I)(a).
177. The *Defence of India Act* made the provisions of MISA regarding reference to the Advisory Board and maximum period of detention harsher. The requirement under MISA to refer to the Advisory Board within 30 days was increased to three months; the maximum period of detention was increased from twelve months to three years or until the expiry of the Defence of India Act, whichever was later; Section 17-A was added authorising the government, under specific conditions, to detain a person without referring to the Advisory Board for a period not exceeding 2 years.
178. The *Maintenance of Internal Security (Amendment) Act, 1975* added two new Sections. Section 16-A provided that Sections 8 to 12 of MISA dealing with disclosure of grounds of detention and reference to an Advisory Board, shall not apply to detentions ordered on or after 25 June 1975, depriving detenus of the right to know the grounds of detention or have their cases reviewed by the Advisory Board. These cases could now be reconsidered by the government at an interval of 4 months. Section 18 deprived the detenus of any right to personal liberty by virtue of common law or natural law.

179. On 29 April 1976, the Supreme Court in the *Additional District Magistrate, Jabalpur vs. Shekhavat Shukla* case upheld the validity of the MISA as amended. The *AIR Manual*, 1979 (fourth ed.) SC 1207.
180. The *Armed Forces (Special Powers) Regulation* 1958 was specifically promulgated in April 1958, to suppress the Naga movement. The Regulation gave special powers 'to officers of the armed forces in disturbed areas in the Kohima and Mokokchung districts of Naga Hills–Yuensang Area' while making the officers at the same time immune from 'prosecution, suit or other legal proceedings in any court of law' in respect of anything done in any part of Kohima or Mokokchung district of the Naga Hills-Tuensang Area with a retrospective effect from 23 December 1957. A similar Act was passed for the states of Assam and Manipur (*The Armed Forces Assam and Manipur) Special Powers Act* 1958 No. 28 of 1958 (11 September 1958). A disturbed areas legislation was enacted for Punjab in December 1983 (*The Punjab Disturbed Areas Act*, 1983 amended in 1989) to put down the movement for a separate state.
181. The Bill introduced by the Janata Government on 24 December 1977, sought to make detention without trial an integral part of the ordinary law by adding a 19 clause chapter in the Code of Criminal Procedure.
182. TADA was first enacted on 23 May 1985 and was to remain in force for two years. It was allowed to expire, however, and a fresh anti-terrorist legislation was enacted on 24 May 1987, reviewed and extended periodically, till it finally expired on 23 May 1995. Even before TADA expired, the *Criminal Law Amendment Bill* was introduced in the Rajya Sabha on 18 May 1995. The Law Commission, entrusted with the task of enacting a 'suitable legislation for combating terrorism and other anti-national activities' proposed in its 173rd report, a modified Bill—the *Prevention of Terrorism Bill*, 2000—for the purpose.
183. D.H. Bayley, *Preventive Detention in India*, 1962, p. 25.
184. See *Lawless Roads*, People's Union for Democratic Rights, Delhi, 1993.
185. Section 6 of Chapter 1, POTO (first Ordinance) promulgated on 24 October 2001, provided that the Ordinance 'shall come into force at once and *shall remain in force for a period of five years*…'
186. Interestingly, across South Asia, one can see an accumulation of special laws that have come in response to specific events and have lingered, 'undermining the rule of law, its institutions and protection of human rights' Pierre Sane, 'Special Powers not the Answer', *Hindu*, 18 February 2000, p. 10. In Sri Lanka, for example, the *Prevention of Terrorism Act* (PTA) crept into the legal system more than 20 years ago as a temporary measure and persisted to became normal law. A nationwide state of emergency has moreover been in force in the country more or less continuously since 1983. Both the PTA and emergency provisions have given the security forces wide powers of arrest and detention, especially of opponents of the government. Detention over long periods without charge or trial, have led to deaths in custody, widespread incidents of 'disappearances', and torture. In Pakistan too, the government's response to sectarian and ethnic conflicts has been to pass new anti-terrorism laws and set up parallel courts, so much so that in late 1998, three court systems co-existed: Courts for the Suppression of Terrorist Activities, the Anti-Terrorism Courts and Special Military Courts to try 'terrorist' activities (ibid).
187. Law Commission of India, 173rd Report on Prevention of Terrorism Bill, 2000, pp. 1. Emphasis added.

188. *Report of the Committee on the Reform of the Criminal Justice System*, 2003, p. 294. Emphasis added.
189. Section 1(4) of TADA similarly lays down that any investigation, legal proceeding etc., initiated during the life of the Act can be continued and enforced and necessary penalties, forfeitures or punishments can be enforced under the provisions of the Act. Section 1(6) of POTA has a similar provision.
190. 'Caught in the Crossfire', *Statesman*, 1999.
191. Gautam Navlakha, 'Freedom to Terrorise', *Economic and Political Weekly*, 2002.
192. Mrinal Talukdar, 'TADA lives on in Assam Jails', *Indian Express*, 20 October 1999, p. 4.
193. 'Dawn of a new life after years of struggle', *Hindu*, 2 October 2001.
194. Mrinal Talukdar, 'TADA lives on', op.cit.
195. See Upendra Baxi, *The Crisis of the Indian Legal System*, 1982, p. 30.
196. Upendra Baxi has compared the two systems, the ordinary criminal justice system with the preventive detention system on several counts in the table below. See ibid, p. 31.

Category	*CJS*	*PDS*
Object	Social defence:repression	Repression: social defence
Models of justice	Due process: Maximal and Optional	Minimal due process
Strategies	Investigation, Prosecution, Appellate Judicial Review	'Jurisdiction of suspicions', executive satisfaction, peripheral judicial oversight
Models of adjudication	Professional	Lay; at best mixed professional (i.e.executive) adjudication, with advisory boards
Patterns of power-sharing and dominance	Court pre-eminent. At best, courts strictly legalistic, and pro-accused. At worst, courts engage in 'politics of accommodation' with other branches of the state	Executive pre-eminent. Legislative (i.e.Executive) nullification of pro-libertarian aspects of judicial decisions. Politics of co-option (judges on advisory boards)
Style and attitudes	Balancing of interests, consciousness of social visibility of decisions	Short-term problem solving by the executive. Low social and political visibility in normal times.
Justice costs	Miscarriage of justice, class bias, Social defence cost	Freedom costs (double jeopardy), political costs (vendetta, repression), blunting the sense of justice
Benefits	Retention of structural status quo, marginal achievement of social defence	the same
Values pursued	Justice within the logic of bourgeois legal order	efficiency within the same order

Source: Upendra Baxi, *Ibid.*, p. 31

197. PTA arrests, points out Hillyard, are invariably carried out by armed police—security in police stations is more intense, there is heightened tension and dissemination of information to the media is more carefully handled. If a person is subsequently charged there is intense security at the remand hearings and at the trials. Thus before a shred of information has been heard, the behaviour of authorities suggests that the person is an active terrorist. See Hillyard, op.cit., p. 261.

198.

Key Issues Under POTA	*Corresponding Provisions in Other Acts*
Section 3: Definition of terrorist act	Section 121, 121A, 122, 123, of *Indian Penal Code*
Section 3.8: Relating to punishment for those in possession of information of material assistance in preventing the commission of terrorist acts	Section 39 of the *Criminal Procedure Code*
Section 4: Possession of certain unauthorised arms	Covered under sections of the *Arms Act*, the *Explosives Act*, 1884, the *Explosive Substances Act* or the *Inflammable Substances Act*, 1952
Sections 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 & 17 on dealing with proceeds of terrorism	Sections 82–86, Sections 102–105 and Sections 451–459 of the *Criminal Procedure Code* can deal with proceeds of terrorism; Section 7 and 11 of the *Unlawful Activities (Prevention) Act*, 1967 specifically deals with such proceeds from the banned organisations.
Section 18: Declaration of an organisation as a terrorist organisation	Organisations can already be banned under Section 3 of the *Unlawful Activities (Prevention) Act*, 1967
Section 19: Denotification of a terrorist organisation	The *Unlawful Activities (Prevention) Act*, 1967 already provides procedural guarantees to review the notification of Governments.
Section 20: Offences relating to membership of a terrorist organisation	Section 10 of the *Unlawful Activities (Prevention) Act*, 1967 already deals with members of an unlawful association
Section 21: Offence relating to support given to terrorist organisation	Section 13 of the Unlawful Activities (Prevention) Act, 1967 deals with those who (*a*) take part in or commit, or (*b*) advocate, abet, advise or incite the commission of any unlawful activity
Section 22: Fund raising for a terrorist organisation	Section 11 of *Unlawful Activities (Prevention) Act,* 1967
Section 30: Protection of witnesses	Under Section 506 of *Indian Penal Code*, and Section 507 of *Criminal Procedure Code*, criminal intimidation is a punishable offence
Section 35: Interception of communication	Section 5 of the *Indian Telegraph Act*, Section 69 of the *Information Technology Act* already allows such interception

Source: Prevention of Terrorism Ordinance 2001: Government Decides to Play Judge and Jury, South Asia Human Rights Documentation Centre, New Delhi, November 2001, pp. 21–2.

199. The details of bail procedures and the manner in which it was interpreted has been discussed in the next chapter.
200. See *Trial of Errors: A Critique of the POTA Court Judgement on the 13 December Case*, People's Union for Democratic Rights, Delhi, February 2003, p. 4.
201. Paddy Hillyard, op.cit., p. 263.
202. See J. Sim and P.A. Thomson, 'The Prevention of Terrorism Act', *Journal of Law and Society*, p. 75, 1983.
203. For a detailed discussion of the theme see Ujjwal Kumar Singh, 'State and the Emerging Interlocking Legal Systems in India: Permanence of the Temporary', *Economic and Political Weekly*, 2004.
204. Section 26 of POTA pertains to the power of Special Court with respect to other offences. It provides that (1) when trying any offence, a special court may also try any other offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with such other offence and (2) If, in the course of any trial under this Act of any offence, it is found that the accused person has committed any offence under this Act or under any other law, the Special Court may convict such person of such other offence and pass any sentence or award punishment authorised by this Act of such rule or, as the case may be, under such law.
205. Section 5 of TADA: Possession of certain unauthorised arms etc in specified areas: Where any person is in possession of any arms and ammunition specified in columns 2 and 3 of Category I or category II (a) of Sch I to the *Arms Rules*, 1962, or bombs, dynamite or other explosive substances unauthorisedly in a notified area, he shall notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which shall not be less than five years, but which may extend to imprisonment for life and shall also be liable to fine.
206. For details of the case see *Lawless Roads*, op.cit., p. 8.
207. POTA Section 3[1(b)]: Whoever is or continues to be a member of an association declared unlawful under the *Unlawful Activities (Prevention) Act*, 1967, or voluntarily does an act aiding or promoting in any manner the objects of such association and in either case is in possession of any unlicensed firearms, ammunition, explosive or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property, commits a terrorist act.
208. Chapter II (Punishment for, and Measures for Dealing with Terrorist Activities) Section 5(1) (Enhanced Penalties) lays down: If any person with intent to aid any terrorist contravenes any provision of, or any rule made under the *Explosives Act*, 1884 (4 of 1884), the *Explosive Substances Act*, 1908 (6 of 1908), the *Inflammable Substances Act*, 1952 (20 of 1952) or the *Arms Act*, 1959 (54 of 1959), he shall, notwithstanding anything contained in any of the aforesaid Acts or the rules made thereunder, be punishable with imprisonment for a term which may extend to imprisonment for life and shall also be liable to fine.
209. Chapter V 'Interception of Communication in Certain Cases', Sections 36 to 48 deals with the definition, appointment of a competent authority, application for authorisation of interception, decision by competent authority on application for interception, submission of order of interception to review committee, duration

of an order of interception, authority competent to carry out interception, interception of communication in emergency, protection of information collected, admissibility of evidence collected, review of authorisation order, interception and disclosure, annual report of interceptions, respectively.

210. The POTA court, however, while admitting that it was bound by the High Court's decision, pointed out a procedural flaw under Section 34(2) of POTA pertaining to appeals. The Supreme Court later upheld the POTA court's contention that only a two-member bench can hear any appeal against an interlocutory order where POTA trial is concerned.
211. Judgement Special POTA Court, *State vs. Mohd. Afzal*, p. 199. Emphasis added.
212. Ibid., p. 253.
213. Ibid., p. 273. Emphasis added.
214. Section 39 of CrPC provides that every person aware of the commission of, or of the intention of any other person to commit any offence punishable under IPC including Section 121 to 126 IPC, shall in the absence of any reasonable cause forthwith give information to nearest magistrate or police officer of such commission or intention.
215. SIMI was declared an unlawful organisation and banned under Section 3 of the Unlawful Activities [Prevention] Act, 1967 by a notification of Home Ministry dated 27 September 2001.
216. Judgement dated 21 July 2003, p. 7. Table of charges and punishment given to the two accused:

Charge	*Description*	*Accused*	*Punishment*
Section 20 POTA	Offence relating to membership of a banned organisation	Mohd. Jaffary and Mohd. Yasin Patel Falahi	5 yrs. and fine of Rs 25,000 (1 yr. in default)
Section 124-A IPC	sedition	-do-	7 yrs. and fine of Rs 25,000 (1 yr. in default)

217. See the discussion on 'rule of law' and 'Emergency' in Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law*, 2003.

Chapter Two

'Cutting Down Trees'

Procedural Legality and the Quest for Legitimacy[1]

Extraordinary laws, as discussed in the previous chapter, among other things, legitimise exceptions in procedures of investigation and trial. The legitimacy of procedural exceptions derives from political decisions identifying and affirming the existence of a state of emergency that makes such exceptions imperative. The unfolding of these exceptions shows two distinct and related trends: (*a*) the 'executivisation' of law manifested in its final power to decide the exception, and (*b*) the 'politicisation' of law emerging from the state's use of the courts as the means to exercise sovereign will. These exceptions inject ambivalence in the rule of law that gets deepened with each specific exercise of state sovereignty in deciding the exception. In this chapter an attempt has been made to discuss the provisions in POTA that provide the framework within which legal exceptions unfold. Through a discussion of particular cases, we will also see how specific notions of rule of law and emergency emerge, the manner in which practices of rule take shape and sovereign authority of the state constituted.

Punitive Pre-Trial Detentions: Bail Conditions under TADA and POTA

While masquerading as substantive laws, extraordinary laws unfold as both preventive and punitive. Prescribing exceptions to the ordinary law, they facilitate prolonged detention, by providing for arrests without

warrant, extending the period of police and judicial custody, and the period within which the chargesheet is to be drawn. Ordinarily, under Article 22(2) of the Constitution of India, every person who is arrested and detained should be brought before the nearest Magistrate within a period of twenty-four hours of arrest, excluding the time required for traveling from the place of arrest to the Magistrate's Court. Under Section 167 of the CrPC, however, the Magistrate is authorised to extend the detention for a maximum period of fifteen days if the investigation cannot be completed within twenty-four hours. At the end of fifteen days, the accused must be produced before the Magistrate, who can, if there are adequate grounds for further detention in judicial custody, extend the detention further for fifteen more days. The total period of detention cannot exceed sixty days, whether the investigation of the offence has been completed or not. Article 22(2) and Section 167 of CrPC safeguard the rights of the accused after arrest. Sections 436 to 450 of Chapter XXXIII of the CrPC, provide the framework for granting bail to the accused. The provisions draw a distinction between bailable and non-bailable offences. Bailable and non-bailable offences are listed in the Indian Penal Code, and indicated in the First Schedule of the CrPC. Bailable offences are relatively lesser offences like causing simple hurt, being a member of an unlawful assembly, etc., and any person committing a bailable offence has a legal right to be released on bail. A non-bailable offence is of a more serious nature like murder, rape, dacoity etc. While a person accused of non-bailable offences cannot get bail as a matter of right, it does not mean that the accused cannot get bail at all. Apart from bailable and non-bailable offences, Section 2(c) of the CrPC divides offences as cognizable and non-cognizable. Cognizable offences like murder, rape, dacoity, are those for which a police office can arrest a person without a warrant from a Magistrate. In non-cognizable offences—for example, cheating, causing hurt, bigamy etc., a warrant from a Magistrate is required for making arrest. The First Schedule of the CrPC lists cognizable and non-cognizable offences.[2]

Before we see how bail provisions unfolded under POTA, it is important to examine how bail was experienced under TADA. Bail provisions under Section 20 of TADA were stringent, to the extent that in its ten-year life, and beyond its lapse, TADA prisoners continue to languish in jails across the country. Modifying the application of

Section 167 of CrPC, Section 20(4)(b) of TADA lays down that references to 'fifteen days', 'ninety days' and 'sixty days', be construed as references to 'sixty days', 'one year', and 'one year', respectively. Section 8 of TADA made granting of bail subject to the public prosecutor having been given the opportunity to oppose the application for release [Section 8(a)], and the satisfaction of the court that there are reasonable grounds for believing that the applicant is not guilty of such offence and not likely to commit it while on bail [Section 8(b)].

TADA facilitated long-term detention of large numbers of accused/suspects, without charges being brought against them, or proven/disproven in a court of law. According to the Union Home Ministry figures of October 1993, the total number of detentions under TADA was 52,268; the conviction rate of those tried by Designated Courts under it was 0.81 percent ever since the law came into force. Punjab had a conviction rate of 0.37 percent out of its 14,557 detainees. On 24 August 1994, the then Minister of State for Home, Rajesh Pilot stated that of the approximately 67,000 individuals detained since TADA came into force, 8,000 were tried and only 752 were convicted. *Some 59,509 people had been detained with no case being brought against them*.[3] The Review Committees of TADA stated that other than in 5,000 cases, the application of TADA was wrong, and asked for the withdrawal of cases. Thus TADA was wrongly enforced in more than 50,000 cases.

While looking into the public interest litigation brought by Shaheen Welfare Association on behalf of undertrial prisoners charged under TADA (*Shaheen Welfare Association vs. Union of India and Others* 1995), the Supreme Court examined the data regarding the number of TADA cases pending in various states and the number of Designated Courts entrusted with the trial of these cases. The petitioner requested the court for directions (*a*) that the respondents should file a list of detenus lodged in jails in different states under TADA, and (*b*) for the release of TADA detenus against whom the prosecution did not have proper evidence and where the procedure prescribed by law had not been followed.[4] The Supreme Court ascertained the numbers of 'live cases under TADA and the Designated Courts' on the basis of affidavits submitted by states (Gujarat, Rajasthan and Maharashtra) and the Central Government, and the statement furnished by the National Human Rights Commission. In the State of Assam, the number of live cases were 2,908, with only one Designated Court to try them. In Jammu and Kashmir, four Designated

Courts were assigned the trial of 5,041 cases. In Rajasthan, there was one Designated Court for the trial of seventy-seven cases while in Delhi there were four Designated Courts for the trial of 759 pending cases. The figures submitted by the Central Government showed that of the total number of 14,446 cases under investigation and pending trial in the various states, the detentions involved were 42,488, out of which the number of persons actually arrested and put under detention was 5,998.

Going specifically into the question of a right to bail, the Court emphasised two principles: (*a*) Release on bail may be seen as embedded in the right to speedy trial to meet the requirement of Article 21.[5] (*b*) The importance of balancing the rights of the accused with those of the victims, and the collective interests of the community and the safety of the nation as emphasised by the Supreme Court in *Kartar Singh vs. State of Punjab* (*1994*) in the course of examining the validity of Section 20(8) of TADA. The Court concluded that since the stringent bail provisions under TADA made release difficult, it was necessary that the trial 'proceed and conclude within a stipulated time'. Moreover, the invocation of the provisions of TADA in cases where the facts did not 'warrant its invocation' was to be construed as 'nothing but sheer misuse and abuse of the Act by the police'. The disproportionate ratio of the number of cases and the number of Designated Courts, however, made the prospect of speedy trial in the pending TADA cases bleak. The Supreme Court suggested, therefore, what it called, 'a pragmatic and just approach' involving a four-fold classification of TADA detenus on the basis of the degree and manner of their implication by the Act, with a corresponding modality of their release on bail.[6]

The maximum period allowed for investigation, after which bail was permissible, was reduced from one year under TADA to 180 days in POTA. The truncation of this period was, however, counterbalanced by the persistence of conditions that had to be satisfied for securing bail, namely, the conformity of the public prosecutor, and the satisfaction of the POTA court regarding the innocence of the accused. In a large number of POTA cases, therefore, bail was refused. Almost all provisions under Section 49 of POTA lay down exceptions to provisions pertaining to arrest and detention in the CrPC. At the outset, Section 49 lays down that every offence punishable under the Act was to be deemed a *cognizable offence*. Subsequent clauses of Section 49 lay down bail conditions in POTA cases, modifying the applicability of Section 167 of

CrPC, which as discussed earlier, provides the procedure to be followed when investigation in a case cannot be completed within the stipulated twenty-four hour period. Section 49(2) of POTA extended the period from fifteen to ninety days, adding the provision that the Special Court could further extend the period to 180 days after the Public Prosecutor had 'indicated the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days'. Section 49(6) of POTA lays down that 'no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond unless the Court gives the Public Prosecutor an opporunity of being heard'. Under Section 49(7), if the Public Prosecutor opposed the bail application, no person accused of an offence punishable under POTA could be released on bail 'until the Court was satisfied that there are grounds for believing that he is not guilty of committing such offence'. The ambivalent lettering of a proviso in Section 49(7), however, despite the Supreme Court's explanation and rectification, led to an assumption that bail under POTA was permissible and possible only after one year. The proviso in Section 49(7) read as follows: 'provided that after the expiry of a period of one year from the date of detention of the accused for an offence under this Act, the provisions of subsection (6) of this section shall apply'.

The Supreme Court Judgement in the case *People's Union for Civil Liberties and Anr. vs. Union of India*[7] that upheld the constitutional validity of POTA and its specific provisions removed the anomalies in the wording of bail provisions. It did not, however, alleviate the main grievance of the petitioners regarding Section 49(7), which lay down that a Court could grant bail only if it was satisfied that there were grounds for believing that an accused 'is not guilty of committing such offence'. Section 49(7) was thus especially violative of the right to bail of an accused since it did not incorporate the principles laid down by the Supreme Court in Sanjay Dutt's case (at page 439 para 43–8 of SCC) where it held that if a challan is not filed after expiry of 180 days or extended period, the indefeasible right of an accused to be released on bail is ensured provided that the same is exercised before filing of challan.[8]

Arguing on behalf of the government, the Attorney General submitted, however, that the bail provisions under POTA were 'not onerous' and did not 'impose any excessive burden or restriction on the

right of the accused'. His submission derived from two assumptions: (*a*) Similar provisions were to be found in Section 37 of the Narcotic Drugs and Psychotropic Substances Act 1985 and in Section 10 of the UP Dacoity Affected Areas Act (*b*) Allegations of excessive burden were not based on a 'true construction of 49(6) and (7)'. A 'true construction' would show, he argued, that 'it was not correct to conclude that the accused could not apply for bail at all for a period of one year' and that the right of the accused to apply for bail during the period of one year was not completely taken away. Rather, the stringent provision of bail under Section 49(7) would apply only for the first year of detention and after its expiry the normal bail provisions under CrPC would apply.

Upholding the validity of the Act and the reasonableness of bail provision, the Supreme Court started from the premise that Section 49 of the Act was similar to Section 20 of TADA whose constitutional validity had already been upheld in *Kartar Singh case*. Drawing yet again on the 'complex' nature of 'offences under POTA', it justified the exceptional character of the Act, in particular the 'expanded period of detention' required to complete the investigation:

> Usually the overt and covert acts of terrorism are executed in a chillingly efficient manner as a result of high conspiracy which is invariably linked with anti-national elements both inside and outside the country…. Such a comparatively long period of solving the case is quite justifiable. Therefore, the investigating agencies may need the custody of accused for a longer period.

Drawing on the ordinary practice of bail or the 'general law' as the judgement puts it, the judges pointed out that: 'the conduct of the accused seeking bail has to be taken into account and evaluated in the background of nature of crime said to be committed by him'. Such an evaluation is based on the 'possibility of his likelihood of either tampering with the evidence or committing the offence again or creating threat to the society'. Since the satisfaction of the Court under Section 49(7) had to be arrived based on particular facts in the context of the evaluation of the special nature of crime, the Court refused to attribute unreasonableness to Section 49(7).

Taking note of the petitioner's contention that the proviso to Section 49(7) of POTA is read by some of the courts 'as a restriction on exercise of power for grant of bail under Section 49(6) of POTA',

the Supreme Court judged that the proviso to Section 49(7) is not meant as a restriction but an 'exception' to Section 49(7):

> If the intention of the Legislature is that an application for bail cannot be made prior to expiry of one year after detention for offences under POTA, it would have been clearly spelt out in that manner in Section 49(6) itself. …It is by way of exception to Section 49(7) that proviso is added which means that after the expiry of one year after the detention of the accused for offences under POTA, the accused can be released on bail after hearing the Public Prosecutor under ordinary law without applying the rigour of Section 49(7) of POTA. It also means that the accused can approach the court for bail subject to conditions of Section 49(7) of POTA within a period of one year after the detention for offences under POTA.

The Court attempted also to remove the anomaly or what it called 'absurdity' in the proviso of Section 49(7), which appeared as a result of what it called 'an accidental omission or mistake of not including the word 'not' after the word 'shall' and before the word 'apply'', leading to the misreading that the condition enumerated in subsection (6) would apply (only) after the expiry of one year:

> Even otherwise read appropriately, the meaning of the proviso to Section 49(7) is that an accused can resort to ordinary bail procedure under the Code after that period of one year. At the same time proviso does not prevent such an accused to approach the Court for bail in accordance with the provision of POTA under Section 49(6) and (7) thereof.

The ambivalence injected by the wording of the 'exception' in Section 49(7) along with the scope given in the bail provisions and upheld by the Supreme Court for a stringent application given the exceptional nature of offences under POTA, made for contentious unfolding of the provision in specific cases.

Contests and Ambivalence in the Interpretation of Bail Provisions

Juvenile Offender or Terrorist: The Case of G. Prabhakaran

In the course of an alleged 'combing operation' to 'nab naxalites', on 24 November 2002, the Special Task Force and Q Branch of Tamil Nadu police, arrested a 15-year-old boy, G. Prabhakaran, in Dharmapuri

district. Prabhakaran was arrested apparently because the police could not locate his father Guruswami, a suspected naxalite. Prabhakran was brought before the Judicial Magistrate, Uthangarai, the next day who remanded him to judicial custody without enquiring about his age and Prabhakaran was put in prison along with other naxalite prisoners. Prabhakaran moved a bail petition before the Sessions Judge, Krishnagiri, who admitted the school certificate as evidence of age and granted him bail on 7 February 2002, giving his custody to his maternal aunt and grandfather, both residents of Gurugupatti village, Krishnagiri Taluk. They executed two bonds each for a sum of Rs 5,000 before the Judicial Magistrate Uthangarai on 10 February 2003, who accepted the sureties, and ordered Prabhakaran's release from the Central Prison, Salem. As they waited in front of the central prison for his release, they were informed by the prison Superintendent, that the petitioner could not be released in view of an order of the POTA Special Court dated 10 February 2003, which required the production of the petitioner before the Special Court on 14 February 2003 for the purpose of determining his age and for adjudication of petition for cancellation of bail. On 14 February 2003 the Special Court directed that the petitioner be kept in the observation home, Purasawalkam, Poonamalle High Road, Chennai and fixed the date for hearing for 20 February 2003.

Subsequently, Prabhakaran moved a petition in Chennai High Court, pleading that (*i*) the POTA Special Court did not have the jurisdiction to try a juvenile as the procedures to be followed when a juvenile is arrested is determined by the *Juvenile Justice (Care and Protection) Act*, 2000 (*ii*) the petitioner being a juvenile should have been granted bail at the time of arrest on 24 November (*iii*) even if not released on bail, being a juvenile he should have been kept in an observation home and produced before the juvenile justice board. Prabhakaran pointed out in his petition that not only were these ground rules not followed, the Special POTA Court actually exercised 'excess of jurisdiction' by canceling the bail that the principal sessions judge, Krishnagiri, had granted him, despite having no power to cancel or revise the bail order, and taking upon itself the task of adjudicating his age. Since the Special Court acted in excess of its jurisdiction, the petitioner argued that his initial remand on arrest was illegal and his confinement along with

other alleged naxalites in Central Prison, unlawful. The Chennai High Court decided that in this case the POTA Court had indeed '*exceeded its jurisdiction and trespassed into another territory and the mischief has to be undone*.'

In his deposition before the *People's Tribunal on the Prevention of Terrorism Act and other Security Legislation* in Delhi, in March 2004, Prabhakaran recounted: 'On 24th November 2002, I was taken to Uthangarai police station. After registering a case there, the police took me to Kallavi Police Station. Then again I was taken to Uthangarai Police Station and in the night once again I was taken back to Kallavi Police Station where I found 24 others co-accused. We were all made to strip and remain in our undergarments. In Kallavi Police Station, I was beaten with *lathis* and was questioned by a Q branch official whom I came to know later as 'Babu'. I also saw the others receive the same treatment from Babu. I was not informed of the case against me at any point of time nor did I sign an arrest memo. The police team videographed me. On 25 November 2002, the police brought me before the Judicial Magistrate, Harur who was in charge of Uthangarai. It was only when I was produced before the Magistrate that I came to know that I was being remanded for offences under the Arms Act and other acts. The Magistrate mechanically remanded me to judicial custody along with others whom I did not know. I was placed along with other alleged naxalite prisoners in the Central Prison, Salem. I was then taken into police custody once again on 3 December 2004 and taken to Kallavi Police Station along with five others and kept there for five days. The police questioned me again about my father's whereabouts and tried to force me to sign some typed paper. Since the other accused with me refused to sign the statement typed in Tamil, I too refused to sign the paper….When I was finally granted bail I returned home. I am now in the custody of my maternal aunt. But still I face difficulties and am continually harassed by the Q Branch. At the Observation Home at Poonamallee we were tortured and kept away from the other boys. We were to remain in the shade at all times and were not allowed to see the sun. We were beaten and always kept in a dark room. Unlike some others, there are no gag orders against me. However, I am not supposed to move or go anywhere, and I am not supposed to speak to anybody else. The Q Branch has also cautioned the study centre where I am studying privately for the 10th standard examination, which I am going to take in April. The teachers

have also been harassed by the Q Branch. Now that I have deposed before this Tribunal, if they find out that I was here, I expect there will be further problems when I go back. I did not inform anybody that I was coming here. I was studying in 10th standard. My job was to go to school and study and that was what I was doing. As a result of the charges that I faced, my friends don't talk with me and they don't want to play with me. I want to know why I was charged under POTA and had to suffer so much as a result. My father Guruswamy was arrested subsequent to my release on bail. I found out about this only from the newspapers. Now I live in Kaveripattinam with my maternal aunt Nagammal. The police from the Q Branch continue to follow me to the study centre and house and cause me great embarrassment. I appear regularly before the Juvenile Court in Salem where the chargesheet against me is yet to be filed'.[9]

Section 49(7): Relief or Restriction?

Ambivalence in bail provisions in POTA, because of the proviso in Section 49(7), resulted in interpretations that saw a bar on the maintainability of bail application before the expiry of a period of one year. Significantly, this ambivalence persisted in decisions handed out by the lower courts and the High Court, despite the Supreme Court's elaboration on the bail provision in its decision upholding the validity of POTA. In the case *Abdul Haq vs. State of U.P.* (2004 CRI, L.J. 1889), for example, the Allahabad High Court decided that under the provisions of Section 49(7) 'a bail application filed before the expiry of one year from the date of detention was not maintainable in view of the bar imposed by proviso to Section 49(7)'. In this case, an appeal had been made under Section 34(1) of POTA against the order dated 28 February 2003 by the Sessions Judge, Special Court, Muzaffarnagar, rejecting the bail application of Abdul Haq detained under Section 3 of POTA, Section 3 of the Official Secrets Act and Sections 121, 121A and 123 of IPC relating to P.S. Kotwali City, District Muzaffarnagar.

The P.S. Kotwali City Muzaffarnagar had taken Gaffar, Gayur, and Jhon Mohammad into custody on the night of 13/14 August 2002, and Shakeela on 14 August 2002 on the basis of a 'secret information' that 'certain persons were engaged in terrorist activities and had their relations with the Lashkar-e-Toiba and Field Intelligence Unit, Pakistan

and they were supplying secret informations to the above organisations'. The appellant, ex-Hawaldar Abdul Haq, was arrested on 19 August 2002 during the investigation and 'two books were recovered from his possession [which] he told them was given to him by his son who was serving in the military'. Haq, allegedly, also 'admitted' that 'he was sending secret information to the members of Lashkar-e-Toiba'. In the course of the investigation of the case, Abdul Haq moved an application for bail on the ground that no offence was made out against him. On 27 August 2002, the papers recovered from his possession were sent to Military Authority (Commanding Officer, Liaison Unit Meerut Cantt., Meerut) 'for inspection and report, whether these papers were secret or not or whether these papers were anti-national or not and whether the accused got the possession of these papers from valid source'. On 23 February 2003, before the response from the Commanding Officer could come in, the Special Judge rejected the bail application holding that 'unless the reply [was] in favour of the accused it [could not] be said that the accused [was] not guilty of committing the above offence and therefore at that stage the provisions of Section 49 of the POTA [was] not applicable'. Incidentally, the reply that was subsequently received on behalf of the Commanding Officer showed that the books recovered from the Ex-Hawaldar Abdul Haq were issued to the individual on payment from Rajput Rifle Regiment Centre and contained no information that was detrimental to national security.

Abdul Haq moved the High Court for bail, which subsequently confirmed the Special Court's rejection of Haq's appeal against the rejection of his bail. What is significant in the entire episode of rejection, appeal, and confirmation of rejection, is that the arguments surrounding the bail, irrespective of where they came from—the petitioner or the prosecution, the Special Court or the High Court—were invariably based on the assumption that there existed a one-year bar on bail under Section 49(7) of POTA. The Special Judge had rejected the applicability of bail provisions on the ground that irrespective of what the Commanding Officer's response was, the bail provisions did not apply at that stage. The prosecution's case in the High Court was premised on the ground that the bail application moved by the appellant before the Special Judge was 'premature' and, therefore, rightfully rejected' since the proviso to Section 49(7) of POTA laid down that 'no bail application

[was] maintainable before the expiry of a period of one year from the date of detention of the accused'. The Counsel for the appellant, also did not question the prosecution's interpretation of 49(7), contending instead, that since the bail application to the High Court was moved in September 2003, and a time period of one year had lapsed, the bail application was, therefore, maintainable in the High Court which was the higher court of appeal.

On its part, the High Court after 'having considered the relevant provisions of POTA and submissions of the learned Counsel for the parties' confirmed that 'the bail application before the Session Judge/ Special Judge was premature'. Citing the provisions of Section 49 of POTA, the Judges concluded:

> From the reading of the above section it is clear that the power of granting bail has been provided in subsection (6) of Section 49 of POTA. The proviso to subsection (7) clearly provides a bar on the maintainability of the bail application before expiry of a period of one year from the date of detention of the accused for the offence under this Act.

Significantly, the judges referred to the Supreme Court Judgement, in particular its explication of the provisions of Section 49(7). Citing profusely from the Supreme Court's discussion of Section 49 in the case *People's Union for Civil Liberties vs. Union of India (2003)*, they came to an opposite conclusion:

> Thus it is clear that validity of provisions of Section 49(6) and proviso to Section 49(7) has been upheld by the Apex Court and the restriction created in the proviso will fully apply to this case. Therefore, the application of the appellant for bail before the Sessions Judge/Special Judge before the expiry of a period of one year was premature…. In view of our above discussion we find that the bail application was rightly rejected by the Sessions Judge/ Special Judge as it was premature and the appeal has no force and is liable to be dismissed. Since we have dismissed the appeal on the ground of maintainability of the bail application before the Sessions Judge/Special Judge we are not required to discuss the merit of the case. (pp. 1889–92)

The above case makes it evident that procedures which come as exceptions to the ordinary course of law, even when they come with safeguards that may, as in bail provisions create grounds for alleviation, may get

interpreted in a way so as to sustain the rigour of the exception. While in Prabhakaran's case, a miscarriage of justice occurred owing to the court's unwillingness to apply a law which protected a juvenile, in Abdul Haq's case there seemed to have been a predisposition towards inflexibility in interpretation. In both cases, the constitutional guarantee of a right to speedy trial stood eroded.

Confessions: Principle of Legislative Classification and Rule of Differentiation

Like the right to speedy trial, protection against self-incrimination is a fundamental principle of the criminal justice system. Most constitutions assure protection against self-incrimination, or conversely, provide the right to remain silent.[10] More often than not, confessions are seen with suspicion, and governed therefore by exclusionary rules, or as termed in American jurisprudence, *the fruit of the poisonous tree doctrine.* An implication of this doctrine is that any confession is seen as suspect unless it is unquestionably established that pre-trial procedures and safeguards have been adhered to.[11] Only then can the two principles that validate confession, namely, *free* and *voluntary*, and therefore, truthful, can be affirmed.[12]

Specific guarantees and safeguards against self-incrimination are provided in the Indian Constitution, in procedural law, and in the exclusionary provisions in the law of evidence.[13] These guarantees protect the rights and liberties of a person in a criminal proceeding and provide safeguards against making use of any statement made by him/her. Article 20(3) of the Constitution of India declares that 'no person accused of any offence shall be compelled to be a witness against himself' embodying thereby the principle of protection against compulsion of self-incrimination.[14] Both TADA and POTA, however, allowed 'certain confessions made to police officers to be taken into consideration', making a departure thereby from the ordinary law and constitutional principles. While the evidentiary value of confessions as mentioned above, is suspect, confessions made to the police have an even lower credibility as legal evidence, since the police is normally also the investigating agency, and more often than not, such a confession is extracted under varying degrees of repression and coercion.

The admissibility of confession to a police officer as legal evidence was first permitted in India under TADA. Before looking at the manner in which confession unfolded under POTA, it is important, therefore, that the various debates that surrounded confession as incorporated in TADA be examined. This examination will show continuity in the issues that came up in the debates surrounding confessions and the grounds on which the provision under POTA was justified when examined for constitutional validity by the Supreme Court.

Under Section 15 of TADA, certain confessions made to police officers were made admissible in the trial of the accused or co-accused.[15] The admissibility of confession before a police officer was upheld by the Supreme Court in the *Kartar Singh vs. State of Punjab*[16] primarily as an 'overwhelming need', and procedural safeguards were prescribed to dilute the 'fruit of the poisonous tree' doctrine. Subscribing to what may be called the *principle of legislative classification and rule of differentiation*, the majority decision of the Supreme Court in the case justified the prescription of special procedure leading up to the provision of severe punishment. The justification of the special provision of Section 15 of TADA pertaining to confession was done by the Supreme Court by taking recourse to the specific contexts and concerns of the Act, that is, terrorism. In the process, the court, affirmed the existence of a class of *offenders* under TADA, namely, 'terrorists and disruptionists', distinct and separate from ordinary criminals who could be tried under 'normal' laws, as well as a distinct class of *offences*, namely, terrorism—an aggravated offence—both, requiring the special provision of Section 15. Starting from the premise that the objective of TADA was to target a distinct and aggravated form of crime and category of offenders, the majority decision of the Supreme Court held that the provisions of Section 15 were 'non-discriminatory', and not 'in the circumstances unjust unfair or oppressive':

> The principle of legislative classification is an accepted principle whereunder persons may be classified into groups and such groups may differently be treated if there is a reasonable basis for such difference or distinction. The rule of differentiation is that in enacting laws differentiating between different persons or objects such laws may not necessarily be the same as those governing another set of persons of objects so that the question of unequal treatment does not really arise between persons governed by different conditions and different set of circumstances (Judgement: para 218)

By pushing the principle of legislative competence and the rule of differentiation, within the framework of 'need', the Supreme Court relinquished the responsibility of determining the stringency and harshness of the provisions, in this case whether the procedure of recording the confession was fair and just. In the process, it also revised the principles of fair and just trial. The objectives of a trial were no longer seen as based on the presumption of innocence. With the acceptance of the assertion of the prosecution that '*a fair trial has two objectives*: it must be fair to the accused and also to the prosecution', equivocation over competing rights appeared. The rights of the prosecution protecting and representing the 'victim' were recognised as co-equal with those of the accused, modifying thereby, the basic principle of a fair trial, that is, the assumption of innocence.

It needs to be pointed out that the case against Section 15 of TADA was being built not only on the ground of its redundance in the context of a pending presentation before the Magistrate, but also on account of the scope it provided for torture and abuse of the accused. What the Supreme Court chose to acknowledge, yet overlook in its decision, was the fact that torture and confession are more often than not, related. Adherence to the legal presumption that the confession obtained by 'a police officer not lower in rank than a Superintendent of Police in terms of Section 15(1)' might have been only in accordance with the legally permissible procedure, turned a blind eye to the 'abuse and misuse of power by the police in extorting confession by compelling the accused to speak under the untold pain by using third degree methods'. To the appellant's plea pertaining to the practice by police officers of:

> whisking away the accused either on arrest or on obtaining custody from the court to an unknown destination or unannounced premises for custodial interrogation in order to get compulsory self-incriminating statement as a source of proof to be produced before a court of law (Judgement: para 246).

the Supreme Court, responded:

> …having regard to the legal competence of the legislature to make the law prescribing a different mode of proof, the meaningful purpose and object of the legislation, the gravity of terrorism unleashed by the terrorists and disruptionists endangering not only the sovereignty and integrity of the

> country but also the normal life of the citizens, and the reluctance of even the victims as well as the public in coming forward, at the risk of their life, to give evidence—hold that the impugned section cannot be said to be suffering from any vice of unconstitutionality. In fact, if the exigencies of certain situations warrant such a legislation then it is constitutionally permissible as ruled in a number of decisions of this Court, provided none of the fundamental rights under Chapter III of the Constitution is infringed (Judgement: para 253)

While upholding the validity of TADA in general and of its specific provisions, including confession, the Supreme Court judgement, ventured also to lay down specific guidelines as safeguards, to ensure that 'confession obtained in the pre-indictment interrogation' by a police officer is 'not tainted with any vice, but is in strict conformity with the well-recognised and accepted aesthetic principles and fundamental fairness'. Instructions were issued that the Central Government must take note of the guidelines and incorporate them by appropriate amendments in the Act and the Rules (Judgement: para 263). The guidelines were as follows:

(1) The confession must be recorded in a free atmosphere in the same language in which the person is examined and as narrated by him.
(2) The person from whom a confession has been recorded under Section 15(1) of the Act, should be produced before the Chief Metropolitan Magistrate or the Chief Judicial Magistrate to whom the confession is required to be sent under Rule 15(5) along with the original statement of confession, written or recorded on mechanical device without delay.
(3) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate should scrupulously record the statement, if any, made by the accused so produced and get his signature and in case of any complaint of torture, the person should be directed to be produced for medical examination before a Medical Officer not lower in rank than of an Assistant Civil Surgeon.
(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no police officer below the rank of an Assistant Commissioner of Police in the Metropolitan cities and

elsewhere of a Deputy Superintendent of Police or a police officer of equivalent rank, should investigate any offence punishable under this Act of 1987.

(5) The police officer if he is seeking the custody of any person for pre-indictment for pre-trial interrogation from the judicial custody, must file an affidavit sworn by him explaining the reason not only of such custody but also for the delay, if any, in seeking the police custody.

(6) In case the person, taken for interrogation, on receipt of the statutory warning that he is not bound to make a confession and that if he does so, the said statement may be used against him as evidence, asserts his right to silence, the police officer must respect his right of assertion without making any compulsion to give a statement of disclosure.

With *Kartar Singh*, therefore, confessions made to designated police officers became admissible, and at the same time the Supreme Court extended the norms for recording confessions under normal law to those recorded by police officers under TADA. In order for confessions to be admissible in trial they had to be untainted, and in conformity with fundamental principles of fairness. Accordingly, the accused could not be produced from police custody, was to be sent to judicial remand, and given thereby time for reflection. The remand of the accused was to be free from police or any other intervention. The Magistrate was bound to put clarificatory questions to assure that the confession was indeed voluntary. If after confessing, the accused was handed over to police cus-tody, the inference would be that the confession was not voluntary (Kannabiran 2003: 110).

The guidelines prescribed by the Supreme Court for TADA were included in Section 32 of POTA. Section 32(1) of POTA lays down that 'notwithstanding anything in the Code or in the Indian Evidence Act 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such officer either in writing or on any mechanical or electronic device like cassettes, tapes or sound tracks from out of which sound or images can be reproduced, shall be admissible in the trial of such person for an offence under this Act or

the rules made thereunder'. The PUCL petition challenging the constitutional validity of POTA argued that the provision pertaining to confession to a police officer must be quashed since it was not required, and made redundant and superfluous by the accompanying requirement of presentation of the accused before the Magistrate. Considering that the accused had to be produced before the Magistrate within forty-eight hours, there appeared to be no need to simultaneously 'empower the police' to record the statement or confession.

The Supreme Court, however, upheld the provision, arguing that presentation before the Magistrate was a procedural requirement, a safeguard that had been suggested by the Supreme Court itself in the Kartar Singh case and adhered to by the Parliament while enacting POTA. The judgement emphasised that while laying down the provision in the case of POTA, the Parliament had in fact taken into account all guidelines, which were suggested by the Court in Kartar Singh case:

> …If the recording of confession is found to be necessary by Parliament and if it is in tune with the scheme of law, then an additional safeguard under Section 32(4) and (5) is *a fortiori* legal. In our considered opinion the provision that requires producing such a person before the Magistrate is an additional safeguard. *It gives that person an opportunity to rethink over his confession.*[17]

Section 32(2), for example, lays down that before recording any confession made by a person under subsection (1), a police officer must *explain to such person in writing that he is not bound to make a confession* and that his confession may be used against him. Moreover, *where a person preferred to remain silent, the police officer could not compel or induce him to make a confession*. It was also expected that the confession should be recorded *in an atmosphere free from threat or inducement* and in the same *language* in which the person made it [Section 32(3)]. To ensure that the procedural safeguards had been complied with, and confession had not been extracted through 'threat or inducement', the person from whom confession had been recorded, was *required to be produced before the Court of a Chief Metropolitan Magistrate or the Court of a Chief Judicial Magistrate, along with the original statement of confession, written and recorded on mechanical or electronic device within forty-eight hours* [Section 32(4)]. The latter was expected to record any statement that the person produced before him might make and get his signature or thumb impression. In case of complaint

of torture, a medical examination before a Medical Officer not lower in rank than an Assistant Civil Surgeon was required to be conducted after which he could be sent to judicial custody [Section 32(5)].

Confessions: Repentance and Truth Statements?

The insistence of the Supreme Court on procedural legality while upholding provisions pertaining to confession in both TADA and POTA occludes the structures of power and domination that inform the confessional process. Unlike the every day admissions that may be made in informal interactions in an atmosphere of trust and confidence, 'confessions' are implicitly different. Most definitions of confession invariably presume the importance of a 'person in authority' to whom a confession may be made. Under the canons of the Catholic Church, for example, a confession consists in accusing one's self of having committed a sin, to a priest who has received authority to give absolution. Thus the confessional process requires a confessor—or a person who admits to having sinned—and another person who not only has the authority to hear the confessor accuse and implicate himself, but also the power to exonerate.

Ironically, confessions in criminal jurisprudence, are sought to be aligned with religious confessions, and seen thereby, as truth statements reflecting the admission of guilt of a 'repentant soul'. Elements of voluntariness and truthfulness while seen as integral to confessions are paradoxically affirmed through procedural norms. The latter are conceived as safeguards having a restraining effect on authority, simultaneously giving the confessor the opportunity to unburden his/her guilty soul. More often than not, therefore, arguments and debates surrounding confessions have concerned themselves with these aspects of confession. The Supreme Court judgments upholding the constitutional validity of the provision in TADA and POTA, ultimately concerned themselves with prescribing procedural norms, which would suffice to affirm the voluntariness and truthfulness of the confession, and by implication the guilt of the confessor. Legally, therefore, the fact that the confession was gathered adhering to the procedures laid down in law would be seen as sufficient to establish the credibility of the evidence.

Yet, from a captive's point of view, who stands accused of a crime and knows what the investigation is all about, confession has always had a relationship with power and authority (Kannabiran, 2004: 106–7). Thus the idea of voluntariness of the confession in captivity, which Kate Millet describes as 'an entire state, entire helplessness before entire power', irrespective of whether or not procedures have been followed, is always suspect:

> …for captivity is an absolute state. Once captive, one can be treated in any manner the captor chooses: this is the physical fact of capture. There are no guarantees in captivity: power need not concede anything at all. One is physically at the mercy of the captor; every potentiality is on one side, none on the other. There may be mercy or there may be none. It is beyond the captive's power to make or unmake any aspect of his captivity. Captivity is an entire state; entire helplessness before entire power.[18]

In the criminal justice system, moreover, the confessional process has become a surrogate for the attestation of the power and authority of the state.[19] When the confessor authors his admission of guilt, he/she speaks against himself. While thus giving evidence against him/ herself, he/she speaks for the law, his personal condemnation becoming a public affirmation of legal truth (Hepburn and Turner 1982: 93). Given its constitutive role in the production of truth, confession is intimately interwoven with the exercise and presence of power.

Moreover, as Foucault has argued, torture and confession have always gone hand in hand. The truth produced by confession is connected with, however silently and secretly with restraint, coercion, imposed obligation and compulsion. The 'ritual of confession', therefore, takes place within a relationship of power:

> For one does not confess without the presence (or virtual presence) of a partner who is not simply the interlocutor but the authority who requires the confession, prescribes and appreciates it, and intervenes in order to judge, punish, forgive, console, and reconcile. The agency of control lies, not in the one who produces the truth, but in the one who receives it.[20]

Confessions are, however, rarely seen as situated within a framework of power and authority, or as statements, which while admitting their guilt ultimately affirm the legitimacy of existing political authority.

In most investigations, trials and judgements where confessions have been integral to the implication and punishment of a person, the act of confession is seen as an act of repentance and penance. As such the act of confessing by itself is seen as having an intrinsic value, of having a purging effect on the confessor.[21]

Most judgements, while emphasising repentance and contrition that brings into play the private or 'inner court of conscience' of the confessor, give credence to another 'private' aspect of confession that is, custodial confession, or confession to a police officer.[22] This credibility subsequently comes to play a major role in legal trials as admissible evidence. While confession in the religious tradition was followed by acquittal or exoneration, in a criminal trial, it becomes a ground for punishment. Thus, while the act of confession itself may be private (within the confessional box of the church) or secluded (within a police station), it is ultimately judged on the basis of its public consequences, and justified on grounds of social responsibility and public sensibilities.

TADA and POTA cases have shown that confessions which were initially made 'in private' (to a police officer) subsequently came to play a major role in trials as evidence. Moreover, the public consequences and social dimensions of a private or secluded activity extended to a concern for published or written confessions over verbal statements. Here again, the relationship of confessions with structures of power and authority becomes evident, for in its written form, the confession became an enduring public restatement of political and social order (Hepworth and Turner 1982: 7). Moreover, the admission of guilt by the accused especially in political cases becomes a legitimation of the existing political order. Judgements, while emphasising one aspect or the other to justify punishment that is, their intrinsic purificatory value, or wider public concerns, have often chosen to disregard procedural norms that were intended to restrain authority. Procedural norms, where emphasised, have often become a surrogate for 'proper confession', and as shall be seen in the discussion of some cases, far from eliminating torture and violence, they have made it invisible.

These aspects are brought out remarkably well in several cases including that of Gurdeep Singh, discussed at length by K.G. Kannabiran.[23] Gurdeep Singh was involved in a bomb explosion in Noida on 6 October 1990 resulting in the death of three persons. Intended to

blow up a bus, this bomb reportedly went off accidentally. As a suspect in another bomb explosion in a cinema hall in Bidar, Karnataka, Gurdeep Singh was produced before the Superintendent of Police. In his confession under Section 15 of TADA in the Bidar bomb explosion case, Singh apparently also admitted his complicity in the NOIDA case, and was subsequently prosecuted by the Delhi police along with others under TADA. Of all the accused in the NOIDA case, Gurdeep Singh alone chose to make an appeal to the Supreme Court [*Gurdeep Singh alias Deep vs. the State* (Delhi Admn), AIR 1999 SC 3646].

Questioning the voluntariness of Gurdeep Singh's confession, his counsel drew attention to the coercive and intimidating circumstances in which the confession was gathered, making the confession suspect. The argument around the legal credibility of confession was important because Singh's confession was the sole evidence against him. The defence counsel pointed out that the confessional statement was made while the accused was in handcuffs. Moreover, while the confession was being recorded, a policeman was present holding on to the prisoner by his chains. Moreover, armed guards surrounded the room throughout the confessional process. While not disputing the circumstances in which the confession was drawn, the judges decided that the voluntary character of the statement by the accused was not affected in any manner by his being held in handcuffs and chains and the presence of armed guards. The latter, they found necessary for reasons of security and, therefore, permissible. The *voluntariness* of the confession, moreover, they said, could not be questioned:

> *…since it [confession] comes through the core of heart through repentance*, where such accused is even ready to undertake the consequential punishment under the law, it is this area which needs some encouragement to such an accused through some respite maybe by reducing the period of punishment, such incentive would transform more incoming such accused to confess and speak the truth. This may help to transform an accused, to reach the truth and bring to an end successfully the prosecution of the case (ibid) [emphasis added].

The judgement set up a precedent whereby a confession could be made before either a Magistrate or a designated police officer, surrounded by armed guards, and the accused produced before the authority straight

from police custody—the time for reflection having been spent in the presence of armed guards.[24]

In yet another TADA case, *Devender Pal Singh vs. State of NCT of Delhi and Another* (2002 Supreme Court Cases (Cri) 978),[25] the Supreme Court affirmed the validity of the confessional statement of the accused while upholding his death sentence, in an appeal against the conviction and death sentence handed down by the Designated TADA Court. Ironically, while upholding the death sentence and the validity of the confessional statement, the Supreme Court criticised the insistence on a strict adherence to procedural safeguards. In this case, it may also be noted, only two of the five accused, could be arrested and tried. One of the two was acquitted for non-corroboration of evidence while Devender Pal Singh, the appellant, was convicted solely on the basis of his uncorroborated confessional statement recorded by the Deputy Commissioner of Police under Section 15 of TADA. Moreover, while two of the three judges—Justices Ajit Pasayat and J.J. Agrawal—found the death sentence on the basis of confession justifiable, Justice J. Shah, dissented.

As far as the details of the case are concerned, on 11 September 1993, a bomb exploded in a car parked at a place from where the car of the then President of the Indian Youth Congress (I) was passing. While the bomb was reportedly intended for the latter's assassination, nine persons died while several others including the Youth Congress President were injured. The investigations into the explosion sought to establish that five persons including Devender Pal Singh and D.S. Lahoria were behind the blast. Devender Pal Singh was arrested at Indira Gandhi (IG) Airport on 19 January 1995 upon his arrival from Germany where his request for asylum had been rejected. The prosecution stated:

> On interrogation, he [Devender Pal Singh] was found having a forged passport. Along with the disclosure statement and personal search memo, he was handed over to ACP who in his evidence stated that on receipt of information about return of the KLF extremist to Delhi, he had gone to the Airport to check the incoming passengers from Germany. According to the ACP, when the Lufthansa Airlines Staff handed over the appellant, he tried to swallow a capsule in plastic foil but he was caught. It was his further testimony that on that day he made a disclosure statement describing his involvement in many cases including the said bomb blast. Therefore, he collected the copy of the disclosure statement and formally arrested the appellant.

> He produced the appellant before ACMM and secured his police remand for 10 days. He was interrogated and he again made a disclosure statement in which he again admitted his involvement in the bomb blast. Next day, he gave in writing that he wanted to make a confession. Accordingly the ACP informed the DCP for recording the confessional statement. The DCP after following the procedure recorded the confessional statement on 23.1.1995. Before the expiry of remand in police custody, the appellant was produced before the Court of ACMM on 24.1.1995, though the copy of the confessional statement or the original was not produced before him. At that time, the investigating officers of the case and Punjab Police were present inside the court. The ACMM asked only one question of the appellant as to whether his statement was recorded by the DCP. To that the appellant answered in the affirmative and his signatures were obtained on the application in confirmation of his admission of having made a statement before the DCP. The appellant was thereafter taken by Punjab Police.

In his statement recorded under Section 313 CrPC, however, the accused denied having made the application expressing the desire to make a confessional statement, and also the confessional statement before the DCP. According to him, he was made to sign some blank and partly written papers under threat and duress and the entire proceedings were fabricated upon these documents. He also stated that before he was produced before the ACMM, he was told that if he made any statement to the court he would be handed over to Punjab Police who would kill him in an encounter. His statement before the ACMM was, therefore, he argued, made under fear. He also stated that he was taken to Punjab and brought back after about three months. He sent an application from jail thereafter retracting his confessional statement and clarifying the circumstances under which it was recorded.

The other accused in the case, D.S. Lahoria was extradited from USA to India and also tried along with the appellant. Lahoria was, however, acquitted by the Designated Court on the ground that there was no evidence against him and that he had not made any confessional statement. The confession of Devender Pal Singh, which formed the sole basis of his conviction was, however, replete with the key role played by Lahoria. Singh's role in the conspiracy even on the basis of his own confession could not hold unless the equally important and synchronous role of the other actor in the conspiracy was not taken into account. The Supreme Court, however, by a majority of two to one dismissed

the appeal of the accused and upheld the death sentence given by the Designated Court. The grounds for dismissal were both on the general ground of terrorism being 'a dastardly act', 'diabolic in conception' and 'cruel in execution' and specifically on the evidential validity of confession. The Court, moreover, felt that the death sentence awarded by the Designated Court was 'most appropriate', since it reflected 'the collective conscience of the community', 'shocked' to the extent of expecting 'the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty'.

Specifically, however, as far as the evidentiary value of confession was concerned, the judgement pointed out that 'the confessional statement of the accused could be relied upon for the purpose of conviction and no further corroboration was necessary if it related to the accused himself. However, 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 be again within the sphere of appraisal of evidence'. In the process of validating the confession, however, quite like the judgement in Gurdeep Singh case, the judges, refused to go into the question whether or not procedural safeguards had been followed. While in Gurdeep Singh case, bypassing of procedural norms was justified on the ground of 'security', in this case refusal was based on a more fundamental premise of 'presumption of honesty in favour of a police officer':

> There is statutory presumption under Section 114 of the Evidence Act that judicial and official acts have been regularly performed. The accepted meaning of Section 114III(e) is that when an official act is proved to have been done, it will be presumed to have been regularly done. *The presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not a judicial approach to distrust and suspect him without good grounds therefore.* Such an attitude can do neither credit to the magistracy nor good to the public. It can only run down the prestige of the police administration (emphasis added).

Moreover, the judgement defended the acquittal of the co-accused Lahoria on the ground of non-corroboration. It specified that a similar principle could not apply to the accused, even when the latter's confession tied the co-accused logically and inextricably into the story,

so much so that the conviction of one ought to have been the ground for the conviction of the other. Non-applicability was justified on the ground that the prosecution was not required to meet 'any and every hypothesis', 'vague hunches' or 'meticulous hypersensitivity' put forward by the accused:

> …exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent. Letting the guilty escape is not doing justice according to law …One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. Vague hunches cannot take the place to judicial evaluation. (Judgement: 983)

Starting from the presumption of the honesty of the police officer, followed by a disinclination to inquire into 'vague hunches', the court nonetheless ventured into the question of the voluntariness of confession. It agreed that whenever an accused challenged that his confessional statement was not voluntary, the initial burden was on the prosecution to prove that 'all requirements under Section 15 of TADA and Rule 15 have been complied with. Once this was done, i.e., the prosecution has *discharged its burden*, 'it [was] for the accused to show and satisfy the court that the confessional statement was not made voluntarily' (Judgement: 987). Having already started from the premise of trusting the investigating agency, the Court concluded that the question of voluntariness was difficult to establish since it lay in the unfathomable realm of the mind of the accused, and the 'prosecution [was, therefore,] not required to show why the accused wanted to make the confessional statement':

> It is not possible to accept the plea that the prosecution has failed to place any material to show as to why the accused would make a confessional statement immediately upon return to India. Acceptance of such a plea would necessarily mean putting of an almost impossible burden on the prosecution to show something which is within the exclusive knowledge of the accused (ibid).

As to what constituted voluntariness, the judges pointed out that it meant acting 'out of [one's] own free will, inspired by the sound of [one's] own conscience, to speak nothing but the truth':

> The crux of making a statement voluntarily is, what is intentional, intended, unimpelled by other influences, acting on one's own will, through his own conscience. Such confessional statements are made mostly out of a thirst to speak the truth, which at a given time predominates in the heart of the confessor which impels him to speak out the truth. Internal compulsions of the conscience to speak out the truth normally emerges when one is in despondency or in a perilous situation when he wants to shed his cloak of guilt and nothing but disclosing the truth would dawn on him. It sometimes becomes so powerful that he is ready to face all consequences for clearing his heart (Judgement: 988).

The judges' understanding of confession, unburdened it of procedural norms and principles, which they had already rejected as 'sterile'. This understanding imparted to the act of making a confessional statement follows a cyclical logic. A confessional statement is construed under this logic as unimpelled and uncoerced by external constraints. It was, on the other hand, a manifestation of an accused person's 'internal compulsions', an overriding 'thirst to speak the truth', to unburden himself of his guilt, steering himself out thereby of a 'perilous situation', and prepared to 'face all consequences'. In other words, it was reflective of an inner desire by a person 'consumed by guilt' to speak the truth and bear the consequences:

> Confession is a species of admission. A confession or admission is evidence against its maker, if its admissibility is not excluded by some provision of law. Law is clear that a confession cannot be used against an accused person unless the court is satisfied that it was voluntary. At that state, the question whether it is true or false does not arise…The question whether a confession is voluntary or not is always a question of fact. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the highest sense of guilt (Judgement: 988–89)

It is this understanding of confessions as primarily and necessarily truth statements, with the accompanying moral justification that a confession is good for the confessor since it unburdens him of his guilt, which was

seen as giving the confessional statement value and legitimacy as legal evidence. Although the police officer had to observe the requirements of subsection (2) of Section 15, in the court's opinion, '*irregularities here and there would not make such confessional statement inadmissible in evidence*'.

Having imparted moral value to confession and justifying its use as evidence of guilt, the judges further pleaded helplessness before the 'legislative wisdom' which had included this provision 'after considering the situation prevailing in the society'. They decided that 'it would not be just, reasonable and prudent to water down the scheme of the Act on the assumption that the said statement was recorded under duress or was not recorded truly by the officer concerned in whom faith is reposed. Unless society itself changed, and produced an atmosphere where a confession would retain its inherent sanctity, there [was] no alternative, but to implement the law as it [was] (Judgement: 1004).

The judgement of the Special POTA Court in the Parliament Attack case (*Mohammad Afzal and others vs. the Union of India case no. 53/2002*), the first POTA case to be decided in a trial held amidst media glare—followed the general temper of the judgement in Devender Pal Singh case while examining the confession of the accused. The Special Judge avowed to have eschewed a judicial position of distrust towards police officers. The judgement, moreover, followed the presumption that an official act may be construed as having been 'regularly done', if it is proved to have been done. In the process, rather than examining the validity of the confession, the judgement affirmed it by adhering to an initial position of trust. The 'official' recording of confession took place on 21 December 2001 before the Deputy Commissioner of Police of the Special Cell, where two of the four accused, Afzal and Shaukat, 'incriminated' themselves and 'implicated' the third accused Gilani in the conspiracy. Given that the accused were in police custody before the said confession and also knew that they would be going back into police custody immediately after, the confessions could by no means be considered 'free'. Moreover, as K.G. Kannabiran, Shaukat's counsel for defense, pointed out in his written submission to the POTA court:

> …It will be seen from the deposition of PW60, the officer who recorded the confession in this case, that he did not even begin to conform with the requirements of ensuring voluntariness of the confession recorded by him, as laid down by the Supreme Court. All that he did was to give the statutory

> warning, somewhat in the spirit of cigarette manufacturers that the accused was not bound to make the confession, and that if made it would be used against him. To a specific question from the defence counsel he admits that the only precaution he took for ensuring that there was no coercion is to direct the IO [Investigating Officer] to produce the accused in the Officers' mess at Alipur Road. He admits that the accused came to him from police custody and were sent back to police custody. He did not give them more than 5/10 minutes for rethinking/reflection.[26]

The accused were produced before the Additional Chief Metropolitan Magistrate (ACMM) of the Patiala House Courts in New Delhi where the recorded confessional statements and the accused were 'produced for perusal and confirmation'. While the report of the ACMM reproduced below, attested that the confessions had been confirmed, inadvertently, it also indicated the limitation of this 'safeguard':

> 22 December 2001
>
> *Present: IO ACP Raj Bir Singh*
>
> *He has produced before me accused Mohd. Afzal s/o late Sh. Habibullah, Shaukat Hussain Guru @ Shaukat s/o Abdul Sattar Guru and Sayed Abdul Rehman Gilani s/o Sayed Abdul Wali Gilani.* IO made a request that the statement of these accused have been recorded by DCP Sh. Ashok Chand on 21.12.2002. He has also produced before me statements in sealed cover sealed [*sic*] with the seal of J.K. I opened the sealed envelope to see the statements. IO made this request to this Court as per provisions of Section 32(4)(5) of POTO. *Accordingly IO and all police officers were send outside the Courtroom.* I came inside my chamber. Accused Mohd. Afzal has been called inside my chamber. *All other accused send outside the Courtroom alongwith the IO and other police personnel.* I also called my peon inside my chamber for just security purpose. Custody of accused has also been handed over to my peon. None else except accused, my peon and myself are present in my chamber. My chamber is closed. Accused has been explained by me that he is not bound to make any confessional statement. He has been further explained that in case he will make any confessional statement the same can be used in evidence against him. Accused has been inquired about making of his statement before the DCP Sh. Ashok Chand. Accused Mohd. Afzal stated that he made statement before the concern officer voluntarily. He has no complaint against the police personnel. He has not been tortured for making his statement. His statement without oath has been recorded by me separately which has been read over and explained to the accused who has also signed the same. Thereafter IO has identified him.

> At this stage this accused i.e. Mohammad Afzal has been handed over to IO.
>
> ….At this stage Shaukat Hussain Guru @ Shaukat has been called inside my chamber….*At this stage accused i.e. accused Shaukat Hussain Guru has been sent outside the courtroom. His custody has been handed over to IO*.
>
> …..At this stage accused Sayed Abdul Rehman Gilani called inside my chamber…. His custody is handed over to my peon…[27]

It is clear from the record of the ACMM that the entire sequence of recording of confession and the production of the accused before the Judicial Magistrate is always custodial and adherence to safeguards, is more symbolic than substantive. If the officer recording confessions merely moved to the official mess instead of his own office in the Special Cell to record the confession, the ACMM summoned the accused to his office while the police waited outside ready to reclaim their custody. This prompted the defence counsel to submit:

> …that the confession of the accused, are liable to be ignored totally as not measuring up to the binding objective criteria for their voluntariness. The prosecution cannot take refuge in the plea that as the accused were produced along with the confession recorded before the Addl. Chief Metropolitan Magistrate soon after the recording of the confession, and they made no complaint of torture, threats, voluntariness is ensured. The provision of production along with the confession recorded before a Magistrate is not a substitute for full compliance with the modalities required for making a confession voluntary, but merely a means of ensuring judicial supervision of the recording of confession to see that all the modalities required for making the confession voluntary are complied with. The fact that they are sent before CMM W/S 32 for verifying how the accused were dealt with. The confession statements also were sent. The Magistrate did not notice or enquire of the procedures required to be taken before recording the confession. It did not strike him that the scribing of confession without any error or mistake or over writing as odd. It did not strike him that dictation by the accused in English continuously and without being interspersed with the language with which the accused is acquainted with, is almost an impossible fact. He too failed in bringing to bear in judicial training while recommending the confession and the accused.

Moreover, in a radical departure from normal practice, accused Mohammad Afzal was produced before the media where he was made

to 'repeat' his confession, before he actually confessed. A report analysing the Special POTA Court judgement in the Parliament Attack case describes the sequence, pointing out the anomalies both in the procedure and the manner in which the judgement considered the evidence:

> On 18th December, the DCP, Ashok Chand, told the media that Afzal had *confessed*. In his deposition before the court, however, DCP Ashok Chand 'forgot' that he had 'told media especially NDTV that Afzal had already confessed'. On 20th December, a press conference was held at the Special Cell where the accused were presented to the media. The ACP, Rajbir Singh claims that he took the permission of the DCP, Ashok Chand, to hold the press conference. In his court deposition, however, the DCP denied having been informed of such a press conference prior to its being held and even denied having any knowledge of such a conference having been held on 20th or any other date when the accused Afzal was produced before the media. It may be recalled that during the Press Conference, Afzal spoke of Gilani's innocence, and was immediately warned by ACP Rajbir Singh not to talk about Gilani. Two mediapersons testified in court that they were asked by ACP Rajbir Singh to delete all references to this exchange. The official recording of confessions took place only on the 21st, before the DCP of the Special cell, Ashok Chand, where both Afzal and Shaukat 'incriminated' themselves and also 'implicated' Gilani in the conspiracy.
>
> Apart from the fact that the confessions were officially recorded after a press conference, the confession is remarkable for other reasons as well, and none of these lends it credibility. The DCP deposed in the court that the confessions were recorded by him and that the 'accused kept on narrating and telling and I kept on writing, whatever was told and narrated'. On a careful reading of the statements and the time in which it is supposed to have been recorded, it is amazing that the statement has no corrections, deletions or overwriting. This not only speaks for the phenomenal speed of the DCP but also the extraordinary tranquility of mind and coherence of thoughts of the accused who were confessing ostensibly out of remorse and had also been told by this time that their confession would confirm their guilt. Significantly the two accused, Shaukat and Afzal were apparently confessing in impeccable English.[28]

In the judgement, however, the confessional statements are seen as valid and recorded in an atmosphere free from fear and coercion. While the dispute regarding speed of recording and its 'flawlessness' is set aside as a matter of individual skill, Afzal's retraction from the confessional statement is dismissed as of 'no value', having come 'after about four months' (Judgement: 250). Similarly, Shaukat's statement of 19 January 2002

denying having made any confession, and then again on 3 June 2002, after going through the chargesheet, is dismissed by the judge while enumerating the case against him (Judgement: 266–7). Moreover, as the report points out:

> Strangely enough, while the judge regards (on page 174) the confessional statements as 'admissible under law', he seems to be selective while using it as evidence against the accused. Thus he accepts some parts of the confession recorded by Shaukat and Afzal and not others, but without considering that this casts doubt on the authenticity of the confession as a whole. For instance on p. 234, while enumerating the evidences against Gilani, the Judge says that Gilani made a call to Shaukat past midnight on 12/13 December at 0.40 am. At this time according to the prosecution's story the final preparations were being made (in the house at Gandhi Vihar) and Gilani's call supposedly made to get an update, has been used as evidence of his involvement in the conspiracy when the final preparations were being made. However, if the confessions are to be believed then according to the confession made by both Shaukat and Afzal, Gilani was present with them at Gandhi Vihar at this time! According to Shaukat's confession, 'On 12.12.01 night, I along with Afzal and Gilani met Mohammad and other Pak militants at their Gandhi Vihar hideout....Myself, Afzal and Gilani then left the Gandhi Vihar hideout on 13.12.01 at about 11.20 am.' Afzal also claims in his confession that Gilani was present along with him and Shaukat at Gandhi Vihar in the night of 12.12.01 and that Shaukat and he (Afzal) before leaving for Srinagar visited Gilani to offer him his share of the booty. The judge obviously does not accept this portion of the confession.[29]

After their conviction by the Special POTA Court, the accused in the Parliament Attack case went on appeal to the High Court, which gave its verdict on 29 October 2003. The High Court upheld the death sentence on Mohammad Afzal and Shaukat Hussain and enhanced their punishment under Section 121 of IPC. Noting that confessions made to police against co-accused, in the absence of any other evidence are not valid under POTA, the Judges exonerated Gilani and Afsan Guru (Judgement: 350). Yet, the court accepted the confessions made by Afzal and Shaukat, using the fact that Gilani refused to confess against the claims by Afzal and Shaukat that their confessions were not voluntary. Moreover, the Judges held that the discrepancies in the confessions did not vitiate the confessions in toto. The judges also noted that when the confessions were recorded by the DCP, 'there is nothing on record that the atmosphere was not free from threat or inducement'.[30]

Dissenting Notes

It is important to point out, however, that the dissenting judgement in the Devender Pal Singh case refused to consider the confession valid solely on its merits as an act of morality. The note of dissent focussed on restoring the legal and procedural norms that the majority judgement had edged out as mere 'irregulartities here and there' irrelevant to the evidentiary value of a confession. Before relying solely upon the confessional statement, emphasised the dissenting judge, 'the court has to find out whether it is made voluntarily and truthfully by the accused. Even if it is made voluntarily, the court has to decide whether it is made truthfully or not (Judgement in Devender Pal Singh: 981). While adherence to procedural norms was important to ensure the voluntariness of a confession, its truthfulness had to be ascertained through 'some reliable independent corroborative evidence'.

In this case, however, when the rest of the accused named in the confessional statement were neither convicted nor tried, 'such type of confessional statement as recorded by the investigating officer could not be the basis for awarding death sentence' (Judgement: 980). Apart from the manner in which the confession was garnered, and the fact that the investigating and prosecuting agency did not furnish corroborative evidence, the lapse on the part of the court lay in not ascertaining the voluntariness and truthfulness of the confession, in not asking for corroborative evidence, and lastly, taking the confessional statement solely as an admission of guilt, and not as illustrative of the circumstances of the event: 'let us consider the confessional statement as it is. In the present case the other accused D.S. Lahoria was tried along with the appellant and was acquitted. The role assigned to D.S. Lahoria in the confessional statement was a major one' (Judgement: 996).

The dissenting judgements by Justice K. Ramaswamy and R.M. Sahai, two out of the five judges in *Kartar Singh vs. State of Punjab* which lay down the guidelines for procedural safeguards, may be recalled here. Starting from the premise that 'one of the established rules or norms established everywhere is that custodial confession is presumed to be tainted', the judges sought to emphasise that both consistency with constitutional provisions and procedural logic, were important considerations. Apart from the fact that custodial confession was never out of the bounds of

suspicion, the paradox that lay in allowing confessions to police officers was more than evident to the Judges:

> An offence under TADA Act is considered to be more serious as compared to the one under Indian Penal Code or any other Act. Normally graver the offence more strict the procedural interpretation. But here it is just otherwise. What is inadmissible for a murder under Section 302 is admissible even against a person who abets or is possessed of arms under Section 5 of the Act (Judgement: paras 454 and 455).

Both the judges cast doubts on the evidentiary value of confessions under TADA referring to what they called 'the veil of expediency', which enveloped all officers. As heads of the District Police Administration responsible for maintaining law and order, they were expected 'to be keen on cracking down on crime and would take all tough steps to put down the crime and create terror in the hearts of the criminals':

> The 'veil of expediency' to try the cases by the persons acquainted with the facts and to track the problems posed or to strike down the crime or suppression thereof cannot be regarded as a valid ground to give primacy to the arbitrary or irrational or ultra vires action taken by the Government in appointing police officers as Special Executive Magistrates, nor is the right of revision against his decisions a solace (Judgement: para 399).

The judges felt that inadmissibility attached itself to a confession recorded by a police officer 'not because of him but because of uncertainty if the accused was not made a witness against himself by forcing out something which he would not have otherwise stated'. Emphasising therefore the importance of *the source* and the *removal of suspicion* from the mind of both the suspect and the objective assessor that built-in procedural safeguards have been 'scrupulously adhered to in recording the confession, the judges found it 'obnoxious' that such a power was conferred on police officers:

> It is therefore, obnoxious to confer power on police officer to record confession under Section 15(1). If he is entrusted with the solemn power to record a confession, the appearance of objectivity in the discharge of the statutory duty would be seemingly suspect and inspire no public confidence. *If the exercise of the power is allowed to be done once, may be conferred with judicial powers in*

> *a lesser crisis and be normalised in grave crisis, such an erosion is anathema to the rule of law, spirit of judicial review and a clear negation of Article 50 of the Constitution .... It is, therefore, unfair, unjust and unconscionable, offending Articles 14 and 21 of the Constitution (Judgement: paras 406 emphasis added).*

Questioning the principles of 'legislative wisdom' and 'legislative competence' that was so central to the majority judgement justifying the provision, the dissenting judges pointed out that 'the mere fact that the Legislature was competent to make law, as the offence under TADA Act is one which did not fall in any State entry' did not also mean that 'the Legislature was empowered to curtail or erode a person of his fundamental rights'. The implication obviously was that the scope of legislative competence is determined by the limits put by the constitution itself:

> Making a provision that has the effect of forcing a person to admit his guilt amounts to denial of liberty. The class of offences dealt by TADA Act may be different than any other offences but the offender under TADA Act is as much entitled to protection of Articles 20 and 21 as any other. The difference in nature of offence or the legislative competence to enact a law did not affect the fundamental rights guaranteed by Chapter III. Section 15 cannot be held to be valid merely because it is as a result of law made by a body which had been found entitled to make the law. The law must still be fair and just. A law which entitles a police officer to record confession and makes it admissible is thus violative of both Articles 20(3) and 21 of the Constitution. Thus the conclusion is that Section 15 is violative of Articles 20 and 21 of the constitution and therefore is liable to be struck down (Judgement: paras 456 and 460)

The judges moreover, pointed out that the procedures envisaged in Article 21, lay down in fact the 'manner and method of discovering the truth'. Further, 'the constitutional human rights perspectives, the history of working of the relevant provisions in the Evidence Act and the wisdom behind Section 164 of the Code', cumulatively 'ignited inherent invalidity of subsection (1) of Section 15 and the court could little afford to turn Nelson's blind eye to the above scenario'. They also rejected the majority judgement's banking on Section 114 III(e) of the Evidence Act that 'official acts are done according to law and put the seal that subsection (1) of Section 15 of the Act passes off the test of fair procedure and is constitutionally valid' (paras 406 and 399). It may be recalled that

the majority decision in Devender Pal Singh Singh case also gave legitimacy to police action on similar grounds.

The judgement of the Supreme Court in the Parliament Attack case, delivered on 4 August 2005, in the appeals made against the High Court judgement, may also be taken up in this section on dissenting notes, since the judgement distances itself from the position on confessions articulated in Supreme Court judgements in TADA cases (*State vs. Nalini* and *Jameel Ahmed & anr. vs. State of Rajasthan*) as also the judgement of the Special POTA Court which had sentenced three of the four accused Afzal, Shaukat and Gilani to death and the fourth, Navjot Kaur alias Afsan Guru to five years rigorous imprisonment, and the High Court judgement in the same case which had, as mentioned earlier, exonerated Gilani and Afsan Guru, while sustaining the death sentences of Afzal and Shaukat. The contested issues were whether a confessional statement could be used against a co-accused, and if at all confessional statements made to the police were reliable as evidence.

In the TADA case *State vs. Nalini*, while examining the admissibility of confession as evidence under Section 15 of TADA in the trial of the person who made the confession as well as against the co-accused/abettor/conspirator, Justices Wadhwa and Quadri held that the confession of an accused serves as a substantive evidence against himself as well as against the co-accused, abettor or conspirator: 'On the language of subsection (1) of Section 15, a confession of an accused is made admissible evidence as against all those tried jointly with him, so it is implicit that the same can be considered against all those tried together. In this view of the matter also, Section 30 of the Evidence Act need not be invoked for consideration of confession of an accused against a co-accused, abettor or conspirator charged and tried in the same case along with the accused'.[31] On the question of the evidentiary value that was to be attached to it, the judges were of the opinion that it would 'fall within the domain of appreciation of 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'. In a recent Supreme Court decision in the TADA case *Jameel Ahmed & anr. vs. State of Rajasthan* [2003 (9) SCC 673], the Court similarly observed: 'If the confessional statement is properly recorded satisfying the mandatory provisions of Section 15 of TADA Act and the rules

made thereunder and if the same is found by the Court as having been made voluntarily and truthfully then the said confession is sufficient to base conviction of the maker of the confession'. The Judges added, however: 'Whether such confession requires corroboration or not, is a matter for the Court considering such confession on facts of each case' and 'it was for the Court to consider whether such statement can be relied upon solely or with necessary corroboration'. More significant were the following observations of the judges outlined as general principles: (*a*) The provision pertaining to confession was a departure from the provisions of Sections 25 to 30 of the Evidence Act, and 'as a matter of fact, Section 15 of the TADA Act operated independent of the Evidence Act and the Code of Criminal Procedure' and (*b*) The confession duly recorded under Section 15 of TADA Act becomes admissible in evidence by virtue of statutory mandate and if it is proved to be voluntary and truthful in nature there is no reason why such a statement should be treated as a weak piece of evidence requiring corroboration merely because the same is recorded by a police officer.

Justices P. Venkatarama Reddi and P.P. Naolekar's position on confessions as enunciated in their judgement in the Parliament Attack case is significant since they suggest that 'viewing confession in the light of other evidence on record and seeking corroborative support therefrom is only a process of ascertaining the truth of the confession'. Wondering also 'whether a confession recorded by a police officer under the special enactment should have more sanctity and higher degree of acceptability so as to dispense with the normal rule of corroboration and leave it to the discretion of the court whether to insist on corroboration or not, even if it is retracted', they propose that the *better view would be to follow the same rule of prudence as is being followed in the case of confessions under general law*: '…the assurance of the truth of confession is inextricably mixed up with the process of seeking corroboration from the rest of the prosecution evidence. *We have expressed our dissent to this limited extent*. In the normal course, a reference to the larger Bench on this issue would be proper. …Perhaps, the view expressed by us would only pave the way for a fresh look by a larger Bench, should the occasion arise in future'. Moreover, the judgement expresses grave doubts over the veracity of confessions before police officers as evidence, which it may be recalled

is an inversion of the position taken by the Special POTA Court in the same case, as well as the majority decision in Kartar Singh case.

Commenting specifically on the latter, the judges pointed out that the constitutional validity of Section 15 of TADA, was upheld despite a 'weighty dissent' of two judges. In upholding the validity, the Court took into account the legal competence of the legislature to make a law prescribing a different mode of proof, the meaningful purpose and object of the legislation, the gravity and consequences of terrorism and the reluctance of the public in coming forward to give evidence. How far these considerations were relevant in providing for the reception in evidence of the confessional statement recorded by a police officer was, however, not elaborated. Yet, the 'apparent hesitation' of the judges in upholding Section 15(1) was reflected 'in the set of guidelines set out by their Lordships at paragraph 263 to ensure as far as possible that the confession obtained by the police officer is not tainted with any vice and to impart a process of fairness into the exercise of recording the confession':

> The Central Government was bidden to take note of the guidelines and incorporate necessary amendments to the Act. These guidelines, by and large, have become part of Section 32 of POTA to which we have already referred. There was also an exhortation at paragraph 254 to the high-ranking police officers empowered to record the confession that there should be no breach of the accepted norms of recording the confession which should reflect only a true and voluntary statement and there should be no room for hyper criticism that the authority has obtained an invented confession.
>
> … *Another interesting part of the discussion is the manner in which the Court gave its response to the critical comments made by the counsel as to the reprehensible methods adopted to extract the confession*. The learned Judges said with reference to this comment: 'if it is shown to the Court that a confession was extorted by illegal means such as inducement, threat or promise, the confession thus obtained would be irrelevant and cannot be used in a criminal proceeding against the maker'. The Court thus merely emphasized the obvious and added a remark that the Court on several occasions awarded exemplary compensation to the victim at the hands of the police officials.

Perhaps the most significant part of the Supreme Court judgment in the Parliament Attack case, is what follows the above appraisal of the

judgement in Kartar Singh case and its implications for Section 32 of POTA as upheld by the Supreme Court in the People's Union for Civil Liberties case:

> It is perhaps too late in the day to seek reconsideration of the view taken by the majority of the Judges in the Constitution Bench. But as we see Section 32, a formidable doubt lingers in our minds despite the pronouncement in Kartar Singh's case. That pertains to the rationale and reason behind the drastic provision, making the confession to police officer admissible in evidence in a trial for POTA offences. Many questions do arise and we are unable to find satisfactory or even plausible answers to them. If a person volunteers to make a confession, why should he be not produced before the Judicial Magistrate at the earliest and have the confession recorded by a Magistrate? The Magistrate could be reached within the same time within which the empowered police officer could be approached. The doubt becomes more puzzling when we notice that in practical terms, a greater degree of credibility is attached to a confession made before the judicial officer. Then, why should not the Investigating Officer adopt the straightforward course of having resort to the ordinary and age-old law? If there is any specific advantage of conferring power on a police officer to record the confession receivable in evidence, if the intendment and desideratum of the provision indisputably remains to be to ensure an atmosphere free from threats and psychological pressures? Why the circuitous provision of having confession recorded by the police officer of the rank of S.P. (even if he be the immediate superior of the I.O. who oversees the investigation) and then requiring the production of the accused before the Chief Metropolitan or Judicial Magistrate within 48 hours? We can understand if the accused is in a remote area with no easy means of communications and the Magistrate is not easily accessible. Otherwise, is there real expediency or good reason for allowing an option to the I.O. to have the confession recorded either by the superior police officer or a Judicial Magistrate? We do not think that the comparative ease with which the confession could be extracted from the accused could be pleaded as justification. If it is so, should the end justify the means? Should the police officer be better trusted than a Magistrate? Does the magnitude and severity of the offence justify the entrustment of the job of recording confession to a police officer? Does it imply that it is easier to make an accused confess the guilt before a police officer so that it could pave the way for conviction in a serious offence? We find no direct answer to these questions either in Kartar Singh's case or the latest case of People's Union for Civil Liberties vs. Union of India [2004 (9) SCC 580]. The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law, as said by the eminent American jurist Schaefer. We may recall as well the apt remarks of Krishna Iyer, J. in Nandini Satpathy vs. P.L. Dani [(1978) 2 SCC 424]:

'The first obligation of the criminal justice system is to secure justice by seeking and substantiating truth through proof. Of course, the means must be as good as the ends and the dignity of the individual and the freedom of the human person cannot be sacrificed by resorting to improper means, however worthy the ends. Therefore, "third degree" has to be outlawed and indeed has been. We have to draw up clear lines between the whirlpool and the rock where the safety of society and the worth of the human person may co-exist in peace.'

…In People's Union for Civil Liberties case, a two Judge Bench of this Court upheld the constitutional validity of Section 32 following the pronouncement in Kartar Singh's case. The learned Judges particularly noted the 'additional safeguards' envisaged by subsections (4) and (5) of Section 32. *The court referred to the contention that there was really no need to empower the police officer to record the confession since the accused has to be in any case produced before the Magistrate and in that case the Magistrate himself could record the confession. This argument was not dealt with by their Lordships.* However, we refrain from saying anything contrary to the legal position settled by Kartar Singh and People's Union for Civil Liberties. We do no more than expressing certain doubts and let the matter rest there. It has been pointed out to us that even in advanced countries like UK and USA, where individual liberty is given primacy, there is no legal taboo against the reception of confessional statement made to police in evidence. We do not think that it is apt to compare the position obtaining in those countries to that in India. The ground realities cannot be ignored. It is an undeniable fact that the police in our country still resort to crude methods of investigation, especially in mofussil and rural areas and they suffer many handicaps, such as lack of adequate personnel, training, equipment and professional independence. These features, by and large, are not so rampant in those advanced countries. Considered from the standpoint of scientific investigation, intensity of training and measure of objectivity, the standards and approaches of police personnel are much different in those countries. *The evils which the framers of the Indian Evidence Act had in mind to exclude confessions to the police, are still prevalent though not in the same degree. …Even many amongst the public tacitly endorse the use of violence by police against the criminals. In this scenario, we have serious doubts whether it would be safe to concede the power of recording confessions to the police officers to be used in evidence against the accused making the confession and the co-accused.*

…The Law Commission of India in its 185th Report on review of the Indian Evidence Act has expressed strong views disfavouring the admission of confessions made to police officers. The Commission commented that the basis for introducing Sections 25 and 26 in the Evidence Act in 1872 holds good even today. The Commission observed: 'we are compelled to say that confessions made easy, cannot replace the need for scientific and

> professional investigation'. Thus the prosecution has to prove beyond reasonable doubt that the confession was made voluntarily and was reliable.[32]

Following from the above, in their judgement, the judges set aside the confessional statements made by Afzal and Shaukat for not following procedural safeguards which made their truthfulness suspect. Thus while sentencing Afzal under Section 120B read with Section 302 IPC, Section 3(3) of POTA for conspiracy to commit terrorist acts, the judges set aside the conviction under Section 3(2) stating that 'there was no evidence that he was a member of a terrorist gang or a terrorist organisation, once the confessional statement is excluded. Incidentally, we may mention that even going by confessional statement, it is doubtful whether the membership of a terrorist gang or organisation is established'. While on the point of the truthfulness of the confession in the case of Shaukat, the judges pointed out:

> …there is one additional point which deserves serious notice. According to his version in the confession statement, his wife Afsan Guru (A4) was also having knowledge of their plans. Is it really believable that he would go to the extent of implicating his pregnant wife in the crime. It casts a serious doubt whether some embellishments were made in the confessional statement. We are not inclined to express a final opinion on this point as we are in any way excluding the confession from consideration on the ground of violation of procedural safeguards and the utterly inadequate time given by PW 60 for reflection.[33]

Judicial responses to questions challenging the constitutional validity of anti-terror laws have almost always been confirmatory of extraordinary laws, and affirmative of 'legislative competence'. Supreme Court decisions upholding the constitutional validity of POTA and TADA attribute legality to the various procedural exceptions these laws prescribed. Yet, there are layers within the judgements and the other judgements that followed, for example, in the Parliament Attack case, the dissenting judgements in the Kartar Singh case and Devender Pal Singh case, where spaces of substantive liberty are sought to be carved out by the Supreme Court. While the dissenting notes raised issues that countered the majority position, the judgement in the Parliament Attack case used these dissenting notes as resources to roll back the decisions of the High Court and the Special POTA court.

Banning of Organisations

Banning of organisations is generally construed as a truncation of activities of a specific group. If one reads banning in the context of associational freedom and freedom of expression guaranteed by the Constitution, it may be assumed that for a ban to be commensurate with democracy, the activities of a banned group should be detrimental to public peace, order and morality. Thus the process of banning of an organisation should comprise furnishing of evidence justifying the ban, and the provision to the banned organisation of judicial redressal, or scope to question the ban. It must be pointed out that while there may be groups whose activities constrict the ideological spaces of freedom and emancipation, the process of banning, primarily because banning is inherently undemocratic, must have safeguards against arbitrariness. There must be therefore, specific and objective criteria for banning of organisations, as specified by the Supreme Court that the criterion of subjective satisfaction, applicable in the case of preventive detention, cannot be extended to negate associational freedom.[34]

Before POTO/POTA (Chapter III Sections 18 to 22) introduced the banning of terrorist groups, a procedure for banning unlawful organisations already existed under the Unlawful Activities Prevention Act, 1967 (UAPA), amended by the Unlawful Activities Prevention Act 2004. Under the UAPA, the identification of an 'unlawful organisation' required a notification in the Official Gazette by the Central government, and the notification had to be normally accompanied by grounds for banning and its confirmation, along with 'conspicuous and adequate publicity'. POTO/POTA, however, changed the manner in which an organisation banned under the UAPA could now be treated in law. POTA brought in a process of banning which no longer required a statement to explain the reasons of issuing a ban, a Gazette notification merely adding an entry to the Schedule of the Act was sufficient. Unlike the UAPA, there was no provision for judicial redressal. While the period of proscription under the UAPA was two years (Section 6), POTO/POTA provided no such period after which the ban would cease to be effective. Moreover, Sections 20, 21, 22 relating to membership, support and fund-raising, while aiming at curbing terrorist activities, broadened the scope of the definition of terrorist activities to include membership, support and financial assistance. This broadening of scope injected vagueness into

the definition, allowing for a much wider use of the law. Subsection 2 of Sec. 21, for example, put down that 'a person commits an offence if he arranges, manages or assists in arranging or managing a meeting' in which the speaker is a member of a banned organisation, was guilty of supporting terrorist activities, punishable by a sentence of up to ten years. As stated earlier, a meeting under the Act meant 'three or more persons whether or not the public are admitted', opening up immense possibility of arbitrary use.

A perusal of the list of banned organisations in the Schedule shows that the reasons of banning an organisation were primarily political. Immediately after the promulgation of POTO on 24 October 2001, the government announced a list of twenty-three banned organisations, including for the first time groups from Jammu and Kashmir.[35] Ten of the twenty-three groups were from the North-East,[36] and the remaining—the Liberation Tigers of Tamil Eelam (LTTE), the Students Islamic Movement of India (SIMI), the Deendar Anjuman, the Babbar Khalsa International, the Khalistan Commando Force, the Khalistan Zindabad Force, and the International Sikh Youth Foundation. On 5 December 2001, the Communist Party of India (Marxist-Leninist)—People's War and Maoist Communist Centre (MCC) along with all their 'Formations and Front Organisations' were added to the list. Several other organisations were added later and by 21 July 2002, the number of banned organisations had reached thirty-two.[37] Several of these banned organisations are associated with political movements that have challenged dominant power configurations.

Moreover, the ban on SIMI, an Islamic communal organisation, when its corresponding organisations of the Hindu Right, were given a long leash by the Government, despite their role in Ayodhya and Gujarat, shows selective application. SIMI was banned under the UAPA 1967, on 27 September 2001 in the context of their support for Osama Bin Laden against the United States in the latter's war against terror following the 9/11 attacks. While banning the group, the Central government accused it of 'working for an international Islamic order, supporting militancy in Punjab, Kashmir and elsewhere … and engineering communal riots'. The immediate provocation for the ban according to Home Ministry officials came when SIMI chief Shahid Badr speaking in

Bahraich in Uttar Pradesh called Laden the 'champion and true saviour of Islam', and condemned India for supporting the United States. Shahid Badr was charged with sedition and inciting communal hatred in Uttar Pradesh. The statement from the Home Ministry read, 'SIMI is opposed to secularism, democracy and nationalism and is working for an international Islamic order. It supports secessionism and advocates violence…the ideas were clearly manifested in the speeches of its leaders…It has been found to be involved in communal violence and disruptive activities'.[38] Officials, however, were hard pressed to show that the ban had been in the offing for quite some time, and that several non-BJP states including Madhya Pradesh and Maharashtra had also sought the ban.[39]

The notification banning SIMI for two years declared it an 'unlawful association' under Section 3(1) of the UAPA 1967. Under Section 4 of the Act, the Central government was obliged, within thirty days of the publication of the notification, to refer it to the Tribunal for the purpose of adjudicating whether or not there was sufficient cause for declaring the organisation unlawful. In the course of this process, the SIMI would have also got a chance to appear before the Tribunal, which could either confirm or reject the ban within six months. While stating that they had made a 'thorough study of SIMI's activities' and had 'prepared their case accordingly', the Home Secretary claimed that 'Bin Laden is just one individual; SIMI's links go much beyond that'.[40] A spate of arrests in ten states followed the ban. Within a day of the ban, 240 SIMI activists were arrested in several states, including 90 in Uttar Pradesh, 45 in Maharashtra, 35 in West Bangal, 4 each in Delhi and Kerala, and several in Tamil Nadu and Rajasthan.[41] Uttar Pradesh, the nerve centre of SIMI's activities saw violent protests, and police firings in which three persons were killed.[42] Significantly, the ban stirred up mixed responses. The Madhya Pradesh Chief Minsiter Digvijay Singh, welcomed the ban but also added that a 'simultaneous ban should also have been imposed on Hindu fundamentalist organisations like the Bajrang Dal and Durga Vahini for vitiating the communal harmony in the country'.[43] Mulayam Singh Yadav, the Samajawadi Party leader in the Opposition in Uttar Pradesh charged the government of having abandoned 'even the pretence of secular neutrality' and demanded similar bans for the VHP, Bajrang Dal and Shiv Sena.[44] Farooq Abdullah, the Chief Minister

of Jammu and Kashmir regretted that the Centre had not taken the Opposition into confidence on the matter, and that the report and evidence the centre had, should have been put before them.[45] The Hurriyat Conference leader termed the ban as a 'ban on Islam', and its sole purpose as 'targeting Islam'.[46]

Even as the debate continued and the proceedings had been set in motion amidst appeals by civil rights groups to make reasons for the ban public, the inclusion of SIMI in the group of twenty-three groups banned under POTO, abruptly truncated the judicial proceedings. Not only did the announcement take the ban outside the scope of judicial redressal or any effective review mechanism within a prescribed time frame, it also deprived both the banned group and the people at large the right to know the reasons for the ban. The government was, however, spared the rigours of an examination by the Tribunal and could also continue to keep those already arrested under the ban on SIMI under prolonged detention.

Another illustration of how political imperatives determined the imposition of a ban and the manner in which POTO facilitated such a measure, was evident in the case of the Akhil Bharatiya Nepali Ekta Samaj (ABNES), a Nepali migrants welfare organisation. The banning of ABNES which had no history of 'criminal', 'violent' and 'terrorist activities' on Indian soil followed the visit of the Nepali Prime Minister, who asked for curbs on the activities of ABNES, and presented a list of persons that the Nepal government 'wanted'. The timing of the ban on ABNES coincided with the visit of King Gyanendra of Nepal in June 2002. The visit aimed at seeking New Delhi's help in snuffing out the Maoist resistance from Nepal, who had been struggling to establish a democratic republic in Nepal for several years. It may be pointed out that a similar visit by King Gyanendra to China elicited no more than a friendly endorsement of the 'efforts of the government and the king of Nepal to maintain domestic stability'. King Gyanendra's visit to New Delhi was preceded by that of Prime Minister Sher Bahadur Deuba, who asked for curbs on the activities of ABNES which had a strong following among about eight million people of Nepali origin living in India. Purportedly, a list of persons that the Nepali government wanted back was also presented to the Indian government. The Indian government responded by adding ABNES to the list of terrorist organisations

banned under POTA shortly after the King's visit. The banning of ABNES was accompanied by a series of detentions and deportations of Nepali students and journalists.[47]

The banning of ABNES under POTA allowed the Indian government to declare these persons 'undesirable aliens' and deport them to Nepal. It may be pointed out that the deportation of these persons was against international human rights norms since the lives of these deportees were in danger under the undemocratic regime in Nepal. Moreover, through this apparently unilateral action, which the government claimed to have taken in the exercise of its sovereign authority, it circumvented the provision in the Extradition Treaty with Nepal, in which it reserved the right not to facilitate the return to Nepal of persons who were likely to face political prosecution there.

Section 19 of POTA provided for a procedure of denotification of terrorist organisations. An application for denotification under Section 19(1) could be made to the Central government. Since a banned organisation was not provided the initial reason for the ban, the applicant for denotification was placed at a disadvantage. Moreover, in its response to the application for denotification, the Central government was not required to give reasons for any refusal, and merely state that 'the government is not inclined to use its powers under Section 19(1) to denotify'. The applicant could within a month of refusal to denotify, approach the Review Committee under Section 19(2) of the Act. The unfolding of the process of denotification, as discussed below in the case of ABNES, reveals their ambiguity and inadequacy. Since the Act did not initially specify the creation of any permanent Review Committee, for a long time after the Act came into force, the applicants lacked an authority to apply to. Moreover, the Act did not mention the time limit within which the Review Committee was expected to examine the application.

ABNES was banned under Section 18(2)(a) of POTA on 1 July 2002, and added in the Schedule at serial number 32. On 21 August 2002 ABNES moved an application before the Central Government under Section 19(1) and (2) and clause 3 and 4 of the Making of Application for Removal of Organisation from the Schedule Rules 2001 for its removal from the Schedule. On 7 October 2002, the Central government denied the prayer without giving reasons. On 12 December 2002, ABNES filed an application for review before the Review Committee

against the Order, which was the next permissible step under the provisions of the Act. Since there was no Review Committee in existence, the petition was sent to the Secretary, Ministry of Home Affairs, so that a Review Committee could be constituted and the application placed before it. The organisation did not receive any acknowledgement of its petition.

In the meantime, pressured by the opposition and NDA allies, in particular DMK and MDMK over the manner in which POTA was being applied in Tamil Nadu, the Deputy Prime Minister L.K. Advani, announced the setting up of a Review Committee on 13 March 2003 under the provisions of Section 60 of POTA. Subsequent to the setting up of the Review Committee, ABNES through its advocates submitted a reminder to the Central government on 5 February 2003, and received no response. On 12 February, the People's Union for Democratic Rights (PUDR) submitted an application to the Review Committee furnishing it with the details of ABNES's application, urging the Committee to consider and expedite the matter. The Secretary of the Committee, himself a Sessions Judge, seemed to be in a quandary over the application, stating that the application did not fall under the purview of the Committee since it could take up only cases of individuals arrested under POTA.[48]

The Review Procedure

Ever since POTO and later, POTA, came into force, the list of persons detained and charged under it grew steadily. Civil liberties and democratic rights institutions/activists pointed out that POTA like all extraordinary laws is inherently undemocratic and abuse/misuse is built into its provisions. NDA ministers, on the other hand, without finding fault with the Act itself, on various occasions sifted among cases to identify 'appropriate' POTA cases and cases exemplifying 'misuse'. Notably, two prominent arrests—of MDMK (*Marumalarchi Dravida Munnetra Kazhagam*) leader and member of Parliament Vaiko by the AIADMK government in Tamil Nadu, and Raghuraj Pratap Singh alias Raja Bhaiya's arrest by the then Mayawati government in UP—were labelled by various constituents of NDA government as politically motivated and cases epitomising 'misuse' of POTA. Significantly, the courts

sought to seek the appropriateness of both the cases within the framework of legality outlined by POTA itself. Vaiko's appeal for bail was dismissed, and attempts by Mulayam Singh's government to withdraw POTA in Raja Bhaiya's case staggered, with the court asking for reasons that would justify withdrawal.

Agonised by the court's decision to stick to the letter of law, and pressured by the opposition, as well as NDA allies (DMK and MDMK), Deputy Prime Minister L.K. Advani, in a *suo moto* statement in the Lok Sabha announced the setting up of a Review Committee on 13 March 2003, under the provisions of Section 60 of POTA, to check misuse of the Act. While making the announcement, Advani emphasised that the Review Committee would look primarily at the implementation of POTA.[49] The emphasis on implementation was accompanied by a declaration by Union Minister of State for Home, I.D. Swami that the setting up of the Committee was not intended to 'dilute' the effectiveness of the Act.[50] Accordingly, a Central Review Committee was constituted under the Chairmanship of Justice Arun B. Saharya, former Chief Justice of Punjab and Haryana High Court.[51] Subsequently, in the midst of several complaints, some of which came from the Review Committee itself about the lack of cooperation from state governments, an Ordinance was promulgated on 28 October, to amend Section 60 of POTA by inserting three new subsections. While earlier Section 60 had provided for a Review Committee having specific administrative powers of review under Section 19 and Section 46 of POTA, the amendment broadened its review powers by conferring it with the quasi-judicial powers of examining whether there is a *prima-facie* case for proceeding against an accused under POTA. The amendment also sought to give more 'teeth' to the Review Committee by making its decisions binding on the Central and state governments, and by giving the Central Review Committee overriding powers over state review committees.[52] Thus on an application from an 'aggrieved party', the Central and State Review Committees could now decide, whether there existed a *prima facie* case for proceeding against the accused arrested under POTA 'and issue directions accordingly' [Section 60(4)]. This amendment not only made the direction of the Review Committee binding on the Central and state governments and police officers investigating the case [Section 60(5)], it also provided that the direction issued by the Central Review

committee would prevail over any order passed by a State Committee in any case of review relating to the same offence under POTA [Section 60(6)].

Before looking at the new powers of review under the Ordinance, it is important to look back at the experience of TADA, the purposes of review as envisaged by the Law Commission in its recommendations for a new Prevention of Terrorism Bill 2000, and at the powers that the Review Committee already possessed in un-amended POTA.

Learning from the Past: TADA Misuses and Review Process

TADA, which expired in 1995 amidst widespread criticisms of abuse, unlike POTA, did not have a provision for setting up a Review Committee. While looking at the constitutional validity of the Act, in the case *Kartar Singh vs. State of Punjab* (1994), the Constitution Bench of the Supreme Court suggested that a 'higher level of scrutiny and applicability of TADA' should be ensured by setting up a Screening or Review Committee. The Committee consisting of the Home Secretary, Law Secretary and other Secretaries was to review all TADA cases instituted by the Central government, as well as to have a quarterly administrative review, reviewing the application of TADA provisions in the respective states. Similar Screening or Review Committees were suggested at the state level as well.

Several state governments set up Screening Committees. A Committee set up under the chairmanship of the Chief Secretary of Delhi, reviewed prosecutions under TADA. On its recommendation, the Government of Delhi conveyed its approval to the Director of Prosecution, Delhi, for withdrawal of charges under TADA in various pending cases in the Designated Court. The Designated Court, however, dismissed the applications by the Public Prosecutor for withdrawal arguing that a mere administrative decision on the basis of the Review Committee's recommendation was not sufficient ground for withdrawal of criminal prosecution.

Subsequently, a Special Leave Petition (SLP), challenging the orders of the Designated Court, was admitted by the Supreme Court.[53] While holding that the Designated Court was right in deciding that the withdrawal of prosecution could not be a mechanical process, the Supreme Court averred that in the discharge of his statutory function

under Section 321 of CrPC, dealing with withdrawal from prosecution, the Public Prosecutor will have to satisfy himself and thereafter, the Designated Court, of the existence of sufficient grounds for withdrawal of cases from prosecution. At the same time, the Supreme Court also pointed out that that the review mechanism provided by the Supreme Court, in the Kartar Singh case, was intended as a necessary remedial measure. If, therefore, the Review Committee, recommends that resort to provisions of the TADA is unwarranted for any reason which permits withdrawal from prosecution for those offences, a suitable application made under Section 321 of CrPC on that ground has to be considered and decided by the Designated Court. The Court also stressed that since the initial invocation of provisions of TADA is sanctioned by the government, the latter's revised opinion on the basis of the recommendation of the Review Committee, 'should not be lightly disregarded by the Court except for weighty reasons such as malafides or manifest arbitrariness'. The mere existence of *prima facie* material to support the framing of the charge should not by itself be treated as sufficient to refuse permission for withdrawal.

Recommendations of the Law Commission

After the expiry of TADA, the Law Commission was entrusted by the Home Ministry to undertake a fresh examination of the issue of a suitable legislation for combating terrorism and other anti-national activities. The Law Commission subsequently recommended the 'Prevention of Terrorism Bill, 2000', as a 'thoroughly revised' version of the Criminal Law Amendment Bill.[54] During discussions and seminars organised by the Law Commission to help prepare the draft Bill, a strand of argument favoured safeguards in the form of regular screening and reviewing of cases. Justice Verma, who in 1995 admitted the Special Leave Petition (SLP) challenging the Designated Court's rejection of withdrawal applications, argued that the guidelines for safeguards put forth in the Supreme Court's decisions in TADA cases should be kept in mind while drawing up the new legislation. Subsequently, Section 39 of the draft Bill drawn by the Law Commission provided for a Review Committee, with a composition similar to that recommended in Kartar Singh case. The powers of the Review Committee included reviewing cases

instituted by the government under the Act *at the end of each quarter in a year*. The Committee could 'give such directions, as they may think appropriate, with respect to the conduct and continuance of any case or a class of cases, as the case may be'.[55]

Significantly, the *Prevention of Terrorism (First) Ordinance* promulgated in October 2001 while including a provision for the constitution of Review Committee (Section 59 in POTO), *excluded the general power of periodic review, envisaged both in the Supreme Court judgements and the recommendations of the Law Commission*. Moreover, specific powers of review that were included in POTO/POTA, significant for the fate of several POTA cases, were not applied since a Review Committee did not exist for nearly a year and a half since the law came into force.[56]

Powers of the Review Committee under Un-Amended POTA

As discussed earlier, before the Ordinance amending POTA came into force, the Review Committee had the powers to review specific executive decisions taken under the provisions of POTA, namely, (*a*) the declaration of certain organisations as terrorist (Section 18) and (*b*) the interception of communication (Sections 36–48).

Under Section 18 of POTA, the Central government could declare an organisation terrorist. Section 19 provided for a procedure through which an organisation labeled terrorist may be denotified. This procedure involved an application to the Central Government for removal from the Schedule listing terrorist organisations. In case of refusal by the Central government, Section 19(4) provided that the applicant could 'apply for a review' to the Review Committee constituted by the Central Government under subsection (1) of Section 60 within one month from the date of receipt of the order by the applicant. Section 19(5) empowered the Review Committee to allow an application for a review, if it considered that the government's decision to refuse was flawed when placed in the light of the principles applicable on an appeal for judicial review. The Review Committee could then make an order under Section 19(6) and the Central government, as soon as the certified copy of the order is received by it make an order removing the organisation from the list in the Schedule [Section 19(7)].

POTA, we may remember allowed interception of communication to be presented in court as evidence of guilt. Section 38 of POTA

provided that before initiating an interception, an application for its authorisation should be made by a police officer of a specified rank to the Competent Authority. Section 37 provided that the Competent Authority of a specified qualification is to be appointed by the Central or state governments, which can under Section 39 reject the application or issue an order authorising interception. *Section 40 provided that all such orders shall be submitted to the Review Committee* (emphasis added) Section 40(1) provided that the Competent Authority immediately after passing the order under subsection (1) of Section 39, but in any case not later than seven days from the passing of the order, submit a copy of the same to the Review Committee constituted under Section 60 along with all the relevant papers, record and his own findings, in respect of the said order, for consideration and approval of the order by the Review Committee. The Review Committee in its turn within ten days of receipt of the above, could decide whether the order was necessary, reasonable or justified [Section 46(2)]. In case of the Committee's disapproval, the intercepted communication *would not be admissible as evidence in any case* [Section 46(4)].

In several cases, telephonic interception and their interpretation formed a crucial part of evidence. In *Mohd. Afzal vs. State*, commonly referred to as the Parliament attack case, the 'condemning' evidence against one of the three accused, S.A.R. Gilani, sentenced to death by the Special Court, was an intercepted message. This evidence, it may be pointed out, was later adjudged insubstantial and inconclusive by the High Court, which acquitted the accused, of all charges. Incidentally, the interpretation of the intercepted conversation was not the only aspect of the evidence that was disputed in the Special Court by defence lawyers. POTA provided for a specific procedure for the authorisation and protection of intercepted communication. In this case, whether or not the prescribed procedure had been followed was also put under scrutiny.[57] Had there been a Review Committee to regulate the powers of the Competent Authority in matters pertaining to interception of communication, the proceedings in the Special Court may have taken a different course.

Neither of these crucial safeguards could be implemented, primarily because the Central government failed to set up a Review Committee until several months after the Act came into force. Significantly, while

POTA was debated upon during the joint sitting of Parliament, Arun Jaitley, then Law Minister, responding to charges of misuse of the law in Gujarat, referred to the provision for a Review Committee as a safeguard under the Act, assuring that '…the Review Committee in Gujarat will be set up under the Union Law, High Court Judge will be its Chair-man. If the law is misused, the High Court Judge will be the competent authority to stop it.'[58] On the other hand, another safeguard, which de-pended not on the institution of a Review Committee, but solely on political will, was not activated. This safeguard under Section 48 of POTA required that an annual report of interceptions be placed before the Houses of Parliament or the State Legislatures giving a full account of the number of applications for interception and reasons for their ac-ceptance or rejection. Given that interception violates citizen's rights, this safeguard assured public scrutiny and was, therefore, a potential check on government arbitrariness.

The New Powers of Review: Contests and Collisions

Despite Advani's claims to 'special powers' of the Central government under POTA,[59] the working of the Review Committee between March and October 2003, when the Amendment Ordinance was promulgated, saw the Centre and state governments headed on a collision course over exclusive initiative in the matter. The Tamil Nadu government while sending details of arrests under POTA in the state simultaneously questioned the Central Review Committee's jurisdiction to inquire into the arrests.[60] Moreover, in the Vaiko case, pushed for a review by a representation from 301 MPs from various parties remained stuck because the Jayalalitha government did not respond to the various averments made on Vaiko's behalf. The Central Review Committee complained of 'lack of responsiveness' with respect to eighty complaints taken up by it with five state governments so far.[61] Moreover, the State Committees themselves were functioning in disparate ways. In Jharkhand, for example, Additional DGP J. Mahapatra conducted a review of POTA cases. After a month-long review of POTA cases, he decided to withdraw cases against eighty-three persons because evidence against them was thin.[62] There was furthermore, no time limit specified for review, and

the possibility of collision between the Centre and the State Committees examining cases had remained.

The Ordinance itself came amidst pressures from MDMK and DMK, allies of the BJP in NDA, who had supported POTA in Parliament, and had since moved to a position demanding its repeal, rather than settle for 'half-measures'.[63] The new Ordinance, while ostensibly aiming at breaking the emergent deadlock in the functioning of the Review Committee, seemed, however, to have bypassed it, envisaging a stage that was nowhere in sight.[64] Justice Saharya pointed out that the power envisaged for the Review Committee could come into play only later: 'I am involved in collection, scrutiny and evaluation of facts about POTA detenus right now. The Ordinance does not come into play here'.[65] Moreover, there were other areas that made the powers of the Review Committee irresolute. Those pertained especially to the relative powers of the Review Committee and Special POTA courts, especially in cases where trial under POTA was already underway. This area of uncertainty came into play in the Vaiko case, where with the filing of chargesheet in January 2003, the Special POTA court had already come in picture. While the Central Review Committee had so far received no response from the Tamil Nadu government, armed with new powers under the Ordinance, the Committee for the first time issued notices to the Tamil Nadu government to show cause whether the incarceration of MDMK leader Vaiko and journalist R.R. Gopal under POTA was 'fit and proper'.[66]

In the meantime, the shifting of positions on POTA by NDA's allies, proved critical for harnessing support for the Act. Moreover, the unfolding of POTO/POTA, including the manoeuvrings pertaining to institutions of a Review Committee showed that the central question was not the misuse or political use of the Act by a particular party. The law was replete with provisions that made it inevitable that the Act would operate in a manner that furthered the interests of the politically dominant. The fact that the frameworks of debate on POTA in the context of the institution of the Review Committee focused exclusively on its administrative functions and issues of political use/misuse, deflected from the other more significant functions of review that the Committee could actually perform. For the better part of the two years

that POTA had been on statute books, the Review Committee had not been in existence. When instituted, its functioning itself became deeply entangled in a political mesh, as will be illustrated in the next chapter.

The domain of state sovereignty is often hedged in with the question of legitimacy. The idea of legal exceptionalism and by implication, the idea of a prior rule of law and closely related to it, the specific relationship between state power and legal authority raise significant issues of legitimacy. The 'rationale of supreme necessity not covered by regular law' is sought as a justification of legal exceptionalism, simultaneously reinforcing and dependent upon notions of state sovereignty. This relationship informs the jurisprudence of emergency and unfolds in contentious ways, wavering between affirmation of state actions by courts, and on the other hand, manifesting a domain of potential conflict over what the state perceives as necessary power, and what the law actually makes available. Ironically, it is through the former—a relationship of affirmation—that law manifests its ultimate capacity to maintain itself 'in relation to an exteriority', that is, 'by including something solely through its exclusion'. Ultimately, it is in the context of the jurisprudence of emergency that conditions of affirmation obtain, and far from being extraneous to rule of law, suspension of liberty becomes part of it. An emergency would thus not only be part of the rule of law, but the exceptional procedures that it brings with it, may in general work towards the legitimation of state power. This process of legitimation is, however, fraught with contestations that make themselves manifest in different forms and affect the character and the relationship between the different state structures in different ways.

Anti-terror laws like POTA and TADA are reflective of a politics that seeks to institutionalise exceptions in law, and free itself of the constraints of due process, burden of proof and free and reasoned assessment of possible alternatives. Central to extraordinary laws, as discussed earlier, is the notion of 'extraordinary', since they seek to identify situations, which are not ordinary or 'normal', but 'emergent' and 'temporal'. A set of inter-related concepts and processes immediately get imbricated in this formulation, primarily, the notion of a sovereign authority, the

manner in which the exceptional is legally and procedurally determined, and the ideas of 'national-security', 'emergency', and the 'political' which inform the discursive contours of the exception. A reasonable understanding of the exception would see it as comprising an unforeseen and sudden situation requiring immediate action. This assumes two things, first, the presence of an authority that decides on the existence of an exceptional situation, and second, the notion of a 'normal' situation, existing as a counter correlate of the 'emergent'.

Significantly, judicial responses to questions challenging the constitutional validity of anti-terror laws have more often than not been confirmatory of extraordinary laws. They have in the process affirmed the authority of the executive to decide on the existence of an extraordinary condition and frame specific policies including legal measures commensurate with the situation. While upholding the constitutional validity of anti-terror laws, the Supreme Court has not only endorsed extraordinary procedures on the 'rationale of supreme necessity not covered by regular law', it has also accepted and upheld the executive's delineation of 'necessity' for example, public order, national security, waging war against the state, conspiracy against the state, terrorism etc. It is significant that while affirming the constitutional validity of extraordinary laws, as in *PUCL vs. Union of India*, deciding on the constitutional validity of POTA, the Supreme Court has invariably focussed on the question of 'legislative competence', while choosing not to interrogate the 'need' for such a law on the ground that it was a 'policy matter' and hence not subject to judicial review. In the process, the Supreme Court has expanded the legislative authority of the executive, giving it the overreach by means of which, it transcends the contest over, as expressed earlier, what the state perceives as necessary power, and what the law actually makes available.

The Supreme Court decisions upholding the constitutional validity of POTA and TADA may be seen as attributing legality to the various procedural exceptions these laws prescribed. Yet, there are layers within the judgements and the other judgements that followed (for example, the Parliament Attack case, and the Raja Bhaiyya case, which shall be discussed later) where spaces of substantive liberty are sought to be carved out by the Supreme Court. Yet, substantive liberty, which, holds

out the promise of weaving rights into legal formalism, based on the assumption that citizens have moral and political rights, the latter to be enforced by and through the courts, remains inadequately realised. The latter is precisely because the safeguards are sought to be woven into laws founded on principles of procedural exceptionalism. We have seen this tension between procedural safeguards and political goals of anti-terror laws play out specifically with respect to 'bail', 'confession', 'banning of organisations' and 'review procedures'. These tensions, moreover, bring to the fore, issues pertaining to substantive notions of the rule of law, where procedures protect specific rights pertaining to fair trial.

NOTES

1. The expression is borrowed from the title of Oren Gross's article 'Cutting Down Trees: Law-Making Under the Shadow of Great Calamities' in Ronald J. Daniels, Patrick Macklem and Kent Roach (eds), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, 2001. Gross has in turn borrowed it from Robert Bolt's *A Man for All Seasons*, 66 (Vintage International edition 1996). The expression basically refers to a scenario where in the rush to deny the Devil the benefit of law, the laws which [like trees] are 'planted thick from coast to coast', are felled down. See Gross in Ronald Daniel et al., 2001, p. 39.
2. For laws other than the IPC, offences under which three years or more punishment is handed down are cognizable offences. See for details, Rakesh Shukla, *Bail not Jail*, 2003.
3. See A.G. Noorani, 'Banality of Repression' *Frontline*, 23 September 1994, p. 12 and South Asia Human Rights Documentation Centre, *Prevention of Terrorism Ordinance 2001: Government Decides to Play Judge and Jury*, New Delhi, November 2001, p. 31.
4. The details have been taken from the judgement in the case *Shaheen Welfare Association vs. Union of India and Others*, pp. 819–22.
5. In a series of judgements between 1978 and 1980, the Supreme Court had already woven the right to speedy trial into the fundamental right to life and liberty enshrined in the Constitution, namely, *Maneka Gandhi vs. Union of India*, AIR 1978 SC 597, *Hussainara Khatoon vs. State of Bihar* AIR 1979 SC 1364 and *Hussainara Khatoon and Others (1) vs. Home Secretary, State of Bihar* (1980) 1 SCC 81.
6. For details of classification see Rakesh Shukla, *Bail Not Jail: A Handbook on Bail*, 2003, pp. 64–65.
7. Supreme Court Judgement dated 16 December 2003 in the Writ petititon No. 389 of 2002 by the People's Union for Civil Liberties brought before judges S. Rajendra Babu and G.P. Mathur. Supreme Court Judgment 2003 (10) SCALE 967.
8. *Sanjay Dutt vs. State through CBI, Bombay (II)*, 1994, 5, SCC 410, paras 43–48.
9. Deposition by Prabhakaran, in Preeti Verma (ed.), *The Terror of POTA and other Security Legislation*, 2004, pp. 33–35.
10. The Fifth Amendment of the Constitution of United States of America, for example, provides that, 'no person shall be held to answer for a capital, or otherwise infamous

crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall be compelled in any criminal case to be a witness against himself nor be deprived of wife, liberty or property, without due process of law...'.

11. Within the Anglo–American tradition, confession must be a product of free will and voluntary choice, elicited without coercion. Yet, the US has about 60% confession rate, confession being the 'golden goose' of the Anglo–American criminal justice system, relieving the prosecutor from the burden of proof, unless the defence lawyer challenges the validity of a confession. In the Continental law tradition, there is a relatively low rate of confessions, with Germany having a 40% confessional rate. The countries have adopted the law of torture which means that only those highly likely of guilt would be tortured, any confession extracted under torture would only be admitted if 'clear as the noonday sun', if unclear 1 witness was needed, if recanted, 2 witnesses needed. It does not, however, relieve the prosecutor from the burden of proof when trying a case with a valid confession. http://faculty.ncwc.edu/toconnor/410/410lec.12.htm.
12. The voluntariness test, also called the free and voluntary rule, is a two-pronged test, and much like a totality of circumstances test involves subjective and objective factors, namely, (*a*) The susceptibility deriving from the background of the suspect—intelligence, education, prior experience with system, physical condition, mental condition, coping skills (*b*) Environment and method used: location of the setting, length of the questioning, intensity of the questioning, frequency, food and sleep deprivation, intimidating presence of officers. *ibid*.
13. Malise Ruthven, while tracing the history of torture during the British period refers to the report of the commission of inquiry set up in 1854 by the Governor of Madras to enquire into complaints that torture was widespread in his Presidency. Perhaps it was the fallout of this report that led to the statutory exclusion of confessions made to a police officer as evidence in the trial of criminal cases. Statements made while in police custody to any other person were also excluded if there was no magistrate present. These exclusionary provisions set out in Sections 25 and 26 of the Indian Evidence Act have been on the statute books for over a century Malise Ruthven, *Torture: The Grand Conspiracy*, 1978, cited in K.G. Kannabiran, *Wages of Impunity*, 2004, pp. 108.
14. A number of decisions by the Supreme Court have examined Article 20(3), namely, *M.P. Sharma vs. Satish Chandra, District Magistrate*, Delhi (1954 SCR 1077: AIR 1954 SC 300: 1954 Cri LJ 865); *Raja Narayanlal Bansilal vs. Maneck Phiroz Mistry* (1961 1 SCR 417: AIR 1961 SC 29: 1960 30 Comp Cas 644); *State of Bombay vs. Kathi Kalu Oghad* (1962 3SCR 10: AIR 1961 SC 180: 1961 2 Cri LJ 856); *Nandini Satpathy vs. P.L. Dani* (1978 2SCC 424: 1978 SCC Cri 236).
15. *Kartar Singh vs. State of Punjab* writ petition No. 1833 of 1984 (decided on 11 March 1994)—SCC 569, 1994, pp. 569–791.
16. *Section 15 of TADA as amended by Act 43 of 1993 reads as follows:*
'*Certain confessions made to police officers to be taken into consideration*—(1) notwithstanding anything contained in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall

be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under this Act or rules made thereunder:

Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused.

(2) The police officer shall, before recording any confession under subsection (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily. In recording a confession by a police officer, the said police officer under Rule 15 of the Rules made under the Act has to observe some legal formalities and comply with certain conditions. If the confession is reduced into writing, then under sub-rule (3) of Rule 15, the said confession should be signed by the person making the confession and the police officer who records the confession should append a certificate as required by the rule.

Rule 15 of TADA Rules is as follows:

'*Recording of confessions made to police officers*—A confession made by a person before a police officer and recorded by such police officer under Section 15 of the Act shall invariably be recorded in the language in which such confession is made and if that is not practicable, in the language used by such police officer for official purposes or in the language of the Designated Court and shall form part of the record.

(2) the confession so recorded shall be shown, read or played back to the person concerned and if he does not understand the language in which it is recorded, it shall be interpreted to him in a language which he understands and he shall be at liberty to explain or add to his confession.

(3) The confession shall, if it is in writing, be—

(*a*) signed by the person who makes the confession; (*b*) by the police officer who shall also certify

(*b*) under his own hand that such confession was taken in his presence and recorded by him and that the record contains a full and true account of the confession made by the person and such police officer shall make a memorandum at the end of the confession to the following effect:—

'I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing and recorded by me and was read over to the person making it and admitted by him to be correct and it contains a full and true account of the statement made by him.'

(4) Where the confession is recorded on any mechanical device, the memorandum referred to in sub-rule (3) insofar as it is applicable and a declaration made by the person making the confession that the said confession recorded on the mechanical device has been correctly recorded in his presence shall also be recorded in the mechanical device at the end of the confession.

(5) Every confession recorded under the said Section 15 shall be sent forthwith to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate having jurisdiction over the area in which such confession has been recorded and such Magistrate shall forward the recorded confession so received to the Designated Court which may take cognizance of the offence'.

17. *People's Union for Civil Liberties & Another vs. Union of India* Judgement dated 16 December 2003 SCALE p. 994.
18. Kate Millet, *The Politics of Cruelty: An Essay on the literature of Political Imprisonment*, 1994, p. 114.
19. The following extract is perhaps an appropriate illustration: 'Then a sheep confessed to having urinated in the drinking pool…and two other sheep confessed to having murdered an old ram, an especially devoted follower of Napoleon by chasing him round and round a bonfire when he was suffering from cough. They were slain on the spot. And so the tale of confession and executions went on, until there was a pile of corpses lying before Napoleon's feet.' George Orwell, *Animal farm*, 1951, pp. 73–4.
20. Michel Foucault, *History of Sexuality: An Introduction*, Vol. I, 1979, pp. 61–62.
21. Confession is seen as belonging to the sacrament of penance which is fully articulated in various theologies of sin, penance and reconciliation. One's complete statement of guilt had to be accompanied by outward symbols—humility, bitterness, effacement—of inner contrition. Whether it takes place within the Christian confessional, the police station or within a court of law, confession typically presupposes a constellation of notions about the private self tormented by guilt and the private conscience exposed to self-criticism. See Mike Hepworth and Bryan S. Turner, *Confession: Studies in Deviance and Religion*, 1982, pp. 6–8.
22. Confession thus is linked primarily with the notion of 'conscience' as a practical exercise, as an accusation, a trial of the interior self. 'Conscience' has a juridical sense, as in the 'Court of Conscience', where the self is exposed to the internal counsel for the prosecution. The notion of 'consciousness' came to denote the ethical, theoretical sphere of knowledge in the sense of awareness of something (Ibid: 10).
23. See K.G. Kannabiran, *Wages of Impunity*, 2004, pp. 111–12.
24. The ruling dispensed with many of the provisions of the chapter on investigation in the Criminal Procedure Code. It reduced, however, the time spent on investigation, trial and had an enormous appeal for speedy 'disposal' of criminal cases can be achieved (Kannabiran 2003: 112–13).
25. The accused were booked under TADA, 1987—Ss. 3(2)(I), 4 and 5—Penal Code 1860—Ss. 302, 307, 326, 324, 323, 436 and 427.
26. Written statement submitted by K.G. Kannabiran to the POTA court. Unpublished source—copy with the author.
27. Extracted from report of the proceedings recorded by the ACMM on 22 December 2002 under the subject 'Confessional statement of accused persons under Section 32 of POTO.
28. *Trial of Errors: A Critique of the POTA Court Judgement on the 13th December Case*, People's Union for Democratic Rights, Delhi, 2003, pp. 12–14.
29. Ibid.
30. See *Balancing Act: High Court Judgement on the 13th December 2001 case*, People's Union for Democratic Rights, 2004, p. 6.
31. Justice Thomas took the view that the confession coming within the purview of Section 15 is a substantive evidence as against the maker thereof but it is not so as against the co-accused/abettor or conspirator in relation to whom it can be used only as a corroborative piece of evidence.
32. Supreme Court Judgement in the Parliament Attack case (Criminal Appeal Nos. 373–381). Emphasis added.

33. Ibid.
34. Kannabiran points out that banning of organisations must be on the basis of objective criteria and not merely on the basis of some unverified intelligence reports. The Supreme Court very early in its career held that the criterion of subjective satisfaction, applicable in the case of preventive detention, is not applicable to negate associational freedom. K.G. Kannabiran, 'How Does One Repeal POTA?', in Preeti Verma (ed.) *The Terror of POTA And Other Security Legislation*, A Report on the People's Tribunal on the Prevention of Terrorism Act and other Security Legislation, New Delhi, 2004, pp. 14–15.
35. These were Jaish-e-Mohammed/Tahrik-e-Furqan, Lashkar-e-Toiba/Pasban-e-Ahle Hadis, Harkat-ul-Mujahideen/Harkat-ul-Ansar/Harkat-ul-Jehad-e-Islami, Hizb-ul-Mujahideen-Hizb-ul-Mujahideen Pir Panjal Regiment, Al-umar-Mujahideen, Jammu and Kashmir Liberation Front.
36. These were the United Liberation Front of Assam (ULFA), the National Democratic Front of Bodoland (NDFB), the People's Liberation Army (PLA), the United National Liberation Front (UNLF), the People's Revolutionary Party of Kangleipak (PREPAK), Kangleipak Communist Party (KCP), the Kanglei Yawol Kanna Lup (KYKL), the Manipur People's Liberation Front (MPLF), the All Tripura Tiger Force and the National Liberation Front of Tripura (NLFT).
37. The later additions were Al Badr, Jamiat-ul-Mujahideen, Al-Qaida, Dukhtaran-e-Millat (DEM), Tamil Nadu Liberation Army (TNLA), Tamil National Retrieval Troops (TNRT), and Akhil Bharatiya Nepali Ekta Samaj (ABNES).
38. 'In Osama season, Centre bans SIMI', *Indian Express*, 28 September 2001.
39. Officers of the Special Cell of Delhi Police claimed that the ban was on the cards since SIMI had links with militant organisations such as the Hizb-ul-Mujahideen, and was engaged in 'brainwashing' the youth and facilitating their roping into militant outfits. 'Crackdown on SIMI was on the cards', *Hindu*, 29 September 2001.
40. 'SIMI ban was in the works: Government', *Indian Express*, 29 September 2001.
41. 'Nationwide crackdown on SIMI', *Hindu*, 29 September 2001.
42. '3 killed in police firing after arrests in Lucknow', *Hindu*, 28 September 2001.
43. 'Treat Bajrang Dal like SIMI: Gulshan', *Indian Express*, 29 September 2001.
44. 'Biased and politically motivated: Opposition', *Indian Express*, 29 September 2001.
45. 'Opposition should have been consulted: Farooq', *Hindu*, 30 September 2001.
46. Ibid.
47. Under the Indo–Nepali Friendship Treaty of 1950 signed in recognition of the historic and cultural ties between the people of the two countries, Nepalis in India are treated at par with Indian citizens. Clause VII of the Treaty lays down that 'The Government of India and Nepal agree to grant, on a reciprocal basis, to the nationals of one country in the territories of the other the same privileges in the matter of residence, ownership of property, participation in trade and commerce, movement and other privileges of a similar nature'. Thus, there is no requirement for Nepali citizens to have any VISA or passport to enter or reside in India. The Nepali citizens have the same rights and privileges to which every Indian is entitled in the matter of residence, occupation, and movement. It was in this context that ABNES was formed in 1979 and its activities were primarily social and cultural, aiming towards the amelioration of the conditions of Nepalis as a community. It needs to be noted that ABNES was by no stretch of imagination an organisation involved in terrorism,

as laid down in subsections (1) and (5) of Section 3 and subsection (4) of Section 18 of POTA. Subsection (4) of Section 18 in particular determines that an organisation is to be deemed to be involved in terrorism if it (*a*) commits or participates in acts of terrorism, (*b*) prepares for terrorism, (*c*) promotes or encourages terrorism, or (*d*) is otherwise involved in terrorism. ABNES in its 23-year-old history in India since its formation in 1979, had never been involved in what has been identified as terrorist activities and does not qualify as a terrorist organisation. Apart from the anachronism of its identification as a terrorist organisation, the whole sequence of attempts by ABNES for denotification under the provisions of the Act have amounted to banging one's head against a wall. See for details PUDR, *Quit India*, People's Union for Democratic Rights, Delhi, 2002.

48. See the deposition by PUDR before the POTA Tribunal in Preeti Verma (ed.) *The Terror of POTA And Other Security Legislation*, 2004, pp. 129–42.
49. 'Review committee to check misuse of POTA', *Hindu*, 14 March 2003.
50. 'Review Panel not meant to dilute POTA, says Swami', *Hindu*, 15 March 2003.
51. Other members of the Committee were M.U. Rehman, IAS (retd.), former Secretary to Government of India and Arvind Inamdar, IPS (retd.), former Adviser to the Uttar Pradesh Governor.
52. 'POTA review panel decision binding on Executive: Advani', *Hindu*, 29 October 2003, p. 15.
53. *R.M. Tewari, Advocate vs. State (NCT of Delhi) and Others*; *Government of NCT Delhi vs. Judge, Designated Court II (TADA)*, and *Mohd. Mehfooz vs. Chief Secretary and Another (SCC 1995).* For details see Colin Gonsalves, Monica Sakhrani and Annie Fernandes (eds), *Prisoner's Rights*, Human Rights Law Network, Bombay, 1996.
54. 173rd Report of the Law Commission (2000).
55. Section 39(4) of The Prevention of Terrorism Bill, 2000; Draft Bill as recommended by the Law Commission of India, Annexure-II, p. 38; 173rd Report of the Law Commission (2000).
56. Section 60(1) provided that the Central government and each state government shall, whenever necessary, constitute one or more Review Committees for the purposes of this Act. Section 60(2) lays down the composition of such a Committee providing that it shall consist of a Chairperson and not more than three other members. The Chairperson of the Committee according to Section 60(3) shall be a person who is, or has been, a Judge of a High Court, who shall be appointed by the Central government or as the case may be, the state government, which in the case of the appointment of a sitting High Court Judge as Chairperson, obtain the concurrence of the Chief Justice of the High Court. The rules for the appointment and other conditions of service of the Chairperson and other members of the Review Committee were subsequently framed by the Central government which came into force on 16 January 2002, the date of its publication in the Gazzette of India. Apart from the composition of the Committee regarding which the Rules followed the provisions of POTA, the Rules provided that the term of each Committee shall be two years.
57. The defence for the accused challenged successfully the admissibility of this evidence in the High Court on the ground that the procedural safeguards laid down in POTA were not followed. The POTA court, however, while admitting that it was bound by the High Court's decision pointed out a procedural flaw under Section 34(2) of

POTA pertaining to appeals. The Supreme Court subsequently upheld the trial court's contention that only a two-member bench could hear any appeal against an interlocutory order where a POTA trial was concerned.

58. Debates, Joint Sitting of the Houses of Parliament, Lok Sabha Secretariat, New Delhi, 26 March 2002, p. 85.
59. 'Throw POTA Out', *Hindu*, 28 October 2003.
60. 'T.N. questions jurisdiction of POTA review panel', *Hindu*, 28 July 2003.
61. Manoj Mitta, 'Why POTA Ordinance is a joke', *Indian Express*, 30 October 2003, p. 8. The numbers of cases under POTA have been different in reports by the Centre, the states, and independent monitoring groups. The responses received by the Review Commitee by the states showed that 15 states and six Union Territories made no arrests under POTA. In the remaining states, 301 cases were registered involving 1,600 persons of whom 514 were in prisons and 885 reported absconding. The maximum number of complaints received by the Committee were from Tamil Nadu (23), Delhi (5), Maharashtra (6), Uttar Pradesh (3) and Jharkhand (2). For details of numbers arrested in each state see J. Venkatesan, 'No POTA application in 15 states, 6 UTs', *Hindu*, 2 October 2003.
62. Jharkhand has a record number of 702 accused under POTA, of whom 207 have been arrested. Manoj Prasad, 'Jharkhand drops POTA against 83', *Indian Express*, 2 April 2003.
63. For the details of Karunanidhi's and Vaiko's statements see 'DMK insists on repeal of POTA, plans protests', *Hindustan Times*, 23 October 2003, p. 7 and 'Vaiko sticks to stand on POTA', *Hindu*, 23 October, 2003, p. 13. Moreover, legal advice assured the DMK that Vaiko may not be released even after the promulgation of the Ordinance, which meant that repeal of POTA was the only way out for him. 'George fails to move DMK on POTA', *Indian Express*, 4 November 2003.
64. Manoj Mitta, *op.cit.*
65. Akshay Mukul, 'POTA change not enough says Justice A.B. Saharya', *Times of India*, 29 October 2003, p. 10.
66. 'Jaya gets another notice, this time on Vaiko', *Indian Express*, 14 November 2003, p. 2.

Chapter Three

The Unfolding of Extraordinariness

POTA and the Construction of Suspect Communities

Debates surrounding POTA focussed largely on the abuse and misuse woven into the provisions of the Act and how trial under POTA was especially debilitating and disadvantageous for the accused. While such a discussion is important for understanding the precise implications of extraordinary legal provisions, particularly for questions of justice, it obfuscates the political contexts within which an Act unfolds. Through an examination of the contexts in which POTA was implemented in the states, this chapter and the next, will discuss the issues that came up as the Act unravelled in practice, and their implications for the political process, institutional structures and principles of governance.

An examination of the manner in which POTA unfolded in particular states, shows patterns of institutional erosion, informed in turn, by a politics of intolerance and distrust. In Tamil Nadu and Uttar Pradesh, for example, the much publicised and 'officially recognised cases' of 'misuse' of POTA, that is, the arrest of the MDMK leader Vaiko and Raja Bhaiyya, respectively, show how POTA was implicated in electoral politics, the politics of attrition within states, and between the Centre and particular state governments. The trajectory of these two cases shows that surreptitiously but surely, through legislative amendments, judicial pronouncements, and a process of executivisation, POTA figured

in centre-state relations as a centralising force. While from a civil rights perspective, it is immaterial whether citizens suffer at the hands of the Central or the State governments, it is important to see this process of centralisation as a tendency that is counterproductive in a polity that sees federalism as a manifestation of democratic decentralisation and a means to preserve political/ideological and cultural plurality. At the same time, however, as is evident from the intricacies of the unfolding of the case, the domain of law provided also a sphere within which state politics unravelled both in its specific local context 'autonomous of' and in contest with 'politics of the centre'.

While the above issues will be examined in the next chapter, a similar unfolding of contests and politics of attrition may be identified in cases taken up for discussion in this chapter as well, that is, the use of POTA in Gujarat and Maharashtra. The primary concern of this chapter, however, is to show the manner in which the official justifications of extraordinary laws and emergency powers as necessary correctives directed against a clear enemy, namely, the 'terrorists', unfolds in a way so as to draw lines of conflict around groups and communities. The statement of objects and reasons of these laws, the debates that surrounded them within Parliament and outside, and the manner in which they have unfolded in practice have indeed shown how they have contributed towards making an entire community suspect in the eyes of law and the people. The discussion in Chapter One on the ways in which extraordinary laws spin a web of suspicion around specific communities, can be seen most distinctly in Gujarat and Maharashtra. In the case of Gujarat, an aggressive Hindu nationalism, founded on principles of religious intolerance and exclusion, a hallmark of the BJP-led NDA coalition government at the Centre and the BJP government in the state led by Narendra Modi, formed the context in which POTA was imposed. This politics made itself manifest in the invocation of POTA in the Sabarmati train burning or the Godhra case, and the arrest of suspects, all of whom were Muslims, for 'terrorist activities'. A similar use of POTA was seen in Maharashtra in the Sholapur region. POTA became enmeshed in another variant of political intolerance in Jharkhand and Andhra Pradesh, where assertions of difference—ideological and ethnic—were sought to be subdued through the application of the Act.

Gujarat: The Politics of Hindutva and Communal Use of POTA

The unfolding of POTA in Gujarat was striking for the impunity with which the BJP government in the state led by Chief Minister Narendra Modi invoked the Act against Muslims. The selective use of an anti-terror law against the minority community is not unprecedented in India, the use of TADA in Rajasthan and Gujarat against Muslims is well known and documented. The manner in which POTA was used in Gujarat during Modi's regime was, however, significant for the way in which the Act became the legal and ideological instrument with which the forces of Hindutva rendered the Muslim community suspect and legitimised the violence perpetrated on them with the complicity of state agencies.

Godhra: 'A Simple Case of Unlawful Assembly' or 'Act of Terror'?

The burning of coach S6 of the Sabarmati Express in Godhra on 27 February 2002, in which fifty-nine persons, including some *karsevak*s returning from Ayodhya were killed, was the first case in which POTO was invoked in Gujarat. An FIR (FIR no. 9/2002) was filed the same day against several named and unnamed persons. The circumstances of the incident and the sequence of events that led to the burning of the coach are as yet far from certain, despite several commissions of enquiry having gone through the evidence. Yet, on 28 February 2002, Narendra Modi immediately labelled it a premeditated 'act of terrorism': 'It was *a pre-planned attack*. The charred bodies which I saw at the Godhra railway station *testified to the black deed of terrorism*'. On 2 March 2002, POTO was applied in the case and in a show of remarkable promptness, a large number of people, all of them Muslims, were rounded up for questioning and arrest. The burning of the coach was followed immediately by a protracted communal violence against Muslims in the state, in which over 2,000 persons, predominantly Muslims lost their lives and over 1,50,000 were rendered homeless and destitute. What is significant is that while POTO was invoked in the Godhra incident, and the several chargesheets that were drawn in the case laboriously built up a case to show Pakistan's (ISI) involvement and prove thereby its 'pre-meditated',

'dangerous' and 'anti-national' character, the post-Godhra carnage was explained away as a 'reaction' to Godhra, 'spontaneous' and 'natural'. Ironically, several months, fact-findings, enquiries and review committees later, there was little evidence to show that Godhra was planned,[1] and much more to believe that the carnage that followed the incident 'occurred in the context of long-standing state-abetted communal mobilisation with the Godhra incident providing the immediate pretext'.[2]

Not surprisingly, the selective use of POTO in the Godhra case, and against Muslims, was widely noted and criticised, as was the lackadaisical approach of the state towards bridling the violence that was being unleashed against Muslims by mobs, with eyewitnesses testifying to the involvement of VHP and Bajrang Dal leaders and their relatives in leading the riotous mobs, while the police abstained from taking prompt retaliatory or preventive action.[3] Newspaper reports and fact-finding investigations by citizens and civil rights groups came up with startling accounts of the scale and intensity of violence, and evidence implicating the state government in it.[4] Amidst the raging violence and its widespread condemnation, on 22 March 2002 the Gujarat government withdrew POTO from the Godhra case.

The reason for withdrawal was, however, neither a sudden change of heart of the Narendra Modi government nor the criticism of his government for the events in Gujarat. Most explanations of his move at the time interpreted it as a 'tactical retreat' in the face of the developments that were taking place at the centre around the Prevention of Terrorism Bill, which was being put up in Parliament to replace the Ordinance. As discussed in the previous chapter, the Bill was not expected to have a smooth passage, and the BJP was feeling the pressures of holding together a coalition in which its partners like the DMK, Trinamool Congress, National Conference, and the Telugu Desam Party had their own reservations on the Bill. The Bill was defeated in the Rajya Sabha on 21 March 2002, and the opposition immediately claimed moral victory, declaring that the states were against POTA. The NDA, on the other hand, had the satisfaction of creating a dent in the opposition fortress by wresting the support of AIADMK, which used it later with a vengeance against its own political adversaries in Tamil Nadu.[5] A day after the Bill was defeated in the Rajya Sabha, the President convened a joint session of the two houses on 26 March 2002, to consider

the Bill. The announcement was loudly protested by the opposition which saw the move as a 'misuse of a constitutional provision' directed towards pushing through the Bill, instead of evolving a consensus by sending it to a Select Committee.[6] The withdrawal of POTO in the Godhra case by the Gujarat government, significantly, a day after the Bill was defeated in Rajya Sabha, blunted the 'censure edge' that the opposition had so far exercised. With the removal of Godhra as a festering issue, the way was cleared for a rallying of forces by the NDA allies to ultimately push the Bill through the Joint Session.

Apart from being a 'tactical retreat', another significant aspect that was borne out during the course of the case, was the fact that POTO had not been withdrawn, but was actually being held in 'abeyance'. *The Hindu* of 23 March 2002 reported:

> The Gujarat Chief Minister, Narendra Modi, said in a statement today that the Government had instructed the Godhra District Superintendent of Police to prosecute the accused in the Godhra train carnage under general laws. The instruction was issued after seeking the opinion of the Advocate-General, who said *the application of POTO could be deferred till the investigations were over*. He also said that if the facts constituting POTO offences were *prima facie* established, prosecution could be launched under the Ordinance, if the Government thought of it.[7]

Moreover, an application filed (on 25 March 2002) by K.C. Bawa, Deputy Superintendent of Police, (before the Railway Court, Godhra) requested that offences under POTO be kept in abeyance '*for the time being*'. The application stated that Bawa had received 'legal opinion from the Gujarat government, according to which it was not appropriate to take action under POTO *under existing circumstances*'.[8] Evidently the lack of political consensus in the centre made it inappropriate to apply POTO. The opportunity to re-apply it, presented itself within a year. Riding high on a wave of 'popularity', and voted back to power in the state assembly elections that took place on 12 December 2002, Narendra Modi slapped POTA back in the Godhra case on 19 February 2003.[9] Significantly, in the intervening period, the case which was being tried under the ordinary law, seemed to be gradually giving way. Two accused in the case had been given bail by the Godhra Sessions Court in August 2002, followed by two more bails on 14 February 2003 by the Gujarat High Court.

Six more bail applications were coming up for hearing before the same High Court judge on 19 and 20 February 2003. It needs no reiteration that bail provisions under POTA were highly stringent. Following the arrest on 6 February 2003, of Maulana Hussain Umerji, a senior and influential member of the Ghanchi Muslim community in Godhra, which had been targeted by the police after the Godhra incident, the state government reapplied POTA on the then 121 accused in the case.[10] A confidential order from the Home Department, Government of Gujarat, dated 11 March 2003, authorised the Godhra Railway Police Station under Section 50 of POTA to carry on investigation in the case under the provisions of POTA. The grounds on which POTA was invoked was that the accused, 'with an intent to threaten the unity and integrity of India' and to 'strike terror in the people', had used 'inflammable substance' and 'lethal weapons', causing the death of fifty-nine persons and injuries to forty-eight persons, and 'damaging public property and disrupting essential services' like the movement of trains. The accused committed thereby a 'terrorist act' under Section 3, subclause 1(a) of POTA.[11]

Interestingly, over the one year of investigation into the case, Maulana Umerji was third 'main' conspirator that the police had put forward.[12] Moreover, the arrest of Maulana and the re-invocation of POTA was based on the 'confession' in court of one of the accused, Zabir Bin Yamin Behra, that the conspiracy was hatched by 'some 20–25 persons', four days before the incident, and carried out 'under instructions' from the Maulana.[13] A government spokesman also claimed on the basis of 'confessional statements' made by various other accused, that the night before the incident, a meeting was held at a guest house in Signal Falia locality where the Maulana issued instructions to set fire to coach S6 in which a large number of '*Ram Sevak*s' were travelling.[14] The Muslim community in the district responded to Maulana's arrest by taking out a silent rally and observing *bandh*s in the minority-dominated areas. The leaders and organisers of the relief camps run during the communal riots the previous year also joined the march to protest his arrest. A memorandum submitted to the Panchmahals District Collector stated that the arrest was based on mere 'hearsay' and had created insecurity among the entire Muslim community in Godhra. It demanded that

the government shift the Muslim population from the town if it could not ensure their safety.[15]

Several questions continued to be raised around the way in which the Godhra case was being reconstructed and comparisons with the post-Godhra riot cases were continuously drawn. The issue of selective and discriminatory application became significant. As an article in *Indian Express* titled 'Same terror, different laws in Gujarat', put it, 'the intention to kill and spread terror on a large scale, the use of inflammable material and dangerous weapons, the provocation of mobs, the disruption of public life—all that could well apply to most of the 4,200 odd post-Godhra cases'. In these cases, however, it was being suggested by investigators, as the article pointed out, that the Muslims brought it upon themselves through grave provocation. Naroda-Patiya happened, the Crime Branch concluded in its chargesheet because a Hindu auto-rickshaw driver was killed in the area. Gulbarg happened, because the late Ehsan Jafri, a former Congress MP who was one of the victims, opened fire on the crowds gathered around his colony. Even in the selective targeting of Muslim homes and businesses across the state, the police failed to see any conspiracy.[16] Feature articles and editorials in most national dailies, highlighted the different paces and trajectories of investigation and trial in the Godhra case and the 'riot' cases, and identified loopholes in the prosecution's story in the Godhra case. Soon after the arrest under POTA of Maulana Umerji, for example, questions were raised on his being put forth as the 'main' conspirator, when his name had 'never cropped up for almost a year', and none of the prime accused had named him. Moreover, the manner in which the name of the 'main' conspirator changed and with each new name, 'new evidence' came up casting away the earlier incriminating evidence, was also emphasised:

> Soon after the investigation began, police named Mohammad Hussain Kalota and Haji Bilal as the main conspirators. They said the two had planned the attack, kept ready the fuel that was used to set the carriage on fire, and incited the mob to kill the Ram Sevaks. Later the main conspirator changed to Razak Kurkur, owner of the Aman Guest House where the fuel used to burn the carriage was allegedly stored…Three weeks back, police arrested Maulana Hussain Umerji, a cleric from Vadodara and claimed he was the chief conspirator.[17]

Another report pointed out the different tracks that the cases were taking: 'While there has been some attempt to bring the Godhra culprits to justice, no such effort is evident in the cases against Sangh Parivar goons who killed nearly 400 people in the first seventy-two hours of the anti-minority riots that followed the Godhra carnage'.[18] A fact-finding investigation report by a civil rights group similarly noted:

> It is not incidental that trial and investigation in cases of communal violence that followed the Godhra incident have languished, waiting to peter out … In the Best Bakery case, the Gujarat government filed an appeal in the High Court forty-three days after the lower court order that acquitted all the accused. On the other hand, it swung immediately into action when Gujarat High Court granted bail on 3 July 2003, to four accused in the Godhra case. Within four days of the High Court granting them bail, the Gujarat government submitted a prayer to the High Court for a month's time to move an appeal against the order in the Supreme Court.[19]

On 8 March 2003, the Special POTA court was set up in Ahmedabad,[20] which subsequently rejected the bail applications of forty-four accused in the case.[21] It may be noted that more than a year had passed since the majority of the arrests in the case were made, but the chargesheets in the case had not yet been completed, and the case was yet to come to trial.[22] New arrests, moreover, continued to be made[23] while one of the accused died in custody.[24]

The Godhra case, as was the experience with POTA cases elsewhere, was destined to experience legal complexities. Yet, the significance of POTA in Gujarat, lay in the manner in which it created and reinforced a communal wedge in the state, becoming a convenient instrument of repression and misrule of the state government, which throve on the ideology of Hindutva. Fact-finding reports by civil rights activists and groups showed how POTA made fear a way of life for the entire Muslim community in Gujarat.[25] As a 65-year-old man who was allegedly detained as a hostage until his son was picked up, put it, 'There may be 307 of our boys in jail under POTA. But the entire Muslim community is under POTA in Gujarat in their homes'.[26]

A *People's Union for Democratic Rights* fact-finding report, its third investigation into the state after the events of February 2002, confirmed that the effects of POTA were being felt in various measures by all

Muslims of Godhra. The majority of the accused in the train-burning case were under prolonged imprisonment as fresh charges continued to be brought against them. The application of POTA in the case made their release on bail or otherwise impossible. Most accused were poor Ghanchi Muslims whose families were impoverished by the long absence of the men who were in almost all cases the only earning members. It was this class of Muslims that bore the immediate brunt of police repression after the burning of the coach, continually suffering the 'combing' operation, random arrests, midnight raids, and illegal detentions at the hands of the police. The majority of the family of the accused, were not aware that POTA had been (re)applied in the 'dabba case', nor did they have any knowledge of the legal implications of its provisions. Almost all of them believed that POTA was in fact a 'sentence' or a 'punishment' that was handed down by the court, at the end of the trial, if guilt was proved.[27]

Some sections of the middle class, which had stepped in where the state had failed, to provide relief and rehabilitation to riot-victims, were silenced and subdued, and made to realise the fragility of the security that their class location gave them. Following the arrest of Maulana Umerji under POTA, all relief work was suspended since the scope of POTA could extend to any one who had any association with the accused, and the Maulana had played a key role in organising relief operations in the region. Apart from the relief and rehabilitation work, the organisation of legal aid was yet another operation that suffered a setback with the imposition of POTA.[28]

With the repeal of POTA and the overriding powers given to the Central Review Committee set up under POTA Repeal Act 2004, to unilaterally examine cases, the Godhra POTA case entered a new phase of legal and procedural complexity.[29] A couple of days before the Central Review Committee was to arrive in Ahmedabad, two appeals were filed in the Gujarat High Court on 29 January 2005, challenging the constitutional validity of the Review Committee.[30] The High Court admitted the appeals and restrained the Central Review Committee from its activities in Ahmedabad. On 13 April 2005, the Gujarat High Court rejected the petition challenging the validity of the Central Review Committee's review of the Godhra case. The court ruled that once the Review Committee decides no *prima facie* case is made out for proceeding against

the accused under POTA, 'the public prosecutor…shall then file appropriate application under Section 321 of the [Criminal Procedure] Code without any delay and place before the Special Court the opinion of the Review Committee together with other relevant records for passing appropriate order'. Citing the opinion of the Madras High Court in the Vaiko case as upheld by the Supreme Court, the Gujarat High Court held that the prosecutor had no discretion in the matter. The court also directed that the Special Court trying the case shall 'dispose of such application as early as possible in line with, *inter alia*, the Supreme Court's observations in *R.M. Tewari vs. State of Punjab*, 1996 which dealt with TADA, in which the Supreme Court observed that the recommendation of review committees 'should not be lightly disregarded by the court except for weighty reasons such as *mala fides* or manifest arbitrariness'. The High Court order was challenged in the Supreme Court.

On 16 May 2005, the Central Review Committee chaired by Justice (retired) S.C. Jain, submitted its final report to the state government. The Minister of State for Home in the state government, confirming the submission of the report, declined, however, to disclose its content. According to the High Court's directive, he pointed out, the report would be sent to the special public prosecutor to be submitted to the Special POTA Court of Justice Sonia Gokani for final consideration. The main recommendations of the Central Review Committee were, however, reported in newspapers and excerpted later in news magazines. The Committee recommended the withdrawal of the application of POTA in Godhra case, while confirming its use in the Akshardham case. It saw no grounds to book the 131 accused in the Godhra train incident under POTA because it did not feel that it was a 'pre-planned conspiracy' nor a case of 'waging war against the State' and suggested that the accused be tried instead under the provisions of IPC, Indian Railways Act, Prevention of Damages of Public Property Act, Bombay Police Act etc.[31] 'Our brief entailed', it noted, 'that we find if POTA, the anti-terror law, was applicable against the accused in the case. The committee has found that there was no conspiracy and the attack on S6 coach of Sabarmati Express does not fall within the meaning of terrorist act'. Going 'strictly' by what it called 'the version and evidence of Special Investigation Team probing the incidence', in its thirty-page order, the Committee said that the incident started on the platform and 'it was a mob that set the

coach ablaze'.[32] Paragraph thirty-five of the report stated: 'The recovery of common weapons like rods, *dharia*s, etc., from the members of the mob and also that no attempt was made by the members to use these weapons for attempting to kill passengers indicates that the mob was not part of the alleged conspiracy to set on fire coach S6 and kill passengers…'.[33] It also noted the different contentions of the prosecution in different chargesheets to dismiss the conspiracy theory,[34] pointing in particular at the indecision of the prosecution itself on whether the provisions of POTA were 'attracted in this case or not':

> This is the reason why in the first chargesheet which is the main chargesheet and which was filed after three months of the incident, the provisions of POTA were not invoked. It was for the first time that the provisions of POTA that is Section 3(2) and 3(3) of POTA were added mentioning about the conspiracy allegedly hatched on the night of 26.2.2002. Even thereafter, though the investigation continued but [sic] the prosecution was not sure whether the provision of POTA could be invoked and that is why Shri Kantipuri Bawa, the Investigating Officer, on behalf of the State Government filed an affidavit dated 5.3.2003 before the Hon'ble High Court of Gujarat in miscellaneous criminal application No. 606 of 2003 mentioning therein 'having realised that there is no sufficient evidence and material to attract provisions of POTA, the same came to be dropped.' Again, for reasons best known to the prosecution, this affidavit was withdrawn and the provisions of POTA were again applied on the basis of certain alleged revelations in the custodial interrogation dated 5.2.2003 purportedly recorded under Section 164 CrPC of accused Jabir Binyamin Bahera. Surprisingly, when Shri Bawa the I.O., filed the affidavit on 5.3.2003 for dropping the charges under POTA, the statement of Jabir Binyamin Bahera was in the know of the prosecution because it is of an earlier date i.e. 5.2.2003. From this conduct of the prosecution we infer that the prosecution itself was not sure whether this case could attract the provisions of POTA and hesitatingly they have implicated all the accused persons to face the trial under the provisions of this draconian law of POTA.[35]

In paragraph thirty-nine the Committee opines that the case was in fact one 'of unlawful assembly committing various offences under the Indian Penal Code and other Special Acts but certainly nor under the provisions of POTA'. The Committee distinguished 'terrorism' and 'terrorist activity' from other forms of violence. Terrorism was the 'deliberate and systematic use of coercive intimidation' and terrorist activity

was not merely 'causing disturbance of law and order or of public order': 'The fallout of the intended activity must be such that it traveled beyond the capacity of the ordinary law enforcement agencies to tackle it under the ordinary penal law'.[36] The Review Committee subsequently instructed the Public Prosecutor to 'file the appropriate application under Section 321 of CrPC without any delay and place before the special court the order of the Review Committee'.[37]

Following the Gujarat High Court ruling, the public prosecutor was now required to pass on the recommendations of the Central Review Committee to the Designated Court and move an application for withdrawal of POTA provisions against the accused. While the High Court directive had upheld the constitutionality of the Review Committee and the POTA Repeal Act, making its recommendations binding on the public prosecutor, no such obligation was placed on the POTA court. While the former was only required to examine the technicalities for the withdrawal of POTA cases in accordance with Section 321 of the Criminal Procedure Code and the guidelines outlined by the Supreme Court in the R.M. Tiwari and Shaheen Welfare Cases, the power to make a final decision on the recommendations of the review committee was still left to the POTA court.[38]

On 31 May 2005, the Special Public Prosecutor conducting the Godhra case placed the opinion of the Central Review Committee before the Special Court in Ahmedabad and sought two week's time to submit his opinion on the matter. Explaining that the voluminous chargesheets and records running into thousands of pages had to be read 'before he requested the court to drop POTA charges against the accused in the case', the SPP also argued that the prosecutor was in no way under a compulsion to agree with the findings of the court.[39] The state government subsequently opposed the Central Review Committee's recommendation for withdrawal and filed a petition before the Special Court. A 'clarification application' was filed in the meantime on the High Court's order, to confirm whether the prosecution had any right to give an independent opinion against the recommendation of the Central Review Committee.[40] As the Godhra case under POTA still continues, despite the recommendation of the Central Review Committee, the fate of those arrested four years back and still in detention remains undecided.[41]

Akshardham Case: Disputed Conspiracies

While recommending the withdrawal of POTA from the Godhra case, the Central POTA Review Committee sustained the application of POTA in the Akshardham case. On 25 September 2002, a *fidayeen* attack had taken place on the Swaminarayan sect's Akshardham temple complex in Gandhinagar in Gujarat in which forty-six persons were killed. The hundreds of worshippers and tourists trapped inside the temple were evacuated by the security forces and the commandos of the National Security Guards (NSG) killed the two attackers inside the temple complex. It was widely believed that the attack on the temple was pre-planned, and condemned as an act of 'desperation' by terrorist elements patronised from across the border.[42]

On 29 August 2003, almost a year after the attack five persons were arrested from the Walled City area of Ahmedabad, all of whom, alleged the Commissioner of Police, had 'confessed' to having provided 'local support' to the two terrorists who attacked the temple, and had subsequently been gunned down by the NSG commandos. According to the police, the attack was carried out jointly by Jaish-e-Mohammed and Lashkar-e-Toiba with support from Pakistani intelligence agency, ISI and the conspiracy was hatched in Riyadh by Abu Talah, Abu Sufian and Salim and Rashid Ajmeri. The five locals arrested—Mufti Abdul Kayum Mansuri and Maulvi Abdullamian Yasinmian Saiyeed, were Muslim religious leaders from Dariapur area and organisers of a riot-relief camp in the area, Salim Hanif Sheikh, a resident of Dariapur, Altaf Akbarhussain Malek and Adma Suleman Ajmeri, both residents of Shahpur. Drafts of two letters allegedly recovered from the person of the two killed terrorists, were said to be prepared by the two arrested clerics and written by Mufti Abdul Kayum. The two terrorists, as the police story went, arrived in the city a week before the attack, and along with Ayub Khan who had reached the city earlier and Adam Ajmeri, visited several places in the city in search for a target. The Akshardham temple was chosen because it could create maximum panic and 'offer no resistance'.[43] Incidentally, the declaration of arrests of the five persons in the case came a day after the residents of Dariapur came out on the streets protesting the illegal detention of locals, and appealed to the Police Commissioner to take appropriate steps.[44] The day after the arrests were

announced, the Gujarat government invoked POTA against them, making it the third case in Gujarat in which the anti-terror law was applied, the other two being Godhra and the murder of former Gujarat Minister Haren Pandya in which 20 persons were arrested.[45]

Within ten days of the declaration of arrests and less than a week after POTA was applied, the case took a weird turn. On 4 September 2003, the Jammu and Kashmir Police in Srinagar announced the arrest of Chand Usman Khan who had confessed to have executed the attack on Akshardham temple. Chand Khan's confession and interrogation by the Jammu and Kashmir police and BSF along with the reports submitted by the intelligence agencies, brought up an entirely different story of the conception and execution of the attack which did not synchronise at any point with that of the Gujarat police. The story of the attack featuring Chand Khan and authorised by the Jammu and Kashmir police ran as follows: In the first week of September, Chand Khan was entrusted with the task of purchasing a white Ambassador car by the Lashkar's South Kashmir leadership, for possible use in a suicide-squad mission. The car fitted with a concealed container was eventually used to transport Chand Khan, his wife and daughter, along with two Lashkar terrorists, code named Abu Awwal and Hafiz, to Barsia near Bareilly, which was Chand Khan's native place. From Bareilly, the two Lashkar men and Khan went to Jaipur by train, and subsequently boarded an Ahmedabad bound bus on 23 September 2002, with the cache of weapons wrapped in a holdall. Their original target, Narendra Modi's ongoing Gujarat Gaurav Yatra, was changed to Akshardham, when they learnt that the yatra was not to be held in Ahmedabad.[46]

Both the Gujarat and Jammu and Kashmir police adhered steadfastly to their own stories and attempted to find loopholes in the other's. The manner in which 'confessions' were used to validate each story became obvious with the claims and counter-claims of the police of both the states. It is significant that the two stories diverged both in their account of the conception of the conspiracy and its execution. The Gujarat story conjured up a complex transnational terrorist network spanning from Riyadh, through Jeddah and Hyderabad to Ahmedabad, with emphasis on local support. Chand Khan's story, on the other hand, began in Kashmir and he admitted to have 'neither sought nor obtained logistic support from the locals'.[47] 'The problem is', suggested a senior

officer of the Jammu and Kashmir police, 'that the Gujarat police are claiming there was an elaborate conspiracy behind the terrorist attack, and there was a lot of local support. What we are saying is that this attack was swiftly carried out by a small module of the Lashkar-e-Toiba immediately on its arrival in Ahmedabad, after it scouted for suitable targets'.[48] The Jammu and Kashmir police, moreover, suggested that the Gujarat police had 'fabricated evidence and coerced suspects'.[49] What they had with them was 'a bunch of people from whom they have reportedly got confessional statements, which will not stand in any court of law if the accused retracts, and that is bound to happen', they claimed.[50] After their story started giving way in the face of the strength of physical evidence in favour of the Jammu and Kashmir version,[51] the Gujarat police secured the remand of Chand Khan.[52] Having tried without success to prove Khan's story wrong, they attempted to fraught linkages between the two.[53] The Gujarat police first established the veracity of the only physical evidence which linked the local men arrested under POTA with the dead *fidayeen*—a letter allegedly written by Moulvi Abdul Qayuum Mansuri—found on their person. On 19 September 2003, the Forensic Science Laboratory in Gandhinagar and Hyderabad confirmed that the letters found on the body of the two terrorists killed in the temple was actually written by Moulvi Qayuum.[54] Having proved local support, and sustained its story thereby, the Gujarat police set about to fit Chand Khan in it. During the time these adjustments in the story were being made, Chand Khan continued to be in the custody of Gujarat police, where he was allegedly tortured.[55] On 24 September 2003, the Gujarat police announced that the Jammu and Kashmir police had 'erred in taking Mr Khan's testimony at face value'. They claimed to be having conclusive evidence to show that Khan was just a cog in the wheel of 'a larger conspiracy that they had already unearthed'.[56] The Gujarat police claimed that Chand Khan had concealed some 'key facts' during his interrogation in Srinagar to protect others involved in the conspiracy. It was Yasin Butt, who both the Gujarat police and Jammu and Kashmir police agreed had recruited Chand Khan for the Lashkar-e-Toiba, and who Chand Khan claimed in the Jammu and Kashmir police story, had travelled with him from Anantnag to Banihal, had in fact travelled separately with the two *fidayeen* to Ahemedabad. The two *fidayeen*

carried out the attack on the temple with the help of Maulvi Kayum and his four local associates, while Chand Khan was entrusted to courier weapons for the use of the *fidayeen* to Ahmedabad.[57] Thus, around the time of the second anniversary of the attack on Akshardham temple, the Gujarat police claimed to have established their version of the conspiracy.[58]

Haren Pandya Case: Godhra Resonates

Haren Pandya, former Home Minister in Narendra Modi's government and a powerful BJP leader, was shot dead on 25 March 2003 by two scooter borne men while getting off his car in the law garden locality of Ahmedabad for his routine morning walk. Working in tandem with the CBI and Hyderabad police, the Gujarat police pieced together a conspiracy masterminded by an Ahmedabad maulvi. By 17 April 2003, the Gujarat police had arrested four persons from Ahmedabad, while five men were arrested from the outskirts of Hyderabad.[59] One of the four, Mohammad Asghar Ali was suspected to have been the one who 'pulled the trigger' on Pandya, and who had earlier also attempted to kill VHP leader Jagdish Tiwari.[60] Significantly all those arrested were reported as having criminal records. The 'main assassin', Asghar Ali, apart from having a history of supporting 'communal offence', was also projected as having 'strong links' with Pakistan, having visited the country once 'for training', and with Kashmir where he had gone once and met militants.[61]

The CBI which had Asghar Ali and his associates in its custody from the time of their arrest, claimed to have 'extracted a mass of information' that needed to be 'verified and corroborated'. It sought and was given further remand of the accused.[62] Significantly, the entire trajectory of the conspiracy, the identification of the mastermind, the main assassin, the accomplices and their connections with each other had been established on the basis of the information extracted from the accused in custody, without any physical evidence. Elaborating the grounds on which the CBI was asking for police remand, the Public Prosecutor's application submitted that 'in executing the crime, the accused had been in contact with each other through electronic gadgets (cellular phones), which were yet to be seized and their numbers were yet to be established'.

Apart from these, the weapon and vehicle used for the crime were still to be recovered, all of which the police argued, required that the accused be brought together for a face-to-face questioning.[63] By 26 April 2003 three more persons, Kalim Ahmed, Anas Machiswala and Shahnawaz Gandhi, were arrested from Sadasivpet town, in Medak district in Andhra Pradesh. The state police alleged that the three belonged to Ahmedabad and had fled the city after providing logistical support, which included supplying the weapon and motorcycle used in the attack, and identifying Pandya to the attackers, who were outsiders.[64]

By 19 April the Gujarat government had already expressed its intention of invoking POTA against the accused in the Haren Pandya murder case, leaving the final decision to the legal cell of the CBI. On 2 June 2003, POTA was invoked against the twelve persons so far arrested in the case. While moving the application for the invocation of POTA, the investigating officer informed the Metropolitan court in Ahmedabad that investigations so far had revealed that the accused were 'inimical' towards Pandya and held him responsible for the killing of Muslims in the post-Godhra riots, and that the murder was part of 'a major conspiracy hatched to strike terror in the minds of a particular section of people in Gujarat by using firearms, causing death and injury to persons as retaliation to the alleged indiscriminate murder of members of Muslim community during post-Godhra riots in Ahmedabad'.[65] On 8 September, a chargesheet against nineteen persons under POTA and different sections of IPC and Arms Act was filed in the CBI Special Court, of whom fifteen were under arrest, and the rest, including the 'mastermind' Mufti Sifiyan, were declared absconding.[66] Following the submission of the chargesheet, the CBI moved an application to the court under various sections of POTA for an in-camera trial [Section 30(1)], and order preventing the publication of proceedings in media. It reasoned that 'any publicity or gathering of people in court could cause breach of peace', 'disrupt law and order situation' and 'threaten the lives of the witnesses, accused and all concerned in the case' [Section 30(2) and (3)(b)].[67]

Apart from the fact that all the POTA accused in Gujarat were Muslims, the trajectory of the cases also shows a general pattern.[68] Each case was construed as a 'conspiracy' to wage war against the State, preparing thereby the grounds for a 'legitimate' invocation of POTA.

The delineation of the conspiracy again followed a pattern—local Muslim men, indoctrinated and trained by visits to Pakistan, conceived and executed their plans to kill and terrorise, under the guidance and motivation of a 'mastermind', usually local, with outside help, in terms of both logistics and solidarity, from Hyderabad and Jammu and Kashmir apart from Pakistan. In most cases, the details of the conspiracy were made public at the time of arrest, without any corroborative evidence. Significantly, the Godhra incident and the riots that followed, inevitably became crucial reference points in chargesheets, as well as infallible pointers towards guilt of a nature that justified the use of an anti-terror law.

The last paragraph of the first chargesheet filed in Sessions Court, Godhra on 22 May 2002 stated:

> …without thinking of the consequences of communal hatred and violence by instigating and exciting hatred they attacked the passengers and coaches of Sabarmati Express with stones and set on fire the coach no. S6…the aforesaid act on the part of the accused is intended to cause communal disharmony between Hindu and Muslim community and to disrupt public peace and is *aimed at provoking Hindu outburst* without thinking of the consequences on the people all over the state of Gujarat and districts and villages….[69] [emphasis added]

Significantly this paragraph in the chargesheet resonated the public statements made by BJP leaders in the state, justifying the post-Godhra violence as a reaction to the Godhra events. It was, moreover, consonant with the way in which cases of communal violence against the Muslim community were being presented by the police, whereby the Godhra incident became the invariable starting point, taking away the impact of the criminal act of violence on the Muslim community. The First Information Report (FIR) in the Naroda Patia case, for example, recounted the incident during a *bandh* call given by the VHP on 28 February 2002, in which a mob of '15 to 17 thousand people led by active workers of the BJP and VHP' some of whose names were listed in the FIR, set on fire a mosque, Muslim residential areas and shops, and killed 'a total of 58 women, males and young children by frontal assault'. Significantly, however, the FIR prepared by the Police Inspector at the Naroda Patia police station, began stating the 'fact of [the] complaint', by narrating the 'recent' incident of the 'murderous assault on the *Karsevaks* in

Godhra', laying down in the process not a fact-sheet of the killing of fifty-eight Muslim men, women and children in Naroda Patia, but a causal-sequence of events that led back to the train-burning case.

If the Godhra incident became the ground for blunting the illegality of the violence on Muslim community, it accentuated the criminality of the two other cases in which POTA was invoked. Thus the chargesheet filed by the CBI in the Haren Pandya murder and Jagdish Tewari attempted murder case where fifteen people were arrested under POTA read as follows:

> The investigation revealed that on 27.2.2002 some Hindu Karsevaks while travelling in a train were set ablaze near Godhra railway station. Thereafter, riots took place in various parts of Gujarat particularly in Ahmedabad city. In these riots which continued unabated till the last week of May 2002, numerous lives were lost and many mosques were destroyed. The Muslim community felt that they had been very adversely affected in these riots. This in turn inculcated in them a strong feeling of injustice, discontent and yearning for revenge.
>
> In this environment, Mufti Sufiyan Ahmed Patangia (A-13), a Muslim cleric used his powerful oratory skills and the ability to inspire confidence in the minds of Muslims to inflame hatred against Hindu community. He exploited the sentiments of the Muslims by showing to them video CDs and literature published by Jamat Ulema-I-Hind and other radical Muslim organisations. These CDs depicted burnt dead bodies of the victims of Naroda Patia, burnt houses, burnt pages of Quran and plundered mosques. …Further Mufti Sufiyan (A-13) during his religious discourses urged the Muslims to involve themselves in Jihadi activities like planting of bombs and targeting VHP and BJP leaders with a view to strike terror in the minds of a section of people viz., Hindus so that such riots against Muslims may not be repeated in future….[70]

Since the incident at Godhra formed the foundation on which all subsequent POTA cases were built, in which the accused were Muslims—'incited' and provoked by feelings of 'discontent' and 'yearning for revenge' against the Hindu community—it was not surprising that the Gujarat government rejected the observations and recommendations of the Central POTA Review Committee that POTA charges against all the accused in the Godhra case be dropped. On 10 June 2005, the state government counsel submitted the government's response to the Review Committee's recommendations before the POTA Court stating that

there was a *prima facie* case against the accused under the provisions of POTA and that there was 'more than sufficient evidence' to apply the provisions of POTA in the case. While emphasising that the Review Committee did not take into account the confessional statements of some of the accused in the case 'in the right perspective as per Section 32 of POTA', the government's counsel also reiterated a position that had been put forward consistently by state governments resisting the dictates of the Central government, that is, 'the review committee cannot interfere in the judicial process'. As will be seen in the next chapter in the discussion of the tussle between the Tamil Nadu government and the Centre over Vaiko's arrest under POTA, the Gujarat government emphasised that the Review Committee's decision cannot interfere in the judicial process and its role was in fact limited to finding if there was a *prima facie* case for proceeding against the accused: 'It can address the State government that the case is fit to be withdrawn and its role is limited only that far'.[71]

MAHARASHTRA: POLITICS OF SUSPICION

Perhaps more than any other state, Maharashtra manifested the manner in which extraordinary laws like POTA are ultimately used politically for consolidation of power. Thus an NCP-Congress government in the state not only used the Act in the blast cases in Mumbai, it also sought to gain political advantage, by proposing to use POTA in cases of atrocities against *Dalit*s. Arrests under POTA were made in Maharashtra primarily from three districts—from Mumbai in cases of bomb blasts, from Solapur in cases of communal violence and from Nagpur where POTA was applied against the radical left. The largest number, about forty-two, were arrested in Mumbai, and were as in the case of Solapur arrests, primarily Muslims. In Solapur, twenty-nine persons were arrested in connection with communal riots in August 2002. The police found bombs in a garage bin in the city and also allegedly recovered knives and country-made bombs from the house of one of the accused. In February 2004, the government acknowledged the wrong application of POTA in these cases, and dropped POTA charges. The accused continued to be tried, however, under the Explosives Act.

In Nagpur, fourteen people including two women were arrested and chargesheeted for allegedly financing, participating and assisting the Naxalite movement in Gadachiroli district. It may be noted that the Gadachiroli police had been stripped off special preventive powers after killing a youth, Chinna Mattami, in February 2001 and for carrying out 'coercive' search for naxal sympathisers. The police invoked POTA to arrest five *tendu* leaf contractors, claiming that they were financing, and even participating in Naxalite activities in the tribal district of Gadachiroli. To bolster their case against the contractors, the police also arrested three 'Naxalites' including two women under POTA, and some other sympathisers and aides. Of these, Dalam (squad) commander Bakanna and local NCP leader Suresh Preddiwar's brother Vijay were labelled absconding. The police maintained that they wanted to snap the Naxalite financial link, claiming that Gadachiroli Naxalites earned nearly fifteen crores in each season from *tendu* contractors, and received large sums from bamboo cutters.

For months, the state government dithered over giving permission for the use of POTA. Finally, when it granted permission for the chargesheets which the police had filed in anticipation against the accused, four of the five *tendu* contractors were out on bail. Ordering the release on bail of *tendu* contractor Mohammad Gausuddin, the Nagpur Bench of the Bombay High Court made the observation that it was necessary for the police to get prior government permission before chargesheeting the accused. The High Court also said that the government should not waste time in giving requisite permission. Although it issued some guidelines to prevent POTA misuse, the court never said Gausuddin's was a case of POTA misuse. During an earlier bail hearing in the case of three other contractors, another High Court bench upheld the validity of the application of POTA on the basis of confessions of the co-accused. The three, A. Naim, Khwaja Moiuddin and Alimuddin, were later granted bail on technical grounds. The only bail plea that remained to be discharged was that of contractor Kamlakar Hollala. Eight of these accused are now out on bail on a surety of five lakhs reduced to two lakhs in some cases. Six, including the two women, continue to be in custody.[72]

The arrests and trial under POTA of the accused in the blast cases in Mumbai, will be discussed in the following section to show how it allowed arrests and prolonged detention without evidence, encouraged

shoddy investigation, made the use of torture and other extra-legal forms of investigation possible, and ultimately through its arbitrary and selective use, made an entire community suspect. The latter, as shall be seen had implications for the electoral fortunes of the ruling combine (Congress–NCP) in the assembly elections.

The Mumbai Blasts

POTA arrests in Mumbai were largely in connection with a series of blasts in the years 2002 and 2003. On 2 December 2002, there was a blast in a bus outside Ghatkopar Railway Station,[73] followed by another blast four days later, at the McDonald's restaurant at Mumbai Central railway station. A month later, on 27 January 2003, there was a blast outside Vile Parle railway station. On 13 March 2003, a powerful bomb blast occurred in the bogie of a local train at Mulund railway station killing eleven people and injuring sixty-five. On 25 August 2003, there were two blasts—one at Jhaveri Bazar and another one at the Gateway of India.

The police approached these blasts as parts of a larger conspiracy, which basically meant that the blasts were seen as interconnected, with a mastermind or masterminds who planned it and several key and minor players who executed it.[74] Consequently, large number of persons were arrested and a number of them figured as accused in more than one blast case. Forty-two persons, including a minor girl, all of them Muslims, were booked under POTA in connection with the blasts. In the case relating to the Ghatkopar blast, nineteen accused were chargesheeted and in the case relating to the bomb blasts at Mulund, Mumbai Central and Vile Parle, a common chargesheet was filed against fifteen accused.[75] Seven persons were chargesheeted in the Gateway of India and Jhaveri Bazar cases.[76]

The arrests took place along extensive search operations in the adjoining Muslim dominated villages.[77] As discussed in the earlier chapter, under the provisions of POTA, bail was almost impossible, and none of the accused in the blast cases was released on bail. Moreover, the police resorted to a unique tactic of arresting them in different cases at different times, to ensure that they remained in continuous police custody for a long period at a stretch. Saquib Nachen, former All India Secretary of

SIMI, for example, was arrested for the Mulund blast on 10 April 2003, for the Ghatkopar blast on 29 April 2003, the Vile Parle blast on 23 May 2003 and the Mumbai Central blast on 16 June 2003.[78] He was in police custody throughout the period that is for almost ninety days in all. Similarly, Atif Mulla, a young MBA graduate arrested in connection with the Mulund blast, was later charged with the Ghatkopar, Vile Parle and Mumbai Central blasts. He was booked under the Mulund blast case on 15 March 2003. When he completed the required 28 days of remand in police custody, he was implicated in the Ghatkopar case and kept in police custody for fourteen more days.

Many accused, most of whom like Nachen, were in custody for nearly ninety days, complained of torture. Not surprisingly, several confessional statements were recorded in custody—eight in the Ghatkopar case and three in the Mulund, Mumbai Central and Vile Parle case. In all these cases, the accused subsequently complained that their confessions were extracted under torture.[79] In another case, Khwaza Yunus, a twenty-six year old, picked up on 23 December 2002 along with Dr Mateen and others in connection with the Ghatkopar case, died of torture in custody.[80] While there were witnesses to the torture, including Dr Mateen, the police on their part reported and lodged an FIR that Yunus had 'escaped' from custody, while being transported to Aurangabad for interrogation in another POTA case.

In fact, the year 2003 may be characterised as the year of POTA in Maharashtra, so much so that it came to be used in political rhetoric for one-upmanship between the ruling Maharashtra's Progressive Front of NCP and Congress with the Shiv Sena in opposition, in the context of the approaching Assembly elections. In July 2003, the Deputy Chief Minister, Chhagan Bhujbal, and the Chief Minister Sushil Kumar Shinde, referred to atrocities on *Dalit*s as cases of 'sectoral terrorism' which was covered under POTA. They announced in the state Legislative Assembly that their government was sincere in their commitment to countering the rising atrocities on *Dalit*s in the state, and were prepared to dispense with the Protection of Civil Rights Act, and apply POTA or MCOCA in such cases.[81] The Shiv Sena chief Bal Thackeray, subsequently charged the Maharashtra government of 'rampant corruption' and being in-capable, therefore, of 'cleaning up' the state of terrorists and militants. 'Only when we come to power—and we will—will clean up the police.

Those who cannot stop the blasts have no right to rule', he asserted. Commending the manner in which J.F. Rebeiro and K.P.S. Gill had 'dealt with terrorism' and 'cleaned up' Punjab, Thackeray did not want terrorists and militants, if caught, to be 'tried and punished' but be 'killed in encounters'.[82]

In the meantime, put under a cloud of suspicion after the blasts, Muslims urged the Chief Minister to stop police terror.[83] In April 2003, residents of Borivali village in Thane district wrote to the Deputy Chief Minister Chhagan Bhujbal, imploring him to direct the police to stop 'terrorising' the village and implicating residents in the 13 March Mulund blast. The villagers pointed out that they had always lived peacefully, before the police started conducting midnight raids and randomly arresting villagers, who were then booked under POTA. Having come to the conclusion that SIMI was behind the blast, the police, they felt, remained 'clueless' about the actual perpetrators. This was evident from the raid it conducted on 27 March 2003, during which it named thirty-two villagers, around 200–300 'unknown' men and forty–fifty women as accused. Since the police had no direct evidence to link the villagers to the blast it arrested residents in old cases to secure their custody. The 'fear' that subsequently came to surround the village was reminiscent of the experiences of other states, particularly, Gujarat. The image of Borivali projected by the police, made it 'feared' so much so that no one even dared venture near Borivali. On the other hand, the villagers themselves reported to be living in fear, too scared to leave their homes for fear of police harassment, and afraid that the dwindling supplies could result in death due to starvation.[84]

Police 'terror' in the village started after 13 March 2003, when a blast in a local train at Mulund, thirty-seven km away, brought the midnight knock. Over a period of a month, one person was booked under POTA while eight were arrested for allegedly abetting the escape of suspects and obstructing the police. The Thane police indicated that there was more in store for Borivali since ten more people were to be arrested. The villagers cowered behind closed doors, wondering who would be the next to be dragged away by the police in the middle of the night. 'This was a peaceful place to live in until the police started coming here on the pretext of carrying out an investigation and arrest innocent people

who had never hurt anybody in their life', complanied former *sarpanch* Ashfaque Suse. First Adil Khot, a civil engineer and a former activist of SIMI who was picked up on 14 March from his home, immediately after the blast, in connection with a two-year old case. Seven others from the village were arrested with him for allegedly possessing handbills issued by SIMI protesting against the burning of the Holy Quran in New Delhi.[85]

Both Saquib Nachen and Atif Mulla belonged to the village Pagdhah, which has a predominantly Muslim population. Atif Mulla's father, testified before the *People's Tribunal on the Prevention of Terrorism Act and other Security Legislation* pointing out that three months before the incident, the Chief Minister of Gujarat Narenda Modi had declared before a gathering at Shivaji Park that 'this village must be checked'. Almost predictably, following the Mulund blast, the police focussed on this village:

> The police started targeting us. Uninterrupted searches and combing operations occurred almost every night. People were arrested and harassed. On 27 March 2003, a contingent of sixty policemen headed by the dreaded encounter specialists Pradeep Sharma, Daya Naik and Sachin Vaze, stormed into the village with about four police vans and they dragged Saquib Nachen out of his house. The people started protesting. They wanted to know why he was being dragged away and whether the police had a warrant against him. Since a huge crowd had gathered around, the police could not go through it. Previously they had on record only one man who could be booked under POTA. But now, after this incident, they have been trying to involve as many people as possible from the village….In this way our entire village was targeted. They registered an FIR, arrested highly qualified people from the village. It was an open FIR, stating that another 250 men and fifty *burqa* (veil) clad women are wanted for obstruction in the case. Every day, and even at 2 A.M. and 3 A.M. at night, they roamed the villages and searched houses.[86]

By October 2003, the electoral implications of the use of POTA were becoming evident to the Maharashtra Congress. The Maharashtra Pradesh Congress Committee chief Ranjit Deshmukh reported to the party high command that the party had lost the Solapur seat 'to POTA' in the Lok Sabha by-elections rather than the BJP–Shiv Sena candidate. Deshmukh's report said that Solapur had thirty-seven POTA cases registered against Muslim youth in the constituency which alienated

the community from the party, and the Muslim voters had stayed away from the polls. The POTA cases followed the communal violence that took place in Solapur a year back. The report also pointed out that senior leaders had repeatedly advised the state government that the use of POTA could be counterproductive. Chief Minister Sushil Kumar Shinde argued, however, that the loss was primarily because the NCP chief Sharad Pawar did not campaign for Congress. Yet, the fact that the NCP candidate had polled just 10,000 votes in the previous elections disproved the notion that Pawar's presence would have made any significant difference.[87]

By April 2004, it was becoming clear that POTA would determine the manner in which the Muslims of Borivali and Pagdhah villages, who had a year earlier appealed to the Chief Minister to stop treating the community as 'suspect', would vote in the Assembly polls on 26 April 2004.[88] The significance of the Borivali/Pagdhah experience had a wider political implication for Maharashtra. The use of POTA alienated Muslims not just in this village but also in Solapur, Malegaon, Osmanabad and other areas.[89] Nasir Mulla, whose 27-year-old son, Atif was picked up and charged under POTA in Ghatkopar and Mulund blasts, claimed to have been in touch with several organisations, and reported that the villagers were weighing their options in the coming Lok Sabha elections. The 'where else can they go, approach', that had been adopted by the Congress and NCP, received a jolt, as Muslim voters, if they decided that the Congress–NCP alliance was the greater evil, could help the BJP–Shiv Sena alliance in several closely contested seats. Moreover, the presence of the Samajwadi Party was likely to queer the field for the Congress–NCP alliance.[90]

Around this time, when electoral implications of the use of POTA were becoming evident, most POTA cases in Maharashtra began to peter out.[90] Following a ruling by the Review Committee, in March 2004, the Maharashtra government dropped POTA charges against Saquib Nachen and eight others in the Ghatkopar case, on the ground that the Mumbai police did not have sufficient evidence. By this time, the accused had undergone more than ten months of incarceration. The 1,873 page supplementary chargesheet against Nachen and others did not have details of the evidence against Nachen, who the police claimed was the main conspirator. Nachen, however, continued to be in judicial custody,

charged under POTA in the Mulund blast case.[92] More than a month later, the Central POTA Review Committee, headed by Justice Arun Saharya, which had come down to Mumbai to hold a hearing for relatives of the accused and the prosecution, found no *prima facie* case against Zaheer Ahmed, another accused in the Ghatkopar case. Zaheer Ahmed, an electrical engineer from the village Parbhani, had been projected by the police as one of the main conspirators in the case and his application for bail had earlier been rejected ten times by the special POTA court. The Review Committee, however, found no incriminating evidence in the chargesheet which was based on the confession of two co-accused, Altaf Ahmed and Imran Rehman, besides certain calls made by Zaheer from the United Arab Emirates.[93] In the Gateway of India and Jhavery Bazar cases, the POTA charge was dropped against a minor, whose parents were also accused in the cases. By the time the charges were dropped she had spent more than five months in the Observation Home for children.

On 2 March 2004, Sachin Vaze, the investigating officer in Khwaza Yunus' case, was arrested on charges of murder and tampering with evidence following the death of accused Khwaza Yunus during interrogation. Vaze's arrest was followed by other officers investigating the Ghatkopar blasts. Khwaza Yunus, as discussed earlier, had disappeared after having been tortured in custody, as borne out by witnesses in the Court. A judicial inquiry conducted by the Special POTA Judge established that the assistant police inspector, Sachin Vaze's contention that Yunus had escaped from police custody while being taken to Aurangabad for investigation on 7 January 2003 was *prima facie* not true. In April 2004, a Division Bench of the Bombay High Court, in response to a *habeas corpus* petition filed by Yunus' father, held that the FIR lodged by Vaze on the disappearance of Yunus was false and fictitious. The High Court directed the police to treat the statement of Abdul Mateen, another accused in the bomb blast case, as the FIR. The Supreme Court upheld this. Sachin Vaze, the investigating officer, was arrested following the High Court's warning that it would transfer the case to the CBI unless the state government provided a satisfactory explanation.[94]

In a manifestation of the politicisation of the use of POTA along communal lines, Sachin Vaze, was promised support by the Vishwa Hindu Parishad (VHP), which not only promised free legal aid, and free ration

for his family, but also spoke of Vaze as a symbol of the VHP. Accusing the government of appeasing Muslims: 'This is a season of Muslim appeasement', the General Secretary of the VHP international, defended Vaze in public as a 'dynamic officer of the Mumbai police charged with human rights violations in connection with the custodial death of a Muslim accused of connections with a terrorist organisation'.[95] The state CID team probing the death of Khwaza Yunus, systematically uncovered the 'lies' in the police FIR. According to the FIR filed by Sachin Vaze, a passing truck had been stopped for help after Yunus 'escaped'. The two 'possible' license numbers cited by Vaze as that of the truck were traced to a scooter in Jharkhand and a tanker in Ahmedabad, neither of which was in Maharashtra that day. Vaze further stated that the party escorting Yunus had made a halt at Lonavla, where he was handed over to the custody of Head Constable Kisan Gaikwad of Lonavla police station for an hour, while Vaze's team had dinner. Deposing in court, Gaikwad informed that the accused handed over to him was in a *burqa*. The CID probe led to the conclusion that the man handed over 'in custody' was actually a police constable in *burqa*. The mobile phone records of the fourteen Crime Branch pesonnel proved, moreover, that they were not where they claimed to have been on 6 and 7 December, but were between Uran in Navi Mumbai and Kalwa in Thane, where they may have been attempting to dispose of Yunus's body.[96] Earlier in a statement before the High Court, co-accused Dr Abdul Mateen described how Yunus was beaten on his chest—with belts and boots—until he vomited blood. Mateen was warned against repeating what he had seen, by police inspectors Rajendra Joshi and Arun Borude.[97] In the first week of March 2005, the state CID arrested four officers of the Mumbai Crime Branch including senior inspector and encounter specialist Praful Bhosale and charged them with Yunus' murder and destroying evidence. The arrests raised a storm of protest in the ranks of the Mumbai police. The court in Vikhroli, where the policemen were produced, saw hundreds of their colleagues and their wives demonstrating against the arrest. Shiv Sena and the VHP who alleged that such an action left the country open to terrorist attacks, also joined the protests.[98]

On 11 June 2005, the Special POTA court acquitted the eight accused in the Ghatkopar case. The court noted shoddy investigation, dubious confessions, no witnesses while recovering crucial evidence (CDs with

inflammatory material), doubts over the authenticity of the CDs, and the failure of the prosecution to prove a conspiracy. Considering that the investigating officer in the Mumbai blast cases had told the court that four of the six bombings were the result of a single conspiracy, the defence expected the remaining cases to similarly collapse.[99]

The Curious Case of Mohammad Afroz Razak

It is in the curious nature of POTA that most of the cases under the Act are based largely on the 'confessions' of the accused to the police. In his confession, Mohammad Afroz Razak made rather tall claims, and was subsequently projected by the police as an alleged terrorist of Al Qaeda and a pilot trained to go on a suicide mission to blow up the House of Commons in London. In his confessional statement to the police, Afroz reportedly claimed that besides the British Parliament, the Rialto Towers in Sydney, the Indian Parliament and the World Trade Center Towers in New York City were part of the suicide mission of Al-Qaeda.

Afroz's case was the first POTA case in the state of Maharashtra. It shot onto the scene spectacularly and then whimpered, much to the embarrassment of the police and the government. The case lingered on, however, through various twists and turns that sustained it despite POTA charges having been dropped on the way. Afroz was arrested on 3 December 2001 on charges of robbery, and soon afterwards presented as a suspected member of Al Qaeda connected with the 9/11 attack on the World Trade Towers in New York City and the hijacking of Indian Airlines plane IC 814 in 1999. On 3 March 2002 charges were framed against him under POTO, which were subsequently dropped on 26 March 2002, on the plea that the police had committed a 'mistake' in invoking POTO against him.[100] The dropping of POTO against Afroz was remarkable for being coincident with the joint parliamentary session that was convened to enact POTA, and parallels may be seen with the invocation and subsequent 'withdrawal' of POTO in the Godhra case in Gujarat at the time of the joint session. While in Gujarat the police re-invoked POTA on 1 April 2002, the Maharashtra government asked the central government to shift the case for investigation to the Central Bureau of Investigation (CBI).[101] Within the Assembly, the Maharashtra government contended with charges made by Shiv Sena

and BJP MLAs that POTO charges against Afroz were dropped under political pressure. It may be recalled that the Congress–NCP alliance in Maharashtra had divergent views on POTO, with the NCP deciding to support the Ordinance in Parliament. For the Deputy Chief Minister and Home Minister, Chhaganlal Bhujbal of the NCP, the dropping of POTO charges and the subsequent report by the Additional Chief Secretary that the Commissioner of Police had acted in haste both in deciding to invoke POTA and subsequently to drop it, came as an embarrassment.[102] It was widely speculated that the Congress Chief Minister Vilasrao Deshmukh may have had a role to play in deciding to drop charges. In the meantime, two police teams that had been dispatched to the United States and United Kingdom to investigate Afroz's international links, returned, with the Commissioner of Police insisting that they had evidence to prove that Afroz was an Al Qaeda man.

Within the court, there were twists as the Special Court stalled police move to drop POTO charges and ordered the investigating agency to take a fresh look at the case and file a chargesheet under POTO or MCOCA by 9 April. The court informed Afroz of his right to get bail in view of the police deciding to drop charges under POTO. Afroz, however, declined to exercise the right until March 30, in order to finish his meditation course in jail.[103] Despite claims by the police of evidence against Afroz, no 'corroborative evidence' seemed to be forthcoming and on 9 April the police filed charges against Afroz for waging war against the state, neither under POTO nor MCOCA, but under IPC.[104] Afroz was granted bail by the designated judge A.P. Bhangle, under a surety bond of one lakh rupees on 5 April 2002, and released on bail on 9 April. Subsequently, Afroz retracted his confessional statement and moved the Mumbai High Court seeking a compensation of ten crore rupees from the city police for fabricating evidence against him.[105]

In the meantime, the result of CBI enquiries into the case as reported in the media, made the police case appear implausible. Their interrogation for Afroz's alleged involvement in the 1999 highjack case, led them to conclude that his statement to the police on his knowledge of two highjackers, Zahoor Ibrahim Mistry (alias Bhola) and Shahid Akhtar Sayeed (alias Doctor) was forcibly extracted from him by putting him 'through the third degree'.[106] In May 2004, charges were framed against Afroz and his brother, co-accused Mohammed Farooque, under

Sections 120 B read with 121 A and 126 IPC on the grounds that Afroz visited Australia, USA and the UK to commit depredations in these countries. They were also charged under Section 120 B read with Sections 467, 468 and 420 of the IPC on the grounds that they forged marksheets and a school leaving certificate so that Afroz could undergo pilot training abroad. Both of them pleaded not guilty to the charge.

Five months later, and more than two years after he was released on bail, Afroz contested the Maharashtra Assembly elections in October 2004 as an independent candidate, starting his *padyatra* along with his twenty odd supporters on Gandhi Jayanti. And the first time contender's choice of destination could not have been better—the *galli*s of his homepad Cheetah Camp: 'This is where they welcomed me with flowers and tears when I got out on bail on 10 April 2002', a newspaper reported Afroz as saying as he jumped over flowing gutters, stepping over buckets of washed clothes and squeezing into narrow lanes, 'dressed in a white sherwani with a rose garland beginning to wilt, leaving almost every home in the *dus-by-dus* section of Cheetah camp impressed'.[107] On 23 July 2005, the Special POTA court which continued to try the case against him after the POTA charges were dropped, found Afroz guilty under Sections 120 B (conspiracy), Section 126 (committing depredation on territories of powers at peace with the Government of India) of IPC, and sentenced him to five years of rigorous imprisonment. It further found him guilty under Section 467 IPC (forgery of valuable security) read with Section 471 IPC (using as genuine forged documents), sentencing him to seven years of rigorous imprisonment.[108]

Jharkhand: Where POTA Replaced All Laws

The creation of the state of Jharkhand in November 2000 was the culmination of a long-drawn struggle manifesting the development needs of the people of the region. It is ironical that the political class that came into existence after the creation of the new state should have continued to suppress the struggles that manifested the continuing crisis of development in the state by using an anti-terror law against them. By January 2004, official figures of POTA arrests at 234 were the highest for any state. A fact-finding investigation by an all India team of civil rights groups, however, put the figures much higher, claiming that more

than 300 arrests were made under the Act in eighteen months, while a much larger number of 3,200, were booked under the Act.[109] Of those arrested there were large numbers of teenaged girls and boys, the youngest being a 12-year-old boy Gaya Singh. Most of those arrested languished in jails, either because their parents were too poor to go to the courts, or because they had no money to furnish the bonds in cases where bail was granted. The oldest person arrested under POTA in the state, was 81-year-old Rajnath Mahato. As in Sonbhadra, the majority of those arrested in Jharkhand were poor and belonged to the tribal population of the state, most of the arrests having been made in Ranchi, Hazaribagh, Palamu, Chatra and Gumla districts. The state government, however, argued that POTA was being used in these areas to curb the Naxalites who dominate large parts of Jharkhand.

The background and pattern of arrests in Jharkhand were described by Netai Ravani, a lawyer and member of PUCL (Jharkhand) to the People's Tribunal on POTA and other Security Laws in New Delhi as follows:

> The Maoist Communist Centre (MCC), the People's War Group (PWG) and some other organisations work in Jharkhand. The area is densely forested, and most of the villages are around these forest areas. The villagers earn their livelihood primarily through manual labour and agricultural work. When members of the MCC or PWG launch protests against the police, or take grains or clothes to give to the poor, they sometimes stay in surrounding villages. The villagers live in constant fear of the police despite the fact that they have no connection to these groups….whenever, reports of these incidents are made to the police, the police raid the neighbouring villages and arrest villagers at random. Some of them are neighbours or alleged members of the MCC. In all these cases, the people arrested are poor and are barely able to sustain themselves. Usually, they are not told about the nature of offence they have allegedly committed, and are not produced before Magistrate within the stipulated statutory period. They are detained in police stations for more than two days before they are transferred to judicial custody.[110]

The testimony before the People's Tribunal by Sanjay Kumar Mahato, a school teacher arrested under POTA, illustrates how the above pattern of arrest unfolded in a specific case. A resident of village Mangar Teleiya, in Giridih district, Mahato was returning from Giridih with two other persons, after having bought some books, when he was stopped by the police, and asked to show 'relevant papers':

> …the police said they had an 'MCC warrant' against me. They took me to the police station, alleged that I was an area commander of the MCC, and threatened to send me to prison. I was kept in custody for 2–3 days and sent to the Giridih Central Jail. Two or three months ago, the POTA charges against me were dropped, but the charges under the IPC continue. I have to attend the Special Court every ten days. The financial situation at home is bleak. There are about fifteen people at home and now my father is the only earning member. Because of the case and my regular visits to Court, I am unable to seek proper employment. I have not been told of any specific charges against me… For two days during interrogation I was beaten. I was forced to sign some blank papers. They said I was being sent to jail and so I had to sign the papers….I was produced before a Magistrate who did not inform me of my rights or the charges against me…I happened to meet someone from my village, who subsequently informed my family…I managed to contact a lawyer and I was able to secure bail from the High Court after thirty days. I lost my job because of the arrest.[111]

Among the first to be arrested under the then POTO in the state on 18 December 2001 were six 'ultras' including two women, allegedly members of the banned Maoist Communist Centre (MCC) and the People's War Group (PWG), in the Gumla district of Jharkhand. With these arrests, Jharkhand became the first state outside the notified disturbed states to use POTO.[112] The four men who were arrested, namely, Ashok Kharia, Devni Soren, Brajbhushan Yadav and Udasan Nag, were alleged activists of MCC. Of the two women booked under POTA, Sunita Kumari was allegedly a member of the 'flying squad' of the PWG area commander, while Dualata Devi was reportedly a member of the MCC.[113] The opposition led by Stephen Marandi criticised the state BJP government for the arrests 'particularly when the Ordinance was yet to receive Parliament's approval'. The Congress proposed that it would oppose the implementation of the Ordinance in the state through the 'back door', the RJD declared that it would 'force' the government to withdraw POTO, while the JMM decided to call for 'mass agitation' in case the law was implemented in the state.[114] While proposing different strategies for opposing the implementation of POTO in the state, they unanimously declared that the BJP government had brought the 'draconian' law to 'strangle the voice of dissent against its misrule'.[115]

The press release of an All India fact-finding team of democratic rights groups, dated 5 February 2003, claimed that all laws of the land

in Jharkhand had been replaced by POTA.[116] The team visited Garhwa, Palamu, Latehar, Gumla, Hazaribagh, Giridih, Chatra and Ranchi districts and met about thirty families of POTA accused mostly from the interior villages. It also met the Chief Secretary of Jharkhand government, the Home Secretary and the DGP apart from the DSP and SP of Gumla district where the highest number of POTA cases were booked, had discussions with the officials, several organisations, the leaders and activists of parties like JMM, RJD and CPI, advocates and journalists to ascertain and cross-check the facts and information that they had gathered.[117]

The team found that POTA was being used indiscriminately in the state on ordinary citizens, most of whom were illiterate tribals, Scheduled Castes and OBCs. Jata Bhuiya, aged 30, from Tikuldiha village in Miral block of Garhwa district was booked under POTA after a complaint against him was filed by some of his cousins in a land dispute over a small stretch of land. Jata Bhuiya and his family claimed to have no idea of any underground organisation or party. Dugu Marandi (20) of Madhuban Mod, near the foothills of Parasnath Hills in Giridih district was picked up by the police when he was going for work in Damodar Valley Project as a daily labourer. A tribal youth who did not even know the names of organisations banned under POTA, was compelled to go around the courts facing POTA sections. He was arrested on 18 October 2002, tortured for three days in illegal custody and produced in court on 21 October and released on bail on 30 January 2003.

Mayanti Rajkumari, a 14-year-old girl arrested on her way back from school on 9 July 2002, was one of the sixteen tribal women arrested and charged under POTA, for alleged Naxalite activity. A resident of Pandrani village in Gumla district, Rajkumari was a seventh standard student in a government school in her village. When she did not return till late in the evening, her parents and brothers got worried and began looking for her. The next morning, the police informed the family that Rajkumari had been arrested along with twenty-four others for allegedly planning to attack a *dhaba* [roadside eatery] eighteen kilometres away from her school. All of them, including Rajkumari, were booked under POTA. The FIR stated that Rajkumari was part of a group of Maoist-Communist Centre extremists, which fled when the police reached the spot on being tipped off. Etwa, Rajkumari's father, alleged that the

charges were fabricated and that his daughter had gone to her grandparents' house in nearby Sisai village after school. It was when she was about to board a bus at Sisai to return home that the police took her into custody. A tribal farmer with five acres of non-irrigated land, Etwa's meagre income was not sufficient to move the court for her bail, 'To file a petition Rs 200–300 is needed. I tried to borrow from many people, but nobody gave me the money'.[118]

Laluwa Oraon, whose daughter Seema Kumari was convicted by the Ranchi court spoke of the expenses he had to bear: 'We sold off two cows to fight her case. Now I will have to mortgage my land to get money to apply for her bail in the High Court'. Three other girls, Silu Devi, aged twenty-one, Urmila Kumari, aged eighteen and Savita Kumari aged nineteen, on the other hand languished in jail despite having been granted bail by the Jharkhand High Court on 7 May 2003. The Ranchi Public Prosecutor explained: 'Their parents were to furnish the bail bonds. But since they are extremely poor, they couldn't manage money to board the bus and come here. So they continue to languish in jail'. Poonam Devi, a 22-year-old woman arrested by the Manatu police in Palamu district, has been in jail since 22 March 2002. No one had moved for her bail since her widowed mother has been missing and her sister has not been well. The state's numerous free legal aid agencies had not taken up Poonam Devi's or any of the other cases.[119]

Ropni Kharia a seventeen-year-old young woman of Tira Masori Toli village in Gumla district under Palkot police station was arrested by the police and charged under POTA. The only educated woman in the village who passed matriculation, Ropni Kharia would educate the women of the village about patriarchal oppression and the ways to resist it, arousing the antagonism of powerful men in the village who accused her of being a member of the banned MCC. Failing to find any document associating her with MCC, the police beat-up her father and other male members of the family. Due to continuous repression, Ropni Kharia surrendered before the police. Despite there being no concrete evidence of her involvement with the banned outfits, she has been implicated under POTA.

Like elsewhere in Maharashtra, Gujarat and the Sonbhadra region of Uttar Pradesh, the police created the terror of POTA in the villages of Jharkhand by naming a number of youth in different FIRs under

the Act. Most of these young persons avoided arrest for the fear of not getting bail for months or years, by either not sleeping in their homes, hiding in the forests, or leaving their work in the village to go to far off towns and pull *rickshaw*s for a living. In the process, hundreds of families suffered due to the absence of their bread-earners. A general trend that was seen in the FIRs examined by the fact-finding team was the identification of one main accused, along with some other names followed by a specified number of men, leaving open the possibility of arrests in future of persons not named in the FIR.

In Palamu and Gumla, where the fact-finding team covered eight and nine cases respectively, the people ran away at the sight and sound of their vehicles. This was not surprising since the police too came to arrest in large numbers and resorted to violence. One hundred and fifty policemen, for example, came to arrest Deo Saran Mahato of village Madheya in Palamu. They came and gheraoed his house at 12 noon on 18 June 2002 while he was busy feeding the cattle and picked him up at gun point without giving any reason for arrest. When his wife, Buddhiwati Devi, tried to resist, the police beat her up with the gun, fracturing her hand and leading to miscarriage of her pregnancy. The police also took eight thousand rupees and ransacked everything in the house.

In another 'crackdown operation' a 500-member strong joint force of the police, Jharkhand Armed Police, and the CRPF converged on the villages of Khapia, Batuka and Salga. In the course of their operation from 4 A.M. to 12 noon, on 29 January 2002, they smashed houses, spoilt wheat reserves, dragged out and beat women, children and old persons, and tortured young men, before picking up thirteen people including Shankar Karmali, a minor boy aged fifteen. All the thirteen persons were placed under POTA and jailed in Ranchi. Many more names from these villages were already mentioned in different FIRs.

Similar episode of repression by the police before picking up some for arrest, was reported from village Mangal Tilayya, a village in Pirtand block in Giridih district, which was ransacked by about 300 heavily armed police forces belonging to Jharkhand Armed Police and the local civil police on 1 December 2003. Hundreds were beaten up. While the fact-finding team was talking to the villagers about their experiences, the police was still camping on the outskirts of the village.

There were also instances where people, who were suspected of even the remotest association with banned organisations were arrested and charged under POTA. Sushil Prakash Bhasin, an Advocate at Daltonganj was arrested from his house on 28 June 2002, and two revolvers were allegedly recovered by the Palamu SP from his house. Shushil Bhasin's father, a freedom fighter and his wife, a teacher, told the fact-finding team that the SP forced them out of the room and searched the only almirah in the house from which he allegedly recovered the incriminating evidence—the two revolvers. Similarly, Nagendra Sharma, a reporter of the Hindi daily, *Hindustan*, was arrested under POTA from Sadbahini village in Palamu district. Sharma's fault was that he had been reporting the activities of banned organisations. Bansidhar Sahu of Palkot village in *Gumla* district was arrested on 2 February 2002 under POTA. Sahu owned a small restaurant at the road-side, where some members of banned organisations went to take tea. Janki Bhuiya, a minor boy of fourteen, along with two relatives and guests from Badkigaon in Hazaribagh district, was arrested in December 2002. Janki Bhuiya's father was suspected to be working with MCC. While nobody in the family confirmed or denied his father's connection with the banned organisation, the family reported that the latter had in fact not come home for the last three years. Janki's mother was earlier arrested and jailed for three months.

The report by the fact-finding team of civil rights groups which was brought up in Parliament by Somnath Chatterjee and some other MPs, leading to a debate, was followed by a scathing report in the *Indian Express* on 27 March 2003. Titled *POTA fact: Jharkhand has a lot more terror than J-K*, the report pointed out: 'so regularly has Jharkhand invoked POTA that it has beaten Jammu and Kashmir hollow in terms of using the law to combat terror—Jharkhand already has 702 POTA accused while Jammu and Kashmir, grappling with cross-border terrorism, has managed only 168 arrests'.[120] The following day, the newspaper made yet another startling report of two POTA arrests in Jharkhand—of 14-year-old Gaya Singh and 15-year-old Binod Singh. The police asserted that both were sympathisers of the MCC and were nabbed from the house of MCC ultra Madan Yadav on 25 September 2002. The boys, however, had a different story to tell. They stated that they had nothing to do with MCC and were in the field with the cattle when ten khaki-clad

MCC men picked them up and forced them to carry their heavy guns, 'we had no choice. In the night, they gave us food and left us at Yadav's house. The next day, the police arrived. We were slapped and taken to the police station. We have been here ever since'. The police, however, were confident that they had a 'solid case' against the two, considering, as the Additional Director General of Police, Jharkhand, informed, that one of them had 'even confessed [to have] fired at the police'.[121]

Earlier, pressures from human rights groups in the state, which had come together to form the *POTA Virodhi Jan Morcha*, and media reports, had forced the state government to review POTA cases. In February 2003, moreover, the NHRC took *suo moto* action seeking information from the Union Home Ministry, and the state government, on the 'misuse of POTA' in Jharkhand. The Central Review Committee was sent 'bulky district-wise reports' but not a 'total list' of arrested persons. The Committee subsequently asked the state government to send copies of FIRs lodged against each accused. Reflecting the manner in which POTA was used in the state, the Home Department in the state government could not provide such FIRs since, as a senior official was to put it, 'In many cases, several people were arrested together under POTA and a single complaint was filed listing their names. In very few cases do we have one FIR against one person'.[122]

Following the pressure built by civil rights groups, the media, NHRC and opposition parties in the state, the Jharkhand government announced the withdrawal of cases against eighty-three accused as the 'evidence against them was thin'. The Chief Minister Arjun Munda, said that all 'innocents' would be freed within a week, and strict action would be taken against police officials responsible for their arrests. The Director General of Police revealed that the decision to withdraw had come 'after a month-long review of the cases found that evidence against them was thin'.[123] The withdrawal of POTA did not, however, mean total relief since the persons still remained accused under IPC charges.[124] The Additional DGP who had conducted the review, said that the cases against Gaya and Binod Singh had not been taken up for review.[125] By the time the government's announcement on withdrawals came, as the *Telegraph*, Jamshedpur, reported on POTA figures in Jharkhand, till the middle of March 2004, the government had lodged 130 cases under

POTA against 745 persons, of whom 218 were under arrest, 185 under detention, 33 on bail and 514 absconding.[126] By 11 June 2004, the Arjun Munda government moved to a position where it refused to grant sanction to prosecute 145 persons booked in fifty-nine POTA cases for reasons ranging from lack of evidence to unfit cases.[127]

POTA in Sonbhadra

The Sonbhadra district in south-eastern UP, contiguous with Jharkhand, Chhattisgarh, Bihar and Madhya Pradesh, is one of the most backward regions of the state, despite the fact that the Kaimur region in which it is located is extremely rich in forest and mineral resources. This region also has the highest population of tribal people in the state, whose rights over the land and its produce have been progressively truncated. The conflict over land, agricultural and forest, and shrinking livelihood resources, has since Independence formed the backdrop against which rights violations in the region have taken place. There has been a continuous dispossession of the agricultural labourer from land, which was appropriated by feudal lords, ironically when the Zamindari Abolition Act came into being. Simultaneously, the process of nationalisation of forests, the conversion of cultivable areas into forestland, and non-implementation of land-ceiling laws etc., led to further loss of livelihoods and community resources.[128] Moreover, rapid industrialisation of the area, with the setting up of the National Thermal Power Corporation (NTPC) at Singrauli, and industries like Hindalco, the Rehand Dam Project, and various coal-mining projects, has meant further dispossession and displacement.

POTA was invoked in this region against forty-six persons of whom forty-five were dalits and tribals in April and July 2002, for alleged Naxalite activity. The chargesheet against the accused stated that all of them belonged to the banned MCC, and were carrying out anti-national activities. Apart from POTA, they were also charged with the Arms Act and Explosive Substances Act. Among the accused was a 12-year-old boy, Om Prakash, charged with killing a 'Raja' of the region and for Naxalite activity. Investigations by civil rights groups into the cases revealed, however, that those arrested had no relationship with MCC nor did they have any previous criminal record.[129] All the arrests were

carried out by the local landlords in connivance with the police to snuff out their struggles for land rights and just wages. Investigations by civil rights groups brought the matter to the attention of the National Human Rights Commission (NHRC).[130] On 28 and 29 December 2002, a Human Rights Convention was organised in Robertsganj, the district headquarter of Sonbhadra, by various human rights organisations and local organisations like PUCL, UP Agrarian Reforms and Labour Rights Campaign Committee, National Forum of Forest People and Forest Workers, Kaimur Kshetra Mazdoor Kisan Sangharsh Samiti, Human Rights Law Network (Delhi), PUHR (Bombay) and Abhiyan (Allahabad). In this convention, the issue of POTA and fake encounters, along with other violation of constitutional rights were raised. The accused in various cases with their family members deposed in front of members of the jury that was headed by Justice Ram Bhushan Mehrotra. In the course of the depositions, it became evident that among the accused, ten were bonded labourers who a few years back had fought a long battle with the help of the CPI to free themselves from bondage. The convention was reported on *Star TV* on 21 January 2003, prompting the Mayawati government to withdraw POTA cases from all the accused. Their plight, however, did not end since all of them were implicated in other Acts as well including the Gangster Act, Arms Act, Explosives Act, Narcotics Act etc.

Of the total POTA cases, fourteen were from village Kanach in Block Chopan comprising three hamlets or *tolas*, namely, Kudail, Kanhora and Pakri, situated at a distance of three to five kilometres from each other. Situated between the banks of the river Sone and the foothills of Machli Pahad, the village is flanked by dense forests and has predominantly tribal population. Two of the three *tolas* Kanhora and Pakri had been adopted under the Ambedkar *yojna*, and officials made tall claims of development work in the area. In reality, however, the roads remained *kachcha*, drinking water remained in short supply, and the infrastructure for education, frugal, with a single primary school. Moreover, the decision to set-up Kaimur Wildlife Sanctuary in 1982, further shrunk the livelihood resources of the tribals by eating into their land without making any alternative arrangements.

All those who were arrested under POTA in the village were tribals and *Dalit*s, manifesting the collusion between landowners and the police

against those struggling to break free from conditions of bonded labour that they had been forced into. Rajnarain Giri was one such landowner in the village owning more than 500 *bigha*s of land most of which was rich fertile land or forest land appropriated by subterfuge and fraud. A substantial proportion of this land had been wrested by Giri from the tribals who had mortgaged their land to him and were subsequently unable to repay their loans, becoming his bonded labourers. In 1985, during his tenure as the Gram Pradhan (1982–1995), a land record operation was carried out, and the amount of land in his name leaped from seven hectares to 100 hectares.[131] Giri's political connections, his own tenure as the Gram Pradhan from 1982 –1995, enabled his family to carry out atrocities, even rape, with impunity. Giri lured some of the baiga youths from tola Kanhora to work for him, raising his own private army that engaged in criminal activities such as looting, arson, and dacoity at his behest, in the name of Naxalites. Since 1998, the tribals of all the three *tola*s, with the support of CPI started raising their voice in organised protest against Rajnarain Giri to restore their land and free themselves from feudal bondage and oppression.

The immediate backdrop of POTA arrests in the village was the attack on 5 July 2002 on Giri's house, in reality the Panchayat Ghar, which Giri had turned into his private residence. After the incident, the villagers in the three *tola*s fled into the forest to escape the reign of terror unleashed by the police. Giri, who was not in the village filed an FIR on his return, naming fourteen people of the village, including two persons from his own caste, Jagannath Giri and his son, apart from four baiga youths Rahul, Bhagawat, Mahendra and Bullu whose parents were Giri's bonded labourers, and who were members of Giri's private army, apart from twenty MCC activists. Relying totally on Giri's statement without verification from independent sources like the Gram Pradhan and other villagers who were present at the time of the incident, the police imposed POTA and other sections of IPC on the persons named by Giri. Incidentally, the villagers including the Pradhan who were subsequently intimidated by the police and Giri, confirmed that except members of his private army, all the men who were involved in the incident were outsiders.

All those named by Giri were taken in police custody, and detained in Chopan police station for fifteen days, where they were tortured before being sent to Mirzapur Jail. Madan Kusvaha, who worked in

Gujarat and had returned to meet his wife and children and take them back to his own village, was picked up from Chopan on way to Ketar, Robertsganj on 7 July 2002. Since Madan was an outsider in the village, he was reported by Giri's family to the police, who picked him up and killed him in an 'encounter'. The FIR against Madan was not traceable in court. His father-in-law, Raghunath, was arrested and charged for sheltering Naxalites under Section 216 of the IPC. Madan's brother-in-law was called back from Gujarat, who was put behind bars on the charge of carrying out Naxalite activities. He was arrested under Sections 216 and 436 of IPC and Sections 25 and 27 of the Arms Act. Kept in jail for seven months, he was tortured and killed by Giri's family on 2 January 2004.[132]

Depositions by those arrested and later relieved of charges under POTA to the *People's Tribunal on POTA and Other Security Legislation* revealed that the district administration and the police were more often than not protecting the interests of the landed either through their inaction in cases where villagers reported oppression, or through an active intimidation of voices raised in protest. Thus, Jagannath Giri, a retired schoolteacher from Kanach, who was arrested along with his son under POTA for protesting against Giri, the landlord, stated:

> …A gang of fourteen was formed and they started disrupting the peace of the village. They used to loot and start extorting money. From some they took Rs 2000 and others were beaten. Traders from out of town were also not spared and they also used to pay extortion money. On 26 June 2002, the villagers gave the DM an application but no action took place. When the Naxalites returned on 4 June 2002, and they came to their own village, they met someone on the way who told them of the harassment. They decided to deal with the situation created by RajNarain Giri. In the meantime, the police were informed and they came into the village to protect RajNarain Giri. We took part in the earlier procession against the injustice, and thus we were also implicated…[133]

Jagannath Giri and his son were picked up by the police on 6 July and were detained in the jungle. On 8 July, they were booked under POTA and were sent to Mirzapur jail:

> We were sent to jail, where we spent a month. Nobody asked about us. Our signatures were taken at two places; they told us it was attendance sheets.

> And on that basis they wrote the FIRs. When we were in jail our family members ran away. All our household belongings—vessels, clothes and grains—was taken away by Giri and his people. Now we have absolutely nothing. We are in a terrible state. Giri and his people still do not let us live in peace. We have left Chopan and our home. I don't know where my son is. I have survived an assassination attempt. They have already killed two-three people…[134]

Several arrests of tribals were made under POTA in Dudhi Tehsil[135] in the region. Birju Gond and his son Ramshakal Gond were arrested on 17 April 2002, whose land was progressively taken away through transfers. Ajay Patnaik, a lawyer and activist from Singrauli, explained the process to the People's Tribunal as follows:

> Since the late 70s, tribal lands have rapidly been taken away for setting up of industries like NTPC, NCL, Sahara, Hindalco, Kanodia. In the Dudhi area, south of Sonbhadra, you can still find 70–80 per cent of tribals in the villages. Now that development work has started, businessmen, officials, and others have started migrating to these places on the lookout for new projects. Overnight, an official purchases 6–8 acres of land in the area. After that they try to find out the owner of the land, and keep quiet for about a decade or so. Not only that, the process of *thanas* are also fixed there. For taking possession of one acre of vacant land, they have to pay Rs 5,000 to the Police Station. The land in all probability belongs to tribals like Birju who doesn't have the *patta* (title deed). The land is transferred in the name of the new owner, money paid to the Police Station, and possession given to the new owner, whereas the original landowner, i.e., the tribal, keeps running from pillar to post, appearing in Court, etc., to no avail.[136]

Birju's appeals to the district administration and the police were not heeded to. His son Ramshakal, was arrested from his in-laws' house in village Pepardu on 17 April 2002, and was tortured in Dudhi Police Station. During the course of his long detention, Ramshakal was repeatedly tortured and forced to confess to specific crimes and identify places, names, people and dead bodies of 'alleged' Naxalites. Jagat Gond, a resident of village Jharokhurd was picked up by the police from the forest of Katauli, near his village, while he was grazing his livestock on 18 April 2002. The FIR dated 20 April 2002, reported, however, that the SHO, SI and other police men were on a search mission near village Majhuli on 19 April, when a stranger informed them that a group of

Naxalites were holding a meeting on Katauli hill, about 200 yards from Jagat Gonds' house. The FIR further informs that when the police force reached the spot, the Naxalites used heavy explosives to escape. Yet, it stated, the police managed to arrest three persons, namely, Ramprasad Gond, Ramnaresh Panika, and Ramchandra Gond. Like Jagat Gond, who was actually picked up earlier from his Katauli dera, Ramnaresh Panika was picked up from his house and not from Katauli hill.

This chapter examined the intricate ways in which POTA unravelled in Gujarat, Maharashtra, Jharkhand and Sonbhadra region of Uttar Pradesh. The examination reveals the substantive details of the themes outlined in the first chapter pertaining to the reasons of state and the ways in which ideological and religious cultural pluralities are rendered suspect. A framework of governmental powers limited by notions of substantive rights and the rule of law makes for democratic regimes, suggesting that even in times of 'acute danger' government is limited, both formally and substantively, in terms of the range of activities that it may possibly pursue in its objective of 'protecting the state'. The discussion in this chapter shows how these limits are progressively eroded. This erosion is manifested in the ways in which the structures and institutions of government come to be governed by a sustained logic of the exceptional and emergent, and in the manner in which such logic is embedded in a politics of negation. Not only is the political community conceived as homogeneous, any articulation of the people's will to re-articulate its form and substance, and refashion their terms of belonging to it, are seen as disruptive. The idea of 'extraordinary' emerges as a manifestation of the ways in which the politics of difference is edged out of the political domain, depoliticised, and criminalised. The delineation of the extraordinary is accompanied by the invocation of 'special' legal procedures and judicial structures to preserve the nature and form of the political community, which is ultimately embedded in structures of class and religious-cultural and political domination.

Notes

1. On 21 May 2005, the POTA Review Committee headed by Justice S.C. Jain recommended the withdrawal of POTA cases on the accused in the Godhra case, because it did not feel that it was a 'pre-planned conspiracy', but a fallout of the scuffle between some vendors and passengers of the S.6 coach. Even if there was a

'conspiracy it was localized and could not be interpreted as an act against the nation', recommending the withdrawal of POTA against all accused. 'POTA may not be applied against accused in Godhra Train incident: It was not a case of waging war', *Hindu*, 22 May 2005.

2. See People's Union for Democratic Rights report 'Terror by Proxy', Delhi, 2003, p. 1. A report in *Hindustan Times* noted 'There is clear indication that on the night of February 27, police received instructions from their political masters to let VHP and Bajrang Dal cadres implement the next day's *bandh*. The killers used the breathing space to meticulously plan terrorist attacks on selected Muslim targets, producing the cutting edge that turned Zadaphia's 'natural reaction' into full-scale genocide unmatched in Gujarat's recent history'. Gujarat Minister of State for Home Gordhanbhai Zadaphia had earlier argued, 'An outside agency like the ISI was involved in the attack on the Sabarmati Express and it was a pure terrorist attack, but what took place in the state later was mob fury. Though not desirable it was only a reaction'. 'POTO: BJP stoops to conquer', *Hindustan Times*, 24 March 2002.
3. Ibid.
4. While POTO was being invoked in the Godhra case and new names continually being added to the list of accused, under government instructions, POTO was withdrawn from the only case of violence against Muslims in which it was applied, in the border district of Banskantha. 'Gujarat may invoke POTO at a later stage if needed', *Hindu*, 23 March 2002.
5. Ibid.
6. This was the third time that a joint session had been convened, the two earlier occasions being over the Dowry Prohibition Bill and the Banking Services Commission (Repeal) Bill. Congress MP, Kapil Sibal, pointed out that the difference was that while the earlier joint sittings were convened to iron out minor differences related to amendments and specific clauses in the Bills, the present sitting was convened to 'undermine the authority of a House', in this case the Rajya Sabha. 'President convenes joint session of POTO', *Hindu*, 23 March 2002.
7. 'Gujarat may invoke POTO at a later state if needed', *Hindu*, 23 March 2002.
8. PUDR, 'Terror by Proxy', p. 2.
9. Ibid. p. 3. The Assembly elections in Gujarat were not without contest, however. The state Assembly was dissolved on 19 July 2002, and Narendra Modi was appointed as the caretaker Chief Minister till the time fresh elections could be held. The BJP had hoped that under Article 174 of the Indian Constitution which required that six months should not lapse between the last sitting of the Legislative Assembly in one session and the date appointed for the first sitting in the next session, and given that the last sitting of the last session of the Gujarat Assembly was 3 April 2002, elections for the new Assembly should be held before 3 October 2002. The attempt to dissolve the Vidhan Sabha was largely being seen as a bid to draw political benefit from the sensitive political context. The BJP asked for early elections, but the opposition parties, as well as some other parties that were part of the ruling combine, feared that elections in Gujarat could provoke more violence, and demanded President's rule in the state. Between 31 July and 4 August 2002, the Election Commission sent a team of officials to Gujarat followed by a visit of the entire three-member commission to decide on a possible timeframe of elections in in the state. Contrary to Gujarat government's argument that only 12 out of its 25 districts were affected, the Election Commission observed that almost 80 per cent

of the state's administration remained unstable, 154 of the 182 constituencies of the state were affected by riots, which included 151 towns and 993 villages. Moreover, the numbers of riot affected persons who were displaced or missing, made the task of preparing the electoral rolls that was underway, impossible to accomplish at an early date. Of the 121 relief camps, only 8 camps were still functioning, but the inmates of the camps that had been shut down had not returned to their homes. The Election Commission concluded that in the context of incomplete rolls and missing electorates, elections could not be held before the end of November 2002. The Central government construed this as a matter under Article 143, where the President was empowered to refer to the Supreme Court a question of law and facts. The Supreme Court's opinion on the Presidential reference rejected the Central and Gujarat governments' indictment of the Election Commission's order expressing inability to hold elections in Gujarat before 3 October 2002. Ujjwal Kumar Singh, *Institutions and Democratic Governance: A Study of the Election Commission and Electoral Governance in India*, NMML Monograph No. 8, 2004.

10. 'Main Godhra conspirator arrested', *Hindustan Times*, 7 February 2003.
11. PUDR, 'Terror by Proxy', p. 3.
12. 'Another 'main' conspirator of Godhra held', *Indian Express*, 7 February 2003.
13. 'POTA against Godhra accused', *Indian Express*, 20 February 2003; 'POTA invoked against Godhra accused', *Times of India*, 20 February 2003.
14. 'Gujarat government invokes POTA against 121 Godhra accused', *Hindu*, 20 February 2003.
15. 'Maulana arrested under political pressure', *Hindu*, 9 February 2003.
16. 'Same terror, different laws in Gujarat', *Indian Express*, 22 February 2003; 'In Gujarat, only Godhra case is fit enough for POTA', *Indian Express*, 3 April 2003.
17. 'No answers, only questions', *Indian Express*, 27 February 2003.
18. 'Little progress in Godhra probe', *Hindustan Times*, 27 February 2003.
19. PUDR, 'Terror by Proxy', p. 7.
20. 'Gokani POTA *Adalat ki Pehali Mahila Nyayadheesh*', *Rashtriya Sahara*, 9 March 2003.
21. 'POTA court rejects bail plea of Godhra accused', *Hindustan Times*, 18 April 2003.
22. The first comprehensive chargesheet running over 1000 pages was filed on 22 May 2002, followed by two supplementary chargesheets on 20 September 2002 and 19 December 2002. A fourth chargesheet was filed on 17 April 2003, followed by two more on 5 and 19 May 2003, respectively. For details of the chargesheets and the points of contentions and discrepancies within and among them see PUDR, 'Terror by Proxy', pp. 2–7.
23. 'Godhra carnage: two more arrested', *Hindu*, 29 May 2003.
24. 'Godhra accused dies of 'low BP' in custody', *Indian Express*, 1 May 2003; 'Godhra accused dies in custody', *Hindustan Times*, 1 May 2003.
25. Harsh Mander, 'POTA and its phantom limbs', *Hindustan Times*, 24 September 2004, also *Terror by Proxy*, PUDR, 2003.
26. Ibid.
27. Ibid., p. 11.
28. Ibid., p. 19.
29. For details of the powers and functions of the Central Review Committee under the POTA Repeal Act see the concluding chapter.

30. The two appeals were filed by separate parties affected by the Godhra train carnage and the terrorist attack on the Akshardham temple. The petitioners challenged Section 2(3–5) of POTA Repeal Act 2004, that conferred powers in favour of the Review Committee by granting primacy to its opinion over the courts constituted under CrPC. 'Hearing on Godhra case accused plea on February 7', *The Hindu*, 3 February 2005. See also 'Pleas against POTA review panel fails', *The Hindu*, 15 April 2005.
31. 'On Godhra, Home quotes POTA panel', *Indian Express*, 22 June 2005.
32. 'Terror angle in Akshardham, not Godhra: POTA panel', *Indian Express*, 22 May 2005, pp. 6–8.
33. Excerpts from the conclusions drawn by the Central Review Committee may be found in 'POTA: Farce and Facts', *Combat Law*, Volume 4, Issue 2 June–July 2005, p. 7.
34. 'Godhra: POTA panel trashes plot theory', *Hindustan Times*, 31 May 2005.
35. Paragraph 38, Excerpts from the Central Review Committee's conclusion, *Combat Law*, 2005, pp. 7–8.
36. Paragraph 39, ibid.
37. Paragraph 41, ibid.
38. 'POTA may not be applied against accused in Godhra train incident: It was not a case of waging war', *Hindu*, 22 May 2005.
39. 'Godhra: SPP places POTA review panel's view in court', *Indian Express* 1 June 2005.
40. 'Decision on application of POTA in Godhra case postponed', *Hindu*, 29 June 2005.
41. Since most of those arrested were poor Muslims, the stories of misery of the family continue to accumulate, as also of torture of those in detention. Khatoon Bibi is the mother of three boys arrested under POTA in the Godhra incident. Her 68-year-old husband Sultan Khan Pathan is suffering from throat cancer. She and her daughter-in-law are the sole breadwinners in the family. One of the detenus narrates his own traumatic experience at the hands of the state authorities thus: 'A policeman took us before the Magistrate, Mr Rane, in Ahmedabad. We complained about the torture in police custody. He shouted at the policemen and said, 'How you have prepared them? Take them back and come with good preparation?' By this he meant using more third degree torture so we should not complain'. For more details see Azim Khan, 'Gujarat: Four Years After the Genocide', 25 February 2006. www.countercurrents.org
42. Prime Minister Atal Behari Vajpayee and his deputy L.K. Advani and other official reactions cited in 'A heinous act', *Hindu*, 26 September 2002.
43. 'Akshardham: 5 held, Lashkar, Jaish 'role', *Indian Express*, 30 August 2003.
44. Ibid.
45. 'POTA invoked against accused in Akshardham case', *Hindu*, 31 August 2003.
46. 'Kashmir arrest blows lid off Gujarat police claim', *Hindu*, 5 September 2003.
47. 'Gujarat cops leave for J-K to seek Chand Khan's custody', *Indian Express*, 5 September 2003.
48. 'Akshardham: Gujarat police's J & K trip futile', *Times of India*, 10 September 2003.
49. 'Akshardham: claims, counter-claims', *Hindu*, 9 September 2003.
50. 'Akshardham: Gujarat police's J & K trip futile', *Times of India*, 10 September 2003.
51. 'Gujarat cops in Srinagar begin to see holes in their Akshardham story', *Indian Express*, 6 September 2003; 'Gujarat cop story weakens: Held men never met each other', *Indian Express*, 8 September 2003.

52. 'Akshardham suspect Chand Khan sent to police custody', *Hindustan Times*, 14 September 2003.
53. 'Gujarat cops in Srinagar begin to see holes in their Akshardham story', *Indian Express*, 6 September 2003.
54. 'Local support in Akshardham attack proved: Gujarat police', *Hindu*, 19 September 2003.
55. 'Chand Khan's lawyer alleges torture, court orders medical check', *Hindustan Times*, 24 September 2003.
56. 'Dispute over Akshardham attack sequence', *Hindu*, 25 September 2003.
57. Ibid.
58. Yasin Butt, the alleged 'mastermind' of the attack on Akshardham, was arrested a few months later by the Jammu and Kashmir Police. 'Breakthrough in Akshardham probe', *Hindu*, 21 February 2004. The Jammu and Kashmir Police said that Yasin was one of the three L-e-T commanders involved in the planning and execution of the temple attack. The other two were killed in encounters. Claiming that he was 'an important link in the conspiracy', they informed the press that Butt had confessed to his involvement in planning and execution of the attack, confirming the roles played by the two killed fidayeen and Chand Khan. 'Akshardham mastermind held in J-K', *Indian Express*, 26 February 2004.
59. 'Conspirators in Pandya murder case identified', *Hindustan Times*, 18 April 2003.
60. 'Pandya's killers had targeted VHP leader', *Times of India*, 19 April 2003.
61. The police said that Asghar Ali had engineered the escape of an alleged communal offender, Mirza Fayaz Baig from a city court in Hyderabd in 1996. Baig was involved in the killing of Nandraj Goud, a BJP corporator, who had participated in the 'kar seva' in Ayodhya. Baig was subsequently shot dead in an encounter with security forces in Kashmir. Son of a retired police officer, Asghar Ali was arrested by the Nalgonda police and RDX and two pistols were recovered in Hyderabad five years ago. His mentor, Faisuddin, who took to attacking the 'kar sevaks' after the demolition of the Babri Masjid was shot dead by the police in 1994. Asghar had allegedly vowed to avenge his killing. 'Haren Pandya murder: 4 held in Hyderabad', *Hindu*, 18 April 2003; 'CBI claims they have man who gunned down Pandya', *Indian Express*, 1 April 2003.
62. 'Five get 10-day CBI remand', *Times of India*, Ahmedabad, 22 April 2003.
63. 'Pandya case accused remanded to custody', *Ahmedabad Newsline, Indian Express*, 22 April 2003.
64. 'Three more arrested in Andhra Pradesh', *Hindu*, 27 April 2003.
65. CBI invokes POTA against all accused of Pandya murder', *Indian Express*, 3 June 2003; 'CBI slaps POTA on Haren Pandya killers', *Hindu*, 3 June 2003.
66. 'Pandya hatyakand mein 19 logon ke khilaf arop-patra dakhil', *Rashtriya Sahara*, 9 September 2003.
67. 'CBI calls for hush-hush trial', *Times of India*, 9 September 2003.
68. Five major POTA cases in Gujarat accounted for nearly 280 persons: the Sabarmati train-burning case, the Akshardham case, the 'tiffin-bomb' case, where a few low-powered bombs exploded in different parts of the city of Ahmedabad causing injuries to some people, the Haren Pandya murder case, and a case where POTA was invoked against 7 persons on 11 December 2003, on the charge of conspiracy to kill some important VHP and BJP leaders.

69. Extracts of the chargesheet have been taken from the testimony of Mukul Sinha, advocate and member of *Jan Sangharsh Manch*, before the People's Tribunal. See Preeti Verma, 2004, pp. 146–156.
70. Ibid.
71. 'On Godhra, Gujarat rejects POTA review panel report', *Indian Express*, 10 June 2005.
72. 'Fear meant Naxals first, terror act later', *Indian Express*, 1 April 2003, pp. 1–2.
73. The blast occurred during rush hour in two buses on routes 416 (plying between Amrut Nagar and Ghatkopar Rly. Station) and 336 (which goes through Ghatkopar). While the Deputy Chief Minister Chhaganlal Bhujbal thought it 'improper' to link the 10th anniversary of Babri Masjid demolition with the incident, for the police commissioner the link could not be ruled out. The blast sparked a scare in the city. An unclaimed bag sparked tension in a multi-storeyed complex near the United States Information Service building and Bombay Hospital, a high security zone. 'No RDX in Mumbai blast', *Indian Express*, 4 December 2002, p. 6.
74. In the Ghatkopar blasts, the Mumbai police claimed to have unraveled an elaborate militant network with at least one of the operatives, Aftab based in Dubai, helped by an Aurangabad electronics engineer (Zaheer Ahmed Basheer Shiekh) and a lecturer in Grant Medical College affiliated to the J.J. Hospital (Dr Mohammed Abdul Mateen). On 25 December 2002, 'encounter specialist' Senior Inspector (Crime Branch) Praful Bhonsle and his men picked up the 'key suspect' Dr Mohammed Abdul Mateen, who they claimed to have identified and watched over a long period of time. The accused were booked under Sections 3, 4, 18, 20, 21 and 22 of POTA. Earlier they were arrested under Sections 120 B (Criminal conspiracy), 302 (murder), 307 (attempt to murder), 326 (voluntarily causing grievous hurt by means of dangerous weapons) of IPC and also under the Indian Explosives Act. 'POTA slapped on bus blast accused', *Indian Express*, 4 January 2003, p. 5. Newspapers reported that the crime branch had marked out Dr Mateen for a long time and even watched him get married. Sources in the investigating agencies were reported to have said that the conspiracy could have been hatched in Room number 72 at the Old Boys Hostel in the J.J. Hospital where Dr Mateen had been living since October 2001. Shiekh and some others were regular visitors in this room, before the plot was set into motion. Shiekh and Mateen were friends in school and allegedly joined the banned SIMI around 1996. 'Mumbai bus blast: A forensic Ph.D. & and an engineer are prime suspects', *Indian Express*, 26 December 2002, pp. 1–2.
75. Zaheed Yusuf Patni was yet another suspect arrested under POTA on 2 October 2003 in the Ghatkopar case and sent into police remand till 17 October. He was also suspected of involvement in 25 August blasts at the Gateway of India and Jhaveri Bazar. Patni had left Mumbai in 1999 for Dubai to work as a forklift operator. The police alleged that he watched the footage of the post-Godhra Gujarat and was one of the people instrumental in forming the Gujarat Muslim Revenge Force, with the help of the Lashkar-e-Toiba. Patni allegedly financed and coordinated the twin blasts in Mumbai and July's explosion in Ghatkopar. 'Gujarat footage incited Mumbai blast suspect', *Hindustan Times*, 3 October 2003, p. 13.
76. On 28 October the police arrested three suspects under POTA in connection with the 25 August bomb blast in Jhaveri Bazar, and produced them in a Special Court that remanded them to police custody till 11 November. Sayed Md. Hanif, his wife

Fahmida and associate Arshad Ahmad Ansari, who were arrested under POTA, were already in judicial custody in connection with 28 July Ghatkopar bomb blasts and the 25 July Gateway of India explosion. In the Jhaveri Bazar case, these three were the first to be arrested. The prosecutor said that Hanif and his wife were the conspirators while Arshad had executed the blast. 'Zaveri bazaar blast: 3 held under POTA', *Hindu*, 29 October 2003, p. 15.

77. Arrests were made from a village called Pagdha in Thane district and from Parbhani in Aurangabad. Preeti Verma, *The Terror of POTA: and Other Security Legislation*, March 2004, p. 251.
78. Another POTA accused in the Mulund blast, Anwar Ali, was a part-time lecturer at the Pune-based National Defence Academy. Anwar Ali was arrested on 12 May by a team of Mumbai Police Crime Branch and remanded to police custody till 26 May. The police stated that Anwar had been associated with the outlawed SIMI and allegedly provided shelter to three Lashkar-e-Toiba terrorists who were gunned down by Mumbai police in an encounter on 29 March, including Abu Sultan, the Southern Commander of the Lashkar-e-Toiba. Ali's name allegedly figured in the diaries of Sultan, recovered after he was killed in an encounter with the Andheri unit of Criminal Intelligence Unit. 'Lecturer held under POTA', *Hindu*, 13 May 2003, p. 1. For four years beginning 1996, Ali had been working with NDA as an urdu instructor on a 'clock hour basis'. His services were terminated following the appointment of a permanent instructor in 2000. Over a month back when the vacancy arose, Ali applied afresh and was reappointed on contract. 'NDA lecturer arrested for Mumbai blast', *Indian Express*, 13 April 2003, pp. 1–2. The Commissioner, Pune police had no information regarding the alleged links of Ali, although they had been tracking activities of some former SIMI members. Moreover, the NDA had called for a verification report on all *ad hoc* teachers in 1999, and the police report did not have any adverse observations on Ali's background. Senior police officers claimed, however, that the NDA had been sent intelligence reports indicating that Ali had dubious links way back in 1999–2000. 'Pune Police clueless, NDA didn't bother', *Indian Express*, 14 May 2003, p. 5. The Mumbai police also claimed that Anwar Ali had built a firing range at his Kondhawa flat. 'Pune hasn't heard of Ali firing range', *Indian Express*, 17 May 2003, p. 4.
79. The details of the torture that was meted out has been recorded in Preeti Verma, *The Terror of POTA*, 2004.
80. In his deposition before the People's Tribunal on the Prevention of Terrorism and Other Security Legislation, Majid Memon, a lawyer from Mumbai, reported the torture that had taken place in police custody on 6 January 2003, as narrated to him by Dr Mateen. Ibid., p. 267.
81. The announcement of plans to 'test' POTA on crimes against *dalits* came in the wake of a long-winding debate by the Shiv Sena, which listed 27 such cases. Mr Bhujbal and Chief Minister Sushil Kumar Shinde, a *Dalit* himself, to the surprise of the opposition quoted to them from a recent editorial written by Bal Thackeray in the Sena mouthpiece, *Saamna* where Thackeray had stated that political parties should not capitalise on the *Dalit* issue and deal with it 'apolitically with sensitivity'. Mr Bhujbal asked the Opposition to heed this advice and read out several lines of the editorial saying '…I hope you read it…You follow it and so will I'. 'Maharashtra Government to 'test' POTA on crimes against Dalits', *Hindu*, 18 July 2003, p. 13.
82. Rejecting a 'protest bandh' which they saw as no answer: 'we cannot have a serial bandh for serial blasts', the opposition took out a silent *morcha* from the Gateway of

India to the *mantralaya* led by its leader, Narayn Rane, demanding the dismissal of the state government. 'Militants must be killed in encounters: Thackeray', *Indian Express*, 28 August 2003, p. 11.

83. 'Villagers urge Bhujbal to check police terror', *Indian Express*, 29 April 2003, p. 4.
84. In their appeal to the government, the villagers urged Chhagan Bhujbal to (*a*) set up a committee comprising human rights activists, lawyers and intellectuals to review the application of POTA to the villagers, (*b*) direct the police to conduct a free and fair investigation into the blast, (*c*) direct the police not to terrorise the villagers and relatives of persons arrested, (*d*) set up a joint committee of village elders and the local police to maintain communal harmony and to rebuild people's faith in the police. Ibid.
85. 'Mulund blast sends village reeling into a nightmare', *Indian Express*, 14 April 2003, pp. 1–2.
86. Preeti Verma (ed.) *The Terror of POTA*, p. 262.
87. 'MPCC finds a new reason for Solapur fiasco', *Indian Express*, 4 October 2003, pp. 1–2.
88. The fact that Saquib Nachen, a former SIMI activist was from Borivali, ensured that the entire village became suspect in the eyes of the police. Nachen who served a 10 year sentence under TADA was released from Sabarmati jail in 2001 and had since been living in Borivali functioning as a Kazi. 'Poll theme: The POTA factor—In Borivali', a simmering anger against the police', *Hindu*, 15 April 2004, p. 13.
89. The 'terror tag' that had come to attach itself to the community was widely being resented. In Mumbai, the Ahle Hadees, a puritanical Islamic group expressed shock at seeing their name dragged by police and politicians over the alleged involvement of 'members' Yusuf Shaikh Janab and Mohammed Jalees Ansari in the Ghatkopar blast: 'Janab and Ansari were never our members. It's a campaign to tarnish our image'. The sect claims to be the Quran's true followers who adhere to strict traditions like long beards and strict purdah for women, with members strictly barred from joining any other religious group. Founded by followers of Shah Walliullah, an Islamic scholar who stood up against British imperialism, in 1906 at *Madarsa* Riyazul Uloom at the foot of Delhi's Jama Masjid, the Ahle Hadees has spread with two lakh members in Mumbai and pockets in Kurla, Sakinaka, Mumbra, Bhandup, Madanpura and Bhiwandi and has set up around 60 madarsas across the city. 'Terror tag dismays puritanical group', *Indian Express*, 1 August 2003.
90. 'In Maharashtra, most races are too close to call', *Hindu*, 25 April 2004, p. 10.
91. On 4 February 2004, the Maharashtra government sanctioned prosecuting six alleged 'Lashkar-e-Toiba operatives' under POTA in the Ghatkopar case. The police claimed to have voluminous evidence on the basis of which a common chargesheet was to be filed in the court of designated judge A.P. Bhangle, against six accused Sayed Mohammed Hanif, his wife Fahmida, and their 'associates', Arshad Ansari, Zahid Patni, Mohammed Hussain alias Batteruwala and Mohammed Rizwan. 'Maharashtra government sanction to prosecute 6 under POTA', *Indian Express*, 5 February 2004.
92. 'Ghatkopar: No proof, state lets off key accused', *Indian Express*, 5 March 2004.
93. The three member POTA Review Committee consisted of Arun Saharya, former Chief Justice of Delhi High Court, Arvind Inamdar, former Director General of Mumbai police and Mehmood-ur-Rehman, ex-Vice Chancellor of Aligarh Muslim University. 'POTA panel "lets off" accused', *Indian Express*, 15 April 2004, p. 4' 'Ghatkopar blast accused released', *Hindu*, 18 April 2004, p. 8.

94. Vaze was charged under Sections 302 (murder), 218 (public servant framing incorrect records to save a person from punishment) and 201 (causing disappearance of evidence or giving false information). 'Ghatkopar: Vaze judicial custody extended to April 23', *Indian Express*, 15 April 2004, p. 4.
95. The general secretary of VHP international general secretary, Pravin Togadia said that Vaze's case was no exception. Any police or security officer 'harassed' in the name of human rights violation in Kashmir or elsewhere would be provided similar help by his outfit. Vaze's case clearly acquired political overtones, with more than one right-wing organisation projecting him as a hero. 'VHP springs to sharpshooter's defence', *Indian Express*, 9 March 2004. On 28 March 2004, Vaze was given interim bail.'Yunus case: Vaze gets bail', *Indian Express*, 29 April 2004, p. 8.
96. 'The mysterious case of Khwaza Yunus', *Indian Express*, 13 March 2005, p. 13.
97. 'Ghatkopar blast: More lies surface in police FIR', *Indian Express*, 8 March 2005.
98. The arrested police officers, senior inspector Praful Bhosale, assistant police inspectors Hemant Desai and Ashok Khot and inspector Rajaram Vhanmane—all members of an award winning team of the Ghatkopar Crime Intelligence Unit—were remanded to custody till March 15. Encounter specialist, inspector Vijay Salaskar, who was present in the court said that they had decided to help them legally. 'Hang his murderers: Yunus's mother can't wait for justice', *Indian Express*, 9 March 2005, p. 5.
99. 'Court lets off 8 accused in Ghatkopar case', *Indian Express*, 12 June 2005.
100. 'Mumbai police drop POTO against Afroz', *Hindustan Times*, 27 March 2002.
101. 'POTA slapped on Al Badr', *Hindustan Times*, 2 April 2002.
102. 'Afroz goof-up report slams Mumbai police', *Indian Express*, 14 August 2002.
103. 'Court stalls police move to drop POTO, orders fresh look', *Indian Express*, 28 March 2002.
104. 'Afroz case: police file chargesheet, skirt POTA', *Hindu*, 9 April 2002. The chargesheet was filed under Sections 120(B), 121 and 126 of IPC, accusing Afroz of waging war against countries friendly with India and conspiring to conduct terrorist activities abroad. 'Afroz is free but Government will continue probe', *Times of India*, 10 April 2002.
105. 'Afroz's brother's bail rejected', *Tribune*, 11 May 2002.
106. 'CBI says Afroz case 'cooked up', *Hindustan Times*, 9 April 2002. While the CBI denied having communicated anything to the press on any aspect of the case, newspaper reports suggested that the CBI director was not convinced of the legality of the case, and reluctant to take it up. 'CBI: Attempt to obfuscate facts in Afroz case', *Hindustan Times*, 10 April 2002.
107. 'Afroz walks into great expectations', *Indian Express*, 3 October 2004, p. 3.
108. The Mumbai police case was based on evidence corroborating that he had received flight training in India at the Fly Air Academy at Mazagaon, at Civil Flying School in Melbourne in Australia where he submitted a fake certificate. The immigration officer in Mumbai confirmed Afroz's departure for Australia on 6 August 1997. In 1999 Afroz joined Tyler International Institute in Texas, his passport entry showed that he had left from Sahar Airport on 23 September 1999. The police also stated that Afroz was trained in Crane Field University, London, corroborated by passport entry. 'Afroz ke liye SC tak Ladenge', 23 July 2005, www.allindianews.in/archive/ 2005_07_23 accessed on 6 August 2005. 'Afroz gets 7-year RI for plan to blast Parliament', *Hindustan Times*, 23 July 2005.

109. 'Caught in the POTA trap', www.tamilinfoservice.com/manitham
110. Preeti Verma, 2004, p. 196.
111. Ibid., 200.
112. '6 PWG, MCC activists booked under POTO', *Hindustan Times*, 19 December 2001.
113. Ibid.
114. 'Jharkhand enforces POTO, arrests 6 Naxals', *Indian Express*, 19 December 2001.
115. 'POTO withdrawal sought', *Hindu*, 19 December 2001.
116. An All India fact-finding team consisting of Hari Singh Tark, President, Association For Democratic Rights (AFDR), Punjab, G.N. Saibaba, General Secretary, All India Peoples Resistance Forum (AIPRF), Balbir Singh Saini, Sr. Advocate at Chandigarh High Court from Haryana, Sashibhushan Pathak, Secretary, Peoples Union for Civil Liberties (PUCL), Jharkhand and Convener POTA Virodhi Jan Morcha Anil Sharma, AIPRF, Delhi and Chayan Sen Gupta, Member, AIPRF, Assam toured several districts of Jharkhand between 29 January and 3 February 2003 to collect first hand information about the POTA accused in the State.
117. The conclusions of the fact-finding groups were revealing and in fact seemed to reverberate from the experiences in Sonbhadra region: (*a*) No terrorist threatening national integrity was booked under POTA in Jharkhand. No one among the three thousand and odd people named under POTA in less than a year seems to be meriting the POTA clauses as there is no anti-national among them. (*b*) POTA was being used against revolutionaries, their supporters and mostly the common villagers from the villages where there existed some influence of revolutionary parties like MCC, CPI (ML) (Peoples War) and other parties. (*c*) Most of the families of victims of POTA do not understand what the law is and are not able to arrange advocates. (*d*) The cases in which advocates were being arranged, the poor families are not able to bear the burden of expenses and have had to sell cattle, houses, and whatever small patches of land they own, becoming further pauperised. (*e*) The figures were as follows: (*i*) FIRs filed on: more than 654, (*ii*) persons arrested so far: 202, (*iii*) enquiries began to file chargesheet: 194, (*iv*) bailed POTA accused: 4, (*v*) POTA accused who died in jail: 4, (*vi*) POTA clauses removed by courts: 013, and (*vii*) total number of persons named under POTA: 3,200. They recommended that (*a*) all POTA cases in Jharkhand should be immediately reviewed by appointing an appropriate review committee as per clauses under POTA, (*b*) pending such a review, the Government of Jharkhand should immediately withdraw POTA and other cases put on innocent persons who constitute an overwhelming majority of cases under POTA, (*c*) special designated Courts should be appointed in Gumla and Palamu districts where the highest number of POTA cases have been registered whereas now these designated courts are situated only in Ranchi and Dumka where POTA cases are minimum in number, (*d*) the police officials responsible for booking POTA cases on the innocent villagers should be punished, (*e*) all the innocent persons booked under POTA and jailed should be compensated by the government, (*f*) the rest of the cases should be converted to ordinary cases under CrPC and other appropriate sections by removing POTA clauses in a phased way on a number of cases, and (*g*) arrest warrants on those who are named under different FIRs of POTA cases should be withdrawn to ease out the tense atmosphere in hundreds of villages.

118. 'No money for bail: 15 year old girls stay in POTA net', *Indian Express*, 5 October 2003.
119. Ibid.
120. *Indian Express*, 28 March 2003.
121. 'A 14 year old tells you what POTA means to the poor', *Indian Express*, 29 March 2003.
122. Akshay Mukul, *Times News Network*, 17 January 2004, accessed at http://tweens.indiatimes.com/articlesshow/msid-428500, prtpage-1.cms
123. 'POTA cases dropped', *Hindustan Times*, 11 June 2004.
124. Testimony by Netai Ravani, advocate and member of People's Union for Civil Liberties in Jharkhand, to the People's Tribunal on POTA and other Security Laws. See Preeti Verma, 2004.
125. 'Jharkhand drops POTA against 83', *Indian Express*, 2 April 2003.
126. 'Freedom for 83 terror law accused', *Telegraph*, 2 April 2003.
127. 'POTA cases dropped', *Hindustan Times*, 11 June 2004.
128. The region has a huge forest cover, which is predominantly inhabited by tribals who had traditionally exercised unlimited control over the resources of the forest. With British colonisation, a new revenue system emerged along with new bureaucracy of the Brahmins and other high castes, whose job was to earn revenue by taxing the poor peasants. The topography of the region presented problems in land surveys. After independence, moreover, the Rajas of the areas opposed Zamindari Abolition and Land Reform Act. Their appeal in the High Court against the measures, delayed the implementation of the Act for 18 years. During these years, the feudal lords appropriated huge plots of lands, including the tribal land, while the remaining *gram sabha* land was transferred to the Forest Department, dispossessing the tribal families who were cultivating these lands, of their means of livelihood.
129. Investigation conducted by Kaimur Kshetra Mazdoor Kisan Sangharsh Samiti (KKMKSS), U.P Agrarian Reforms and Land Rights Campaign Committee, and National Forum of Forest People and Forest Workers, found that those accused in the case were mostly tribals and dalits, who were completely innocent and had nothing to do with the banned organisation, and that they were implicated falsely in the cases.
130. The MLA of Saharanpur Sanjay Garg brought this matter into the Legislative Assembly which not discussed or debated due to the political crisis in the state.
131. Part of this land was rich in limestone used to manufacture cement. Giri also took over land which belonged to the Gram Panchayat, fallow land, grazing land etc. For details of this incident see the testimony by Jagannath Giri to the People's Tribunal on POTA and Other Security Legislation, held in Delhi in March 2004, in Preeti Verma, 2004.
132. Deposition by Roma, an activist of the Uttar Pradesh Bhoomi Sudhar Evam Shram Adhikar Abhiyan Samiti, before the People's Tribunal. Preeti Verma op.cit., 288.
133. Ibid., p. 286.
134. Ibid., p. 287.
135. Ramprasad Gond Dhanu Gond r/o village Jampani, Ramprasad Panika Shivratan Panika r/o vill. Jharokhas, Ramchandra Gond Sahdev r/o Jharokala, Rajkumar Gond

r/o Chapki, Ramdas Gond r/o Gulal Jharia, Raju Chapki, Basant Lal r/o Chapki, Sukhdev Gond alias Pavan r/o Bhalui, Vijay Gond r/o Gond, Ashok r/o Amwar Nehar Colony, Ramsakal Gond r/o Manbasa, Jagat Gond r/o Katauli.

136. See Preeti Verma, op. cit., pp. 296.

Chapter Four

The Unfolding of Extraordinariness

National Security Syndrome and Implications for Centre-State Relations in India

As pointed out earlier, even in its inception POTA epitomised an executivisation of law, giving the executive extraordinary powers of initiating the procedures and investigations under the Act. As the Act unfolded in practice, a further deepening of this process was revealed (*a*) through judicial affirmation of the procedures laid down in POTA, and (*b*) through the authorising of a review process as a quasi-executive and quasi-judicial function. The working of the Act, in UP and Tamil Nadu in particular, threw up areas of tension whereby within the complex configuration of political forces, POTA emerged as a political law amenable to partisan use. The resolution of these tensions invariably resulted in skewing the balance of power in favour of the Centre. This skewing was further affirmed through the decision of the judiciary upholding the constitutional validity of the Act and the legislative competence of the Centre in areas that were being perceived as falling within the domain of the states. In the sections that follow, we shall discuss the manner in which the process of skewing made itself manifest especially in Uttar Pradesh and Tamil Nadu, through an examination of the trajectory of two 'spectacular' cases—of Vaiko in Tamil Nadu and Raghuraj Pratap Singh alias Raja Bhaiyya in Uttar Pradesh—both of which were embedded in a larger debate surrounding the (political) 'misuse' of POTA. In Jammu and Kashmir, the rolling back of POTA became important for the political process of 'healing' and 'normalisation' in the state, and also came

to occupy a zone of conflict between the centre and the state. The nature of the conflict was, however, distinctive, since the lines of contest drawn along the axis of distribution of powers between the state and centre, or between regional and national politics unfolded in curious ways in the peculiar context of the politics of the state.

The Passage of POTA and the Quest for Hegemonic Centralism

It may be recalled here that the Prevention of Terrorism Ordinance, 2001 was promulgated on 24 October 2001. The Bill to replace the Ordinance could not be passed during the subsequent session because the Parliament was adjourned after the attack on Parliament on 13 December 2001. The Prevention of Terrorism (Second) Ordinance 2001 was subsequently promulgated on 30 December 2001. The Act to replace the Ordinance was passed in a joint sitting of Parliament on 26 March 2002 and the President gave his assent to it on 28 March 2002. The passage of POTA in an extraordinary joint session of the Parliament after it was rejected by the Rajya Sabha, bypassing the normal procedure of referral to a select committee of Parliament, was termed undemocratic and a subversion of federalism in various quarters. Others saw the gamut of discursive practices surrounding the Act, as attempts by the Bharatiya Janata Party (BJP) to find a substitute for the Babri Masjid dispute in Ayodhya. The debates during the passage of the Bill, however, brought out a significant area of contest that reverberated in the manner in which the Act has unfolded in practice i.e., the matter of its *implementation.*

During the course of the debate over the Bill in the joint session of Parliament, the Deputy Prime Minister L.K. Advani conceded that there was 'no consensus among the political parties' over the Bill. Significantly, there was no consensus among the states, either. The States and Union Territories that had consented to the Bill fully were Andhra Pradesh, Arunachal Pradesh, Dadar Nagar Haveli, Daman and Diu, Delhi, Haryana, Himachal Pradesh, Karnataka, Lakshadweep, Nagaland and Sikkim. States like Goa, Rajasthan, Assam, Mizoram, Chandigarh, Madhya Pradesh, Uttar Pradesh, Maharashtra, Orissa and Punjab, supported the Bill with suggestions for amendments. West Bengal, Jammu and Kashmir, Kerala, Meghalaya and Tamil Nadu opposed the Bill.[1]

Given that law and order is a state subject, the application of POTA was to be largely determined by the specific political contexts of different states, the relationship of the ruling regime with that in the Centre, and the electoral calculus. The opposition, while making out a case against POTA, asserted that opposition parties in power in different states would refrain from implementing it. Legal experts within the Parliament, pointed out, however, that such resistance may not be possible since the provisions in the Constitution, notably in Part XI, Chapter II, ensured administrative compliance by states. Furthermore, past experience with the working of extraordinary laws had shown that all state governments, irrespective of their political leanings have used such laws to get rid of uncomfortable political opposition. Moreover, several state governments like Maharashtra and Madhya Pradesh had their own version of extra-ordinary laws.

Tamil Nadu: Adversarial Politics and the Legal Web of POTA

POTA unfolded in Tamil Nadu amidst the adversarial politics of the state with clearly demarcated fault-lines between the DMK and the AIADMK, particularly on the question of support to the Tamil national liberation struggle in Sri Lanka. Soon after assuming the office of the Chief Minister of Tamil Nadu in February 2002, the AIADMK supremo J. Jayalalitha, started giving warning signals to political leaders in the state supportive of LTTE that POTA would be used against them for indulging in 'anti-national activities'. 'This is what POTA is for', she claimed in a press conference on 12 April 2002. Soon afterwards she reported that her government would move a resolution in the Assembly urging the centre not to allow any quarter to the LTTE in the country and to extend the ban on the organisation which was due to expire on 13 May 2002. On 4 July 2002, the Jayalalitha government invoked POTA to issue a non-bailable warrant for the arrest of Marumalarchi Dravida Munnetra Kazhagam leader V. Gopalaswamy *aka* Vaiko a lawyer by training, a Member of Parliament, and an ally of the BJP led ruling coalition—the NDA—in the centre.[2] Vaiko, who was outside the country at the time of the issue of the warrant was booked under Section 21(2) and (3) of POTA for making a speech in the state on 29 June 2002,

supporting Sri Lanka's LTTE, an organisation banned in 1991 under the Unlawful Activities Prevention Act, 1967. POTA was also invoked against eight other party functionaries.[3] Besides, the accused were also charged under Section 13(1)(a) of the Unlawful Activities Prevention Act, 1967, and Section 109 (abetment) and 120(B) (sedition) of IPC. Vaiko was arrested at Chennai Airport on 11 July 2002 on his return from United States.[4]

By January 2003, the Tamil Nadu government sought to give more teeth to POTA by declaring the entire state as a 'notified area' to attract Section 4 (possession of certain unauthorised arms) of POTA. Section 4 of POTA laid down that anyone found in possession of unauthorised 'arms and ammunitions specified in Columns (2) and (3) of Category I or Category III(a) of Schedule I to the Arms Rules, 1962, in a notified area', can be arrested under POTA. With the entire state having become a 'notified area' some of the earlier arrests—of twenty members of Muslim Defence Force (MDF) who were picked up in connection with the Babri Masjid demolition anniversary on 6 December 2002, members of the Tamil Liberation Front who were part of Veerappan's gang and were involved in the abduction of former Karnataka Minister H. Nagappa, and twenty-six members of the Radical Youth League, all of whom were arrested for possessing arms could attract POTA provisions.[5]

Incidentally, cases against Vaiko and others were the first POTA cases in Tamil Nadu and triggered off an acrimonious debate over the use of the Act for 'political vendetta'. In a statement issued from Chicago, Vaiko condemned the arrests of his colleagues as a 'vindictive act that strangulates democracy'. 'Puratchi Puyal' or the 'revolutionary storm' to his supporters, Vaiko initially emerged as the leading second line of DMK leaders and the most vocal supporter of the Tamil nationalist cause. Vaiko took pride in calling himself the only Indian politician who fought for the Tamil Eelam cause at international forums, having submitted a series of complaints against the Sri Lankan government to the Human Rights Commission in Geneva. He was considered close to the LTTE Chief V. Prabhakaran and was courted by Sri Lankan Tamil militant groups eager to build support for the Tamil cause in Tamil Nadu. Vaiko shot into limelight when he slipped into Jaffna to spend a month in the jungles with the LTTE leader in 1989. He floated his own party MDMK in 1993 projecting it as a party of the future. The MDMK pulled out of the DMK

front in the 2001 Assembly elections in which the AIADMK managed to get a clear majority. While relatively lightweight in Tamil Nadu, as an NDA ally, with two ministers in the Union Cabinet, the MDMK had got political visibility. For Vaiko, whose party had been on decline since the 2001 general elections, support to the LTTE and the Eelam cause was a political lifeline. In the 29 June speech for which POTA provisions were invoked against him, he had declared that BJP MPs had acknowledged his support to the LTTE. [6]

The political configurations in the state, complicated by coalition partnerships in the Centre, provided the context within which the political drama of POTA arrests unfolded. This drama threw up, however, significant questions pertaining to dissent and freedom of expression. Section 21 of POTA which was invoked against Vaiko, pertained to offences relating to support given to a terrorist organisation. Section 21 laid down that a person commits an offence under this section if 'he invites support for a terrorist organisation', 'if he arranges, manages, or assists in arranging or managing a meeting which he knows is to support a terrorist organisation' and so on. Significantly, for the purposes of this section, the expression 'meeting' meant 'a meeting of three or more persons whether or not the public are admitted'. A person guilty of offence under this section could be convicted and sentenced to imprisonment for up to ten years. That Vaiko, an NDA ally who had supported POTA strongly in Parliament should find himself at the receiving end, elicited smug responses from those who had criticised the Act for its potential of 'misuse' against political adversaries. Ironically, speaking at a meeting of the Parliamentary Consultative Committee of the Home Ministry on 23 November 2001, Vaiko had spoken of POTA as a 'bitter pill which must be swallowed' post-September 11. At the same time, however, he had spoken against Section 21 warning against its possible use.[7] Supporters of POTA, on the other hand labelled Vaiko's arrest as a *misuse*, 'undesirable', 'unjustified' and 'unwarranted'.[8] Significantly, soon after his arrest in Chennai, in the first reassertion of his stand on the banned organisation, LTTE, Vaiko pointed out that although the MDMK's support to the Tamil Tigers was well known, MDMK had never itself indulged in violence nor involved itself in any 'underground activity', which could attract the provisions of POTA.[9] The former Law Minister in the NDA government, Arun Jaitley concurred stating that the

MDMK leader had made certain statements in the context of the Tamil cause in Sri Lanka, but had not supported the LTTE in the context of Tamil Nadu.[10]

Here one must draw the contrasting images that Vaiko's arrest and the arrest under POTA of the accused in the Parliament attack case, invoked. While the accused in the Parliament attack case were triumphantly displayed (in handcuffs) by the police before the visual media and through it to the country at large, as *the* persons or 'terrorists' who had conspired and carried out the attack on Parliament, Vaiko, came across as an unsuspecting victim of political manoeuvrings by a politician who had a proven track record of repressing political opponents. Vaiko himself donned the air of a martyr with a cause, holding on to Nelson Mandela's autobiography, *Long March to Freedom*, beaming a smile and waving a clenched fist, images which endured in newspapers and television reporting. Ironically, while NDA ministers would not tire of drawing the contrast between the two cases in terms of 'appropriateness', at the time of Vaiko's arrest, they were confident that the 'inappropriateness' of POTA would be brought out as the law took its course, that is to say, the weakness of evidence against Vaiko would eventually decide whether or not his arrest was justified. Significantly, the NDA's response in this case was constantly being measured against the attack it had launched on Jayalalitha after she ordered the arrest of the DMK chief Karunanidhi in June 2001.[11] The BJP's position was largely seen as caught between a close ally (Vaiko) and a potential ally (Jayalalitha) who was being seen, especially after the support she lent to NDA in Parliament over the passage of POTA, as symbolising the rift in Opposition ranks.[12]

Within the Parliament, embarrassment for the NDA government grew, even as lines continued to be drawn between those who supported Vaiko's arrest (AIADMK and Congress), those who criticised it as a misuse of the law (NDA allies) and those, like the left parties, the Samajwadi Party, the RJD and the Lok Jan Shakti Party, who saw the Act as inherently undemocratic and amenable to misuse. The Congress which had opposed POTA, cornered the government by taking the position that Vaiko was wrong in publicly supporting the LTTE which was a banned organisation and whose leader Prabhakaran had been convicted by courts in India. Congress MP Mani Shankar Aiyar lashed out at the

NDA, 'if you are now saying that the law has to be amended, can you do it for the sake of one person'.[13] The anomaly of the situation was increasingly revealed whereby the NDA government was constantly being confronted with the question as to why it thought Vaiko's arrest was unwarranted when it was provided for and 'legitimate' under POTA. Again, if the latter was true, how was the government justified in continuing with two MDMK members as part of Prime Minister Vajpayee's Council of Ministers. Ironically, both the AIADMK government in the state, and the NDA government at the centre, from their divergent premises, continued to emphasise the trial under POTA and its outcome, to vindicate their respective positions.[14] As the detention prolonged, and friction within the NDA, in particular between the BJP and the MDMK and DMK brewed,[15] the 'measured' response of the Central government that had premised itself on 'the weakness of the case' gradually became a manifestation of its powerlessness in the matter.[16] The powerlessness of the government emanated partly from the fact that law and order was a state subject and the manner in which POTA was implemented fell solely within the domain of a specific state government. On the other hand, much of it emerged also from the frameworks of legality defined by POTA itself, which determined henceforth the trajectory of the case. In contrast to the 'nocturnal operation' carried out in a crude manner against the DMK chief and former Chief Minister Karunanidhi, in Vaiko's case the state government was 'extraordinarily transparent and procedurally meticulous', to the extent that it even informed the Prime Minister of its intended legal action in 'what lay in the state government's exclusive constitutional domain'.[17]

As the case unravelled in the months that followed, POTA set the limits of legitimacy and legality, and for almost twenty months thereafter, Vaiko languished in Vellore Central Jail. Amidst the claims and counterclaims over abuse and misuse of POTA, Vaiko announced his decision not to seek bail,[18] even as the MDMK got ready to counterattack by challenging the validity of his arrest.[19] The Tamil Nadu government constituted a Special Court on 19 July 2002 at Poonamallee near Chennai to try POTA cases.[20] On 16 November 2002, Vaiko challenged the validity of Section 21 in the Supreme Court saying that it restricted freedom of expression—Article 19(1)(a) of the Constitution. In a writ petition, filed through the Vellore Prison authorities, Vaiko asked the court to

strike down the said section of the Act as unreasonable, arbitrary and unconstitutional. In his plea, Vaiko argued that Section 21, inviting support for a terrorist organisation, has been made an offence without definition: 'Inviting support may not involve any encouragement to commit violent and criminal acts. But Section 21 includes peaceful, private and public discussion of political ideas, and, therefore, the wording violates freedom of expression'.[21] The chargesheet against Vaiko was finally drawn on 30 December 2002, more than five months after he was arrested. During the previous hearing on 18 December 2002, the judge had pulled up the prosecution for its 'delaying tactics' in filing the chargesheet.[22] The charges against Vaiko and eight other MDMK functionaries were finally framed by the POTA court in Poonamallee on 25 July 2003, setting the stage for their trial under POTA.[23]

Agonised by the court's decision to stick to the letter of law, and pressured by the opposition, as well as NDA allies (DMK, MDMK and PMK), the Deputy Prime Minister L.K. Advani announced the setting up of a Central Review Committee under the provisions of Section 60 of POTA, to 'check the misuse of POTA'.[24] The committee was constituted under the Chairmanship of Justice Arun B. Saharya, former Chief Justice of Punjab and Haryana High Court.[25] While making the announcement on 13 March 2003, Advani emphasised that the primary task of the Review Committee would be to examine the implementation of POTA,[26] without, however, diluting its effectiveness.[27]

Despite Advani's claims to 'special powers' of the Central government under the POTA,[28] the working of the Review Committee between March and October 2003, shows an emerging conflict between the Centre and the state governments over exclusive initiative in the matter. The Tamil Nadu government while sending details of arrests under POTA in the state simultaneously questioned the Central Review Committee's jurisdiction to inquire into the arrests.[29] Moreover, the Vaiko case, pushed for review by a representation from 301 MPs from various parties remained stuck because the Jayalalitha government did not respond to the various averments made on Vaiko's behalf.[30] The Central Review Committee complained of 'lack of responsiveness' with respect to eighty complaints taken up by it with five state governments so far.[31] Moreover, the State Committees themselves were functioning in disparate ways. In Jharkhand, for example Additional DGP J. Mahapatra

conducted a review of POTA cases. After a month-long review of, he decided to withdraw cases against eighty-three persons because evidence against them was thin.[32] There was furthermore, no time limit specified for review, and the possibility of collision between the Central and the state review Committees examining cases remained.

Subsequently, following complaints from the Review Committee itself about the lack of cooperation from state governments, and mounting pressures from political parties, especially the BJP's allies in NDA from Tamil Nadu, an amendment Ordinance was promulgated on 28 October 2003. In the meantime, in what was largely being seen as attempts to expose the contradiction within the ruling alliance, and pushing the BJP into choosing one of the Dravida parties as its ally for the forthcoming Lok Sabha elections, a letter urging the dismissal of MDMK ministers from the Union Council of Ministers had again been sent by Jayalalitha to Vajpayee.[33] While the DMK remained firm on its decision to continue agitating for the repeal of the Act, a position it had shifted to in April 2003, it backed the government in Parliament on the passage of the amendment on 16 December 2003.[34] The support was, however, only a temporary interruption in the straining ties between the NDA and DMK. On 20 December the DMK pulled out its two ministers from the Union Cabinet, while deciding to extend 'issue-based support' to the BJP led NDA.[35]

The Ordinance brought on 28 October 2003, replaced later by the Prevention of Terrorism Amendment Act 2003, on January 2004, amended Section 60 of POTA by inserting three new subsections.[36] The amendment gave the Central Review Committee, the power to examine whether there existed 'a *prima facie* case to proceed against an accused under the Act' and to issue directions 'that shall be binding on the Central Government, the State Government and the police officer investigating the offence'. While earlier Section 60 had provided for a Review Committee having specific administrative powers of review under Section 19 and Section 46 of POTA, the amendment broadened its review powers by conferring it with the quasi-judicial powers of examining whether there is a *prima facie* case for proceeding against an accused under POTA. The amendment also sought to give more 'teeth' to the Review Committee by making its decisions binding on the Executive both at the Centre and in the states, and by giving the Central Review

Committee overriding powers over state review committees.[37] Thus, on an application from an 'aggrieved party', the Central and State Review Committees could now decide, whether there existed a *prima facie* case for proceeding against the accused arrested under POTA 'and issue directions accordingly' [Section 60(4)]. This amendment not only made the direction binding on the Central and state governments and police officers investigating the case [Section 60(5)], it also provided that the direction issued by the Central Review Committee should prevail over any order passed by a State Review Committee in any case of review relating to the same offence under POTA [Section 60(6)].

The new Ordinance, while ostensibly aiming at breaking the emergent deadlock in the functioning of the Review Committee, seemed, however, to have bypassed it, envisaging a stage that was nowhere in sight.[38] Justice Saharya pointed out that the power envisaged for the Review Committee could come into play only later: 'I am involved in collection, scrutiny and evaluation of facts about POTA detenues right now. The Ordinance does not come into play here'.[39] Moreover, there were other areas that made the powers of the Review Committee irresolute. These pertained especially to the relative powers of the Review Committee and Special POTA courts, especially in cases where trial under POTA was already underway. This area of uncertainty came into play in the Vaiko case, where with the filing of chargesheet in December 2002 and the framing of charges in June 2003, the Special POTA court had already come in the picture.

Not receiving any response from the Tamil Nadu Government, armed with new powers under the Ordinance, the Review Committee issued notices to the Tamil Nadu government in November 2003, to show cause whether the incarceration of MDMK leader Vaiko and journalist R.R. Gopal under POTA was 'fit and proper'.[40] The Committee stated that it had come to the conclusion that POTA is not attracted in the case of Mr Vaiko and eight others who were arrested in July 2002 and Mr Gopal who was arrested in April 2003. Justice Saharya reported to newspapers that the Committee 'had asked the state government to show cause on or before 2 December whether it was fit and proper to apply POTA in these two First Information Reports. We have also asked them to produce all the relevant records [from the stage of registration of case up to sanction for prosecution] in English along

with the case diary'. The Committee had also borne in mind the fact that Vaiko had challenged the validity of Section 21(3) of POTA under which he was arrested for supporting a banned organisation in the Supreme Court, which had reserved its orders.[41] The State government responded by petitioning the High Court, and raising with the review panel a preliminary objection to the jurisdiction of the Review Committee to issue directions in cases, which were taken cognisance of by courts. It contended that as the proceedings pertaining to POTA against these persons were already pending before the court, the Review Committee did not have the jurisdiction to test the legality of invocation of POTA against them. The Tamil Nadu government also disputed the Committee's claim that after the recent amendment, it was empowered to go into 'the root of the matter to decide whether invoking the legislation in individual cases was warranted or not', challenging thereby the order of the Review Committee to submit relevant papers regarding POTA cases against Vaiko, Gopal and others.[42] After hearing the objections of the state government and the response of the Central government, the Review Committee rejected the Tamil Nadu government's objections on 23 January 2004 as 'fallacious' and 'devoid of substance and merit'.[43] On 4 February 2004, the Madras High Court dismissed the writ petition filed by the Tamil Nadu government—upholding the amendments to POTA, which conferred overriding powers to the Central Review Committee.[44] The Central Review Committee subsequently asked the Tamil Nadu government to furnish relevant materials and a detailed counter in respect of the arrests of MDMK leaders and R.R. Gopal by 16 February.[45] In the meantime, on 14 February 2004, the Tamil Nadu government moved the Supreme Court, seeking to quash the High Court judgement.[46] On 8 March 2004, the Supreme Court dismissed the Tamil Nadu government's appeals challenging the Central Review Committee's powers to probe the detention of MDMK leader Vaiko, R.R. Gopal and eight others. In what was construed as an indictment of the state government, the Supreme Court bench also observed that the powers under POTA appeared to being misused in the state.[47]

The counsel for the Tamil Nadu government argued that in the case of Vaiko and eight others, charges were framed after the Special POTA Court decided that there was a *prima facie* case to proceed against them under POTA. The trial was already underway and twenty-six witnesses

had already been examined in the ongoing trial. Moreover, the discharge application filed by eight others earlier that there was no *prima facie* case against them, had been dismissed by the Special POTA Court, and the dismissal was confirmed by the Madras High Court. The state government argued (*a*) that if the Review Committee would now say that there was no *prima facie* case, it would amount to interference in the course of justice and (*b*) the Review Committee's work would amount to parallel proceedings.

A significant part of the appeal focussed on the constitutional validity of subsections 4, 5, 6 and 7 of Section 60 of POTA which were added through an amendment to the Act, giving powers to the Committee to review and reverse the Special Court's proceedings. Appearing for Vaiko and eight others, senior counsel Fali Nariman pointed out that the scope of proceedings before the Special Court or any court of law was different from the scope of review under the POTA Review Committee, and that it was the duty of the Review Committee, set up pursuant to the amendments to POTA, to look behind the reasons for invoking the law against an individual. Referring to the Kartar Singh case, Nariman pointed out that the apex court itself had directed the constitution of review committees, both at the Centre and state levels, to review all TADA cases, oversee if the provisions of TADA were being misused, and suggest remedial measures.[48] It was based on these directions of the Supreme Court that POTA contained the provisions for creation of a Central Review Committee. The Committee therefore had the power to review all POTA cases and find out whether there was a *prima facie* case to invoke the act.[49]

The Supreme Court's decision in dismissing the appeal, while removing the areas of uncertainty in the relative powers of the Review Committee and Special POTA Courts, manifested the trend towards centralisation, not only by *emphasising the legislative competence* of the Central government in matters concerning 'national security', but also *securing its control* over such cases. In a similar vein, about three months earlier, in a judgement delivered on 16 December 2003, in the case *People's Union for Civil Liberties vs. the Union of India*, while affirming the constitutional validity of POTA, the Supreme Court made a distinction between subjects that fell ordinarily in what was termed 'public order' in the State List, and situations of terrorism, giving the Parliament legislative competence in the latter.

The People's Union for Civil Liberties (PUCL), had challenged the constitutional validity of POTA on the ground that the Parliament lacked legislative competence over it, since provisions of POTA fell under Entry 1 of List II (Public Order).[50] To substantiate their contention, the petitioners referred to the decision in *Rehman Shagoo & Others vs. State of Jammu and Kashmir*, 1960(1) SCR 680. In Rehman Shagoo case, the Constitutional Bench of the Supreme Court had examined the constitutionality of the Enemy Agents (Ordinance) No. VIII of S. 2005 promulgated by the Maharajah of Kashmir under Section 5 of Jammu and Kashmir Constitution Act, S. 1996, and decided that the security of the state was a facet of public order so much so that the situation that obtained in Kashmir in the aftermath of the invasion from Pakistan in 1947 was considered covered by public order and the Jammu and Kashmir Assembly competent, therefore, to legislate on it.[51]

The Supreme Court dismissed the PUCL petition questioning the petitioner's assertion that 'terrorist activity is confined only to state and therefore state(s) only have the competence to enact a legislation'. While outlining the reasons for establishing the legislative competence of the Parliament, the judgement built an argument showing how the fight against terrorism was not a 'regular criminal justice endeavour'. The fight against terrorism was not, it emphasised, an issue pertaining to 'public order or security insofar as it affects or relates [only] to a particular state'. Given the nature of 'undeclared war by the epicenters of terrorism' with the 'aid of well-knit and resourceful terrorist organisations', it was a challenge to India's 'sovereignty and integrity', to 'the constitutional principles' it held dear, to 'the democratically elected government', and to its 'secular fabric'. The judgement went on to say that since the entry Public Order 'or any other entries in List II do not cover the situation dealt with in POTA, the legislative competence of the Parliament cannot be challenged'. It further cited the judgement in Kartar Singh case *to put terrorism under a residuary power not defined in the Constitution*:

> …the ambit of the field of legislation with respect to 'public order' under Entry 1 in the State List has to be confined to disorders of lesser gravity having an impact within the boundaries of the state. Activities of a more

> serious nature which threaten the security and integrity of the country as a whole would not be within the legislative field assigned to the states under Entry 1 of the State List but would fall within the ambit of Entry 1 of the Union List relating to defence of India and in any event under the residuary powers conferred on Parliament under Article 248 read with Entry 97 of the Union List.[52]

It may be pointed out here, that the case *People's Union for Civil Liberties vs. the Union of India*, clubbed together three petitions, including the one by Vaiko questioning Section 21 of POTA under which he was arrested.[53] In his petition which was admitted with the other two on 13 January 2003, Vaiko put forward the case that Section 21 of POTA was too wide and affected the right to freedom of speech and expression guaranteed under the Constitution. He also claimed that in his speech of 11 July 2002, as the leader of a political party, he had only emphasised that at a time when peace talks were going on in Sri Lanka with the LTTE, the Centre should reconsider its stand on the ban imposed on the LTTE.[54] Upholding the constitutional validity of Section 21 of POTA, the Supreme Court argued that (*a*) the crime referred to under POTA is 'aggravated in nature', hence special provisions that depart from the ordinary law, are required since the latter have been found 'to be inadequate and not sufficiently effective to deal with the threat of terrorism', (*b*) Section 21, along with Sections 20 and 22, are 'penal in nature' contemplated to deal with the new challenges, and the need to make punishable 'support to terrorist organisations or terrorist activities', (*c*) offence under the above sections needs positive inference that a person has acted, with intent of furthering or encouraging terrorist activity or facilitating its commission. In other words, these sections are limited only to those activities that have *the intent* of encouraging or furthering or promoting or facilitating the commission of terrorist activities, (*d*) understood in this way, there cannot be any misuse of the provisions.[55] The grounds of validity offered by the Supreme Court, sustained the Central government's arguments put up by the Attorney General that 'support *per se* or mere expression of sympathy or arrangement of a meeting which is not intended or designed and which does not have the effect to further the activities of any terrorist organisation or the commission of terrorist acts are not within the mischief of Section 21'.[56]

Despite the failure of his appeal, Vaiko saw the Supreme Court's acceptance of the Attorney General's submission on Section 21 as a 'personal success' and 'victory of the right to freedom of speech and association'.[57]

Notwithstanding the significance of the Supreme Court's position on the plea, what makes the case interesting for the present discussion is the political positioning and manoeuvrings that it revealed, especially on the part of the two respondents, the Government of India and the Tamil Nadu government. The Central government's response submitted the same day as the writ petition was admitted, that is, on 13 January 2003, appealed for the dismissal of the petition on the general grounds that: (*a*) that there was a general consensus that an anti-terrorism law was very much required in the present day context of terrorism which had spread its tentacles across the world through the use of high-tech weapons, (*b*) the global opinion on enacting special laws to tackle terrorism was clearly demonstrated in the 'post-September 11' scenario, (*c*) there was consensus to define terrorist acts and make the activities of persons and groups engaged in planning and perpetrating terrorist acts and financing such acts as offences, and (*d*) the law was passed at a joint sitting of the two Houses of Parliament after extensive debate and consideration and, therefore, the contentions of the petitioners were totally imaginary and baseless.[58] It was, however, the Centre's response to the specific plea by Vaiko, which pushed the NDA yet again into turbulence, pacified subsequently through hectic political negotiations. In its counter-affidavit, the Centre rejected Vaiko's petition regarding Section 21 of POTA, arguing that (*a*) 'what is prohibited is support or assistance for a terrorist organisation which amounts to a reasonable restriction on the person's right to freedom of speech or expression which is permissible under the Constitution', (*b*) under Section 21(3) of POTA, 'a person commits an offence if he addresses, submitting for the purpose of encouraging support for terrorist organisation or to further its activities', (*c*) Vaiko's speech at the public meeting was 'wrong support for a banned organisation' which 'amounted [therefore] to an act of terrorism', and (*d*) the petitioner (Vaiko) was 'drawing support for a banned terrorist organisation' which was responsible for the assassination of the former Prime Minister, Rajiv Gandhi, and that the 'words flowing from the petitioner constituted an act of terrorism'.[59] Expectedly, the counter-affidavit drew criticism from the allies of

NDA government from Tamil Nadu. The government resorted to fire-fighting measures after a seven-hour meeting of the NDA Coordination Committee. The BJP President, Venkaiah Naidu announced thereafter that the Law Minister Arun Jaitley had clarified to the NDA leaders that what was presented in the court was not the government's stand. A DMK release in Chennai stated that the Law Minister had admitted that the affidavit was 'contrary to the Central government's stand on the issue', and was filed because of a 'mistake', which was being 'corrected'. The correct government stand according to the Law Minister, which the government intended to make clear in court the next day, was that while POTA was necessary for the country, in the case of Vaiko it was 'a misapplication'.[60] While the Centre described the government's counter-affidavit in the Supreme Court as a 'major *faux pas*', and 'contrary to its instructions',[61] Soli Sorabjee, the Attorney General, deflected the blame onto the 'misapprehension' of his juniors.[62] The modified affidavit filed in the court the next day, under the sign of a Director of the Home Ministry, admitted that the earlier affidavit was filed on the basis of a 'misapprehension of the government's stand' and sought to delete two paragraphs in it that justified Vaiko's arrest under POTA.[63]

The Supreme Court's decision of 8 March 2004, dismissing the Tamil Nadu government's petition removed the areas of uncertainty in the powers of the Review Committee, affirming its competence to issue directions to the state government in criminal trial proceedings. The course of the trial thereafter continued to be determined by the frameworks prescribed by POTA, delineating an area of its autonomy amidst political contests. In the meantime Vaiko, giving in to pressures by MDMK functionaries and M. Karunanidhi, President of DMK, agreed to apply for bail.[64] On 3 February 2004, the designated POTA court at Poonamallee agreed to grant bail but placed stringent curbs on his movement and speech.[65] These curbs were relaxed the following day by the Madras High Court[66] and on 8 February 2004 Vaiko was released on bail.[67]

The depositions before the Central Review Committee continued[68] and on 8 April 2004, the Committee decided that there was no *prima facie* case against Vaiko and eight others under POTA for the speeches they had made at the 29 June 2002 meeting at Tirumangalam, directing the Chief Secretary of the Tamil Nadu government to seek an appropriate

order from the trial court.[69] The finding of the Review Committee was seen as a cause for jubilation for the defence, especially since the next hearing for the case was coming up on 15 April 2004. Amidst suggestions from various quarters that the state government should accept the advice given by the Review Committee, prosecution sources referred to the Madras High Court ruling of February 2004, which laid down that even if the prosecutor sought to withdraw a case, it was for the Special Court to accept the plea or not. While a direction to withdraw prosecution would be binding on the government, the prosecution would still have to apply its mind to formulate an opinion.[70] Subsequently, the State government refused to withdraw the case against Vaiko who moved the Madras High Court on 27 April 2004, to have it instruct the state government to withdraw proceedings against him under POTA, as directed by the Review Committee in its 8 April order. Charging the government with 'wantonly delaying the implementation of the orders of the panel', Vaiko pointed out that under Section 21(5) of POTA, such a direction was binding on the government.[71] On 29 April 2004, the Madras High Court ruled that the Central Review Committee's order was binding on the state government, and reaffirmed that in the light of the finding of the Review Committee, the public prosecutor be instructed to file a petition under Section 321 of the CrPC.[72]

Eventually, four months after the Review Committee's directions were issued, on 10 August 2004, the Tamil Nadu government moved back from its earlier position that the directions were not binding on it, to petition the Special Court for withdrawal of proceedings under POTA against Vaiko and other MDMK functionaries.[73] The unfolding of the case thereafter shows yet again how the domain of the law, in this case, the legal framework of POTA, asserted its autonomy. On 4 September 2004, the Special Court Judge, L. Rajendran, dismissed the prosecution's application for withdrawal of case.[74] The order of the Special Court was based on (*a*) rejection of Central Review Committee's findings, (*b*) dissatisfaction with the reasoning of Special Public Prosecutor, and (*c*) a pro-active stand stating that the 'trial was in progress' and 'the evidence is not yet concluded'. The Special Court did 'not accept the findings of the POTA Review Committee as the Review Committee had 'prematurely' concluded on the issue 'without having any opportunity to analyse the complete materials relied upon by the prosecution as available before the court'. In an 'operative order' the Special Court

Judge stated that 'The order of the POTA (Prevention of Terrorism Act) Review Committee is destitute of any valid material except the speech delivered by the accused at the public meeting (at Tirumangalam near Madurai) on 29 June 2002. Hence this court does not accept the same'.[75] The Court refused to accept a request made by the Special Public Prosecutor to seek consent for the withdrawal of the case as this was based on the Review Committee's findings. According to the judge, the public prosecutor had assigned 'no independent, convincing reasons' in seeking consent to withdraw the prosecution against the accused. More importantly, a pro-active strand emerged in Special Court's order underlining its own role. The Special Court Judge stated that the 'trial was in progress' and the 'evidence is not concluded' and in such circumstances 'the conclusions arrived at by the Review Committee about the absence of intention on the part of the accused are untenable'. Finally, the Court decided not to give consent for the withdrawal of case against Vaiko in 'public interest':

> The grant of permission to withdraw the prosecution would not subserve the administration of justice and public interest. It was well settled proposition of law that continuation of the proceedings to their logical end was the rule and withdrawal of a case was an exception, which could be resorted to only sparingly. Appreciation of evidence was a question of fact and the intention of the accused was a rule of evidence. Such appreciation was available only to the trial court to find out the intention of the accused, after the completion of evidence placed before the court.[76]

With the trial court dismissing the prosecution's petition for withdrawal of case against Vaiko under Section 321 of CrPC, the defence decided to take up the matter with the Supreme Court, when the case next came up for hearing.[77] On 8 October 2004, the Supreme Court admitted the special leave petititon filed by Vaiko and eight other MDMK functionaries, challenging the Special Court order declining to permit withdrawal of POTA case against them. It stayed thereby all further proceedings against them, and issued notice to the Tamil Nadu government.[78] Even as the repeal of POTA and the institution of a review procedure to examine all POTA cases within a stipulated time frame put on hold the consummation of legal proceedings under POTA, the announcement of Assembly elections in Tamil Nadu scheduled for May 2006, witnessed a peculiar realignment of political forces. On 30 March 2006, dissatisfied

with the twenty-two seats being offered to it by DMK, the MDMK crossed over to the AIADMK camp, in the process getting thirty-five seats for contesting in the forthcoming elections. After his meeting with Jayalalitha, Vaiko described the decision as 'the finest hour in the political history of Tamil Nadu', and the outcome as 'a formidable alliance [which] would sweep the polls'. The arrest of Vaiko under POTA by the AIADMK government was clearly brushed away as, what Jayalalitha called, a 'thing of the past'. That the arrest would translate into electoral success was, however, an important consideration, since all places connected with Vaiko's arrest had been given to the MDMK.[79] Moreover, four POTA detenus, arrested along with Vaiko in 2002, figured in the list of thirty-five candidates released by the party for contesting the 8 May elections.

Resisting POTA in the Prison: Hunger Strike by RYL Prisoners

Apart from Vaiko and other MDMK functionaries who were arrested under POTA for expressing support to LTTE, P. Nedumaran and Suba Veerapandian, leaders of the banned Tamil Nationalist Movement, and R.R. Gopal, editor of the Tamil biweekly Nakkeeran, who was charged with sedition and brought under POTA for supporting the outlawed Tamil Nadu Liberation Army—several young women and men were arrested under POTA on the charge of being members of the Radical Youth League (RYL), a mass front of the Communist Party of India (Marxist–Leninist). On 24 November 2002, twenty-six persons were picked up by the Uthangkarai police in Dharmapuri district, while allegedly holding a meeting in a mango grove. Another youth, Siva, an eyewitness to an earlier encounter killing by the police, was gunned down during the day. On 2 December 2002, the case was transferred to the Q Branch of police. Subsequently, on 10 January 2003, the government imposed POTA on all the accused claiming that they were members of the Radical Youth League. A final chargesheet against them was filed in the Special Court on 19 May 2003, where they were charged under provisions of POTA, the Indian Penal Code, the Arms Act and the Explosive Substances Act.[80] The accused included two boys (Bhagat Singh and Prabhakaran) and six women—Reeta Mary, Sathia Mary,

Jayanthi Mary, Sathiya, Amalorpavam and Vijaya. The two boys, who were juveniles, secured bail from the High Court after they were denied bail by the POTA court.[81] The bail petition of the six women among the detenus was, however, denied twice by the POTA court. The second bail petition was dismissed after the 17 October 2003 Supreme Court ruling which explained that bail provisions under POTA, after the accused had completed one year in detention, would be considered under the ordinary law provisions. The criminal revision petition against the denial of bail, filed in the High Court on 26 February 2004 was still pending, despite the petition having been presented before three Division Benches, headed by senior judges.[82] No trial had begun in their case, even as they were completing two years in detention, provoking the accused to go on a hunger strike on 26 August 2004, protesting their 'wrongful detention' under POTA, the repressive attitude of the police, which had earlier killed two of their associates in a false encounter, and the failure of the criminal justice system to provide them relief.[83]

On 7 September 2004, an advocate and state coordinator of the Centre for the Protection of Civil Liberties, (G. Hari Babu) moved a *habeas corpus* petition in the High Court, stating that the condition of two of the detenus was critical and that all of them should be shifted to the government hospital for treatment. The government advocate opposed the petition arguing that the jail had a specialised hospital equipped to handle every ailment and if the demand was conceded, other inmates would cite it as a precedent and demand similar benefits. The Madras High Court directed the medical officer of the Chennai Central Prison and the XIV Metropolitan Magistrate to submit reports on the health condition of the POTA detenus who were on a hunger strike. On Saturday, at the instance of the Chief Metropolitan Magistrate, the XIV Metropolitan Magistrate visited the fasting detenus.[84] On 15 September, these detenus, ended their fast following a plea from former Delhi High Court Judge Rajinder Sachar. A team of human rights activists led by the ex-judge visited the prisoners at Central Jail on the morning of 15 September 2004 and convinced them to give up their hunger strike.[85]

Despite the show of concern for their health, the hearing on their bail petition continued to be deferred. On 10 November 2004, soon

after the Ordinance repealing POTA was promulgated, a Division Bench of the Madras High Court excused itself for the seventh time, from hearing bail appeals by eleven of the twenty-six POTA detenus. The counsel for defence lamented: 'The bail applications are going round in circles. I am at a loss to understand why the matter is adjourned from one Bench to the other with no reason being expressed. I am anguished to argue before so many Benches', he said, pointing out that at least three Benches started hearing the matter and then declined to hear further. Referring to the latest adjournment by the Bench comprising Justice N.V. Balasubramanian and Justice R. Bhanumathi said: 'It will ensure that the accused celebrate Deepavali in jail and complete the second anniversary of their incarceration. Like POTA having been forgotten after the Ordinance repealing it was promulgated, even these detenus have been forgotten by the judiciary'.[86]

The Central Review Committee set up under the POTA Repeal Ordinance, met on 13 December 2004, to hear the submissions of the defence counsel. Despite the summons served to the detenus and their relatives clearly stating that it was to be a 'public hearing', relatives of the detenus and media persons were not allowed entry. Advocates who were representing the detenus alleged that they were 'terrorised' by the police who insisted on either a copy of the summons or case details to allow entry. The defence was not given copies of the documents relied on by the prosecution. A large number of police personnel, including top officials from the Q Branch and Special Branch were present in the hearing along with police shorthand writers.[87] On 29 April 2005, the Madras High Court rejected the bail petitions of all men, and granted conditional bail to the six women detenus, holding that there was no reason to believe that 'these women will flee from justice'.[88] While directing them to execute personal bonds of a thousand rupees each and two sureties, the judges asked them to report to the Special POTA Court at Poonamallee at 10.30 A.M. on all working days. On 12 May 2005, the Tamil Nadu government moved the Supreme Court against the bail arguing that the High Court was not justified in applying its discretion to release on bail merely because the detenus were women, disregarding the seriousness of the accusation against them, the severity of punishment it entailed and the nature of evidence.[89]

Uttar Pradesh: The Politics of Caste, Legality and the Contest Over Federal Principles

A significant characteristic of extraordinary laws like POTA, as mentioned at the outset, is the extraordinary powers of initiation of proceedings that it gives to the executive, making it the sole decision making agency in the matter of imposition of POTA in any specific case.[90] This prerogative of the executive has played itself out in ways that shows interplay between legality and politics, with significant ramifications for coalition politics and federal principles. The case of Raja Bhaiyya, which shall be discussed in this section, shows startling parallels with Vaiko's case, in terms of its initiation and subsequent trajectory, and the manner in which law carved out a relatively autonomous space amidst the complex political configurations and permutations surrounding the case. Yet, the case is distinctive as far as comparisons with Vaiko's case are concerned, in the sense that it discloses the social bases of Indian politics, in particular, ways in which caste is imbricated decisively and ubiquitously in the political grid of the country. In the entire episode of Raja Bhaiyya's arrest under POTA and the political and legal battles that followed it, what was striking, was the larger Rajput camaraderie cutting across political divide, which ossified against Mayawati, and gradually transformed the '*goonda* of Kunda', as Kalyan Singh, a former BJP Chief Minister described Raja Bhaiyya,[91] into Maharana Pratap, the legendary Rajput warrior-king of Chittaur.[92]

In the topsy-turvy political scenario of UP, the invocation of POTA on 25 January 2003 by Mayawati, the then Uttar Pradesh Chief Minister, on Raghuraj Pratap Singh alias Raja Bhaiyya, independent MLA and Minister in the previous BJP government in the state and on his 80-year-old father, made things messier. It may be noted that the Bahujan Samaj Party (BSP) and Samajwadi Party (SP) were opposed to POTO and committed to voting against it in Parliament. In December 2001, while gearing up for the Assembly polls in the state coming up in February 2002, Mayawati took issue with Raj Nath Singh's BJP government in the state, and the BJP-led NDA government in the Centre, declaring that POTO was 'for political propaganda and to communally polarise the state during the Assembly elections'.[93] Along with the construction of Ram Mandir, she emphasised, POTO was a manifestation

of BJP's 'hidden agenda' and 'political selfishness', in the context of polls in three states where the party was directly or indirectly in power but 'in a bad shape' namely, UP, Uttaranchal and Punjab.[94]

In the absence of a clear popular mandate for any party in the elections and amidst the tussle between BSP and SP—two significant political players in the state—the BSP formed the government with the support of BJP, with Mayawati as the Chief Minister.[95] Raghuraj Pratap Singh, a Rajput feudal lord whose rule of terror over parts of Eastern Uttar Pradesh was chronicled in the long list of criminal cases against him and his father, led a group of eleven independent MLAs to the Governor of the state in November 2002, to withdraw support from, and dislodge Mayawati's government.[96] Against this background, the imposition of POTA on Raghuraj Pratap Singh was largely construed as an act of political vindictiveness, aimed at snuffing out dissident voices targeting Mayawati's leadership.[97] This attempt at consolidating her position through a law that she had earlier condemned as part of BJP's hidden agenda, shook the BSP–BJP alliance in the state and simultaneously drew a wedge between the BJP's Central leadership and its state unit. The powerful Rajput segment within the BJP, which had patronised Raja Bhaiyya and rewarded him earlier with a ministerial berth for breaking the Congress and Samajwadi Party,[98] criticised their legislators and the national party leadership for not taking an aggressive stand on the issue.[99] While Arun Jaitley tried to balance the tilting coalition by reiterating its 'larger political and social compulsions' and bought time by proposing that 'the party would comment only after going through the FIR filed against the two',[100] former Chief Minister Raj Nath Singh branded the arrest as a 'political misuse' of the Act. Mayawati retorted labelling the criticism a 'casteist and religious approach':

> No one will be released, *meri sarkar rahe ya jaye*. Rajanth is a Rajput, like Raja Bhaiyya. He had opposed the BJP's tie-up with the BSP, and has the backing of his party's Rajput legislators.[101]

As the relationship between the two coalition partners, BJP and BSP took a downslide, the storm within the state BJP over the arrest continued to brew, and with it, the dissatisfaction over the Central leadership's inaction. The UP state BJP chief Vinay Katiyar termed the arrest

'political vendetta', and while conceding that both Raja Bhaiyya and his father were 'history-sheeters', felt that they should have been tried under different Acts, and not POTA.[102] Katiyar cancelled all his programmes to pursue the matter and speak to the 'high command' on the issue, declaring '*Agar POTA laga hai to POTA hatega*',[103] and '*Agar POTA laga to sota chalega*'.[104] Katiyar's statements literally translated as, 'if POTA has been imposed, it can be removed', and 'if POTA is imposed then the whip will unleash', conveyed the vehemence which the arrest generated. In the meantime, BJP legislators continued to put pressure on the BJP legislature party leader Lalji Tandon, to convene a meeting at the earliest to discuss the 'misuse' of the law.[105] The Samajwadi Party, another party professing the support of the backward castes, and Mayawati's political rival in the state, with a claim to Rajput support through the presence of Amar Singh, plunged into the campaign for Raja Bhaiyya's release by asking the Prime Minister to intervene. In a manifestation of Rajput camaraderie, UP Congress chief Arun Kumar Munna, demanded that the BJP pull out of the coalition.[106] Similarly, Amita Singh, a BJP MLA in the Mayawati government representing the Amethi constituency where her husband Sanjay Singh descended from the ruling lineage, criticised the arrests as 'unjustified'.[107]

Meanwhile, lodged in Banda jail, Raja Bhaiyya donned the air of a martyr: '…whether I live or not, the fight to establish democratic norms against dictatorial rule should continue', he wrote from prison, urging in his letter to legislators—MPs and MLAs—to join hands to fight 'state sponsored terrorism'. While a BJP leader felt that his party was emerging as the main loser in the ongoing fight between the *dalit ki beti* and the Raja of Kunda, an SP MP sought to 'make it an issue for the community', appealing to the Thakur community, through the Kshatriya Mahasabha, to launch a major campaign to ensure relief to the 'jailed caste brother'. The Akhil Bharatiya Kshatriya Mahasabha sent letters to MLAs, MPs and officials belonging to the Thakur community in UP and in other states, appealing to them to join in a collective fight against the Mayawati government.[108]

The threat to Mayawati's government that had started looming with the withdrawal of support by Raja Bhaiyya and his supporters, was gradually receding with Mayawati adding to her numbers—eight breakaway

MLAs from Congress and legislators of the Apna Dal considered close to SP.[109] Her confidence in the numbers she had in her support reflected also in the manner in which she took on all her opponents collectively, denouncing their '*manuwadi* mentality'. Addressing newspersons in Lucknow, she drew attention to the 'long criminal history' of Raja Bhaiyya and his father, and the fact that whereas every government in UP whether Congress, SP or BJP under Kalyan Singh, had taken action against the father, Udai Pratap Singh, only she was being criticised because she was 'the daughter of a dalit'.[110] On the other hand, her dalit constituents lauded her for taming a Rajput[111] and settling scores with two other prominent Rajput leaders, Rajnath Singh of BJP and Amar Singh of SP.[112]

The Central government that had initially tried to strike a balance by forming a committee under Arun Jaitley to find out why POTA was invoked against the Singh duo,[113] washed its hands of Raja Bhaiyya's case.[114] The BJP party chief, M. Venkaiah Naidu, while admitting that the feeling of the state unit of BJP should be respected, did not think that giving direction to the State government as to how the law should be implemented, would be appropriate. Naidu advocated 'proper coordination' between the two parties in the ruling alliance in the state, and a system allowing 'regular interaction' in order to restrain public 'airing of views'.[115] Given the receding vote-share of the BJP in the Assembly elections, clearly the appeasement of Rajput sentiments was weighed against the benefits of continuing to humour Mayawati, and was found wanting. On the other hand, for the state BJP unit the calculations had a different dimension. Out of eighty-eight BJP legislators in the state, thirty were Rajputs. There were, a total of eighty-nine Rajput MLAs in UP Assembly, together forming a significant force.[116] Moreover, there was not a single constituency in UP that did not have a minimum of 10,000 Rajput votes,[117]which probably explained the mounting anxiety of the legislators: 'We have nothing to tell our voters on why the party did not take an aggressive stand on POTA', lamented one of them.[118]

With August 2003, the configuration of political forces in the state changed. While even for a united opposition, the task of toppling the government by engineering a split in the BJP and BSP would have been quite daunting with their respective strengths in the Assembly at 86 and 110, respectively, a series of events between July and August, 2003,

changed the balance of power in the state. The controversy over the Taj Heritage Corridor and the institution of a CBI inquiry into it by the Central government, brought the already strained relationship between the two alliance partners to a breaking point. On 25 August 2003, Mayawati sprang a surprise on the BJP by getting her cabinet to recommend the dissolution of the government and holding of fresh elections. The BJP on its part refused to support the recommendation for fresh elections and decided that it would not obstruct the formation of an alternative government even if it meant a government led by Mulayam Singh Yadav. Eventually, the SP came to power in UP with the support of Congress, and to Mayawati's humiliation, thirty-seven breakaway BSP MLAs, with Mulayam Singh as the Chief Minister.[119] Spearheaded by Amar Singh, the SP, had opposed POTO in the Assembly elections, and the associated anti-terror poll plank of BJP, a position that became more pronounced in its opposition to the BSP–BJP government, particularly over Raja Bhaiyya's arrest under POTA.[120] Not surprisingly, among the first decisions that the new government took, even before it proved its majority on the floor of the legislature, was to roll back the imposition of POTA on Raja Bhaiyya, his father and two associates on 29 August 2003.[121] The state unit of BJP predictably welcomed the declaration of withdrawal.[122] Even before Mulayam Singh Yadav formally took over as the Chief Minister, Raja Bhaiyya was transferred from Kanpur Jail to the VVIP ward of the Civil Hospital in Lucknow, where he received a string of visitors including Union Agriculture Minister Rajnath Singh and SP General Secretary Amar Singh, and pledged his support to the SP.[123] Significantly, the proximity of Raja Bhaiyya with SP and Mulayam Singh's involvement with the case worried the Congress for the anti-dalit sentiments it conveyed.[124]

Sent back to Kanpur jail by the POTA court, which took objection to the fact that he was moving about freely in Lucknow,[125] Raghuraj Pratap Singh was soon shifted from the confines of a solitary cell in Kanpur jail to Pratapgarh jail, where he enjoyed several facilities. The adulation and hero-worship, continued. In a Kavi Sammelan organised in the jail as part of a symposium on AIDS, he was exalted to the stature of a 'Raja' or 'king', indomitable and unvanquished. Apart from poets, the function was attended by a cabinet minister, and top officials of the

local administration including the Superintendent of Police, all of whom recited couplets in his praise:[126]

Jis baghi ko haalaat badal nahi sakte,
Us Raja ke aage koi mai ke lal nahin tikte
(None can challenge the rebel whom circumstances couldn't change).

Lakshya par chal pade, kabhi mat rukna
Toot jana Raja par kabhi mat jhukna
(Once you set out on your goal, never stop. Raja, broken you may be but never bow to anyone).

Kuch log hain jo waqt ke sanche mein dhal gaye
kuch log hain jo waqt ka sancha badal gaye
(Some fade away with time, some change its course).

In the meantime, with the intention of hastening the procedure of withdrawal of cases against Raja Bhaiyya, on 15 September 2003, the UP government set up a high-power POTA review panel consisting of the Chief Secretary, the Principal Secretary (Home) and the Law Secretary, to review POTA, NSA and Gangster Act cases, that were filed during Mayawati's regime.[127] What the SP government did not realise, was the fact that while the imposition of POTA could take place only through an executive decision, its withdrawal was subject to the framework of legality outlined by POTA itself. Soon after Mulayam Singh made the public declaration of withdrawal, the POTA court in Kanpur instructed that any withdrawal will have to follow the procedure laid down in law, and the government will have to submit an application to the effect under Section 321 of CrPC (withdrawal from prosecution).[128] In the meantime, a petition was made in the Supreme Court by the relatives of three Pratapgarh residents who had deposed as witnesses in murder cases against Raja Bhaiyya, requesting the court to declare illegal the 29 August order of the UP government withdrawing POTA charges against him.[129] On 18 December 2003, the Supreme Court decided that Mulayam Singh's effort at withdrawal of the case was a 'futile exercise', since the state government was not empowered to take a decision on a Central law. The trial court could not, therefore, act on the public prosecutor's application seeking withdrawal of POTA cases, as it was not

accompanied by the Central government's consent. In other words, the assent of the Centre became necessary for any initiation of withdrawal proceedings.[130]

Following the Supreme Court's directive, the state government sent a request to the Home Ministry for its consent. The occasion was used by the SP to once again reiterate its opposition to POTA in general, while BJP leaders like Raj Nath Singh attempted to reclaim Raja Bhaiyya by emphasising that POTA was wrong in the specific case of Raja Bhaiyya and his father. The SP strengthened its claims by questioning the intentions of the Central government, emphasising that the Centre (read BJP) was delaying Raja Bhaiyya's release, which the state BJP President Vinay Katiyar and his colleague Lalji Tandon countered with the allegation that the state government was not interested in his release.[131] Significantly, by this time, that is, by the end of February 2004, six months after Mulayam Singh's government had assumed office and announced the withdrawal of POTA case against Raja Bhaiyya, the belligerent confidence that had characterised the mood in the *kavi sammelan* in Pratapgarh jail where the unvanquished Raja had been portrayed as having changed the course of time, had given way to pathos. An audio cassette carrying a musical description of the sad plight of Raja Bhaiyya was released in Lucknow by Amar Singh, who blamed Mayawati for the atrocities, but labelled the Central government as the real culprit for having legislated POTA.[132]

With the Central government having been made party to the case, and having legally wrested the power to initiate the withdrawal, the war of words between the BJP and SP over their respective claims over the 'thakur in prison' and through him to the Rajput constituency in the state continued. The war of words assumed significance in the context of the Lok Sabha elections in which the caste/community profiles of candidates and the four major parties in the region, namely, BJP, BSP, SP and Congress, were to play an important role. Thus on 2 May 2003, Union Finance Minister Jaswant Singh declared in Lucknow that it was because of the 'SP's, ineptitude and disinclination' that Raja Bhaiyya continued to languish in prison. Amar Singh retorted by blaming BJP for having legislated POTA and having thrown two of its allies (Vaiko and Raja Bhaiyya) into prison under the Act.[133] The earnestness of the UP government to expedite the matter, asserted Singh, was evident in

the order of 30 April 2004 by the state POTA Review Committee to withdraw the cases against Raja Bhaiyya and his family.[134] On 17 May 2004, Raja Bhaiyya and his father were released on bail by the POTA Court. Released after nineteen months of incarceration, Raja Bhaiyya promptly blamed the BJP saying that it never intended to help him and tried to lengthen his stay in prison.[135] Still an accused under POTA, Raja Bhaiyya was made a Cabinet Minister in Mulayam Singh Yadav's government on 16 July 2004. While adding the 60th member to his cabinet, Mulayam Singh made the induction appear a moral necessity, a symbol of the 'victory of principles' against a dangerous law.[136] Ironically, in the ceremony to mark his induction, which was attended by Thakur MLAs cutting across party lines, Raja Bhaiyya, with thirty-two criminal cases pending against him garlanded the statues of Mahatma Gandhi and Sardar Patel amidst chants of '*Mahatma Gandhi Amar Rahe, Raja Bhaiyya Zindabad*'.[137]

Independent of the show of Thakur camaraderie in UP and the lament of moral affront by the SP, the legal intricacies of the POTA case continued to unfold, bringing the state and Central government on a collision course. On 15 September 2004, in its affidavit to the Supreme Court in response to the petition filed much earlier by the three witnesses in the POTA case, the Central government challenged the action of the UP government in withdrawing the POTA case against Raja Bhaiyya. It informed the Supreme Court that the state government had not sent to the Union Minister of Home Affairs 'any specific proposal seeking prior permission of the Central government for withdrawal of the case against the respondent'. It moreover, emphasised that the case was under review before the Central Review Committee, whose directions would be binding on the central and state governments.[138]

On 10 November 2005, a two-member Supreme Court bench passed a judgement[139] on three petitions: against the *order of the Uttar Pradesh government* (29 August 2003) withdrawing the POTA case against Raghuraj Pratap Singh; the *state POTA Review Committee* (30 April 2003) ruling that no *prima facie* case could be made out against Raja Bhaiyya; and the *UP High Court order* (24 February 2004) giving bail to Akshay Pratap Singh, Raja Bhaiyya's cousin and Member of Parliament belonging to the SP and another petition seeking transfer of cases pending against the accused persons from the Special POTA Court in Kanpur

to the Special Court in Delhi. The Supreme Court quashed the order issued by Mulayam Singh's government that withdrew POTA charges against Raghuraj Pratap Singh, his father Uday Pratap Singh and cousin Akshay Pratap Singh. The Supreme Court bench comprising Justice B.N. Agrawal and Justice A.K. Mathur also set aside the order of the state POTA Review Committee holding that no *prima facie* case may be made out under POTA against the accused. The judges accepted the finding of the POTA Review Committee that the charge under Section 4(a) of POTA could not be sustained since the requirement of prior notification under the section was not fulfilled. They invoked, however, Section 4(b) of POTA, under which mere possession of 'hazardous explosive substance' or 'lethal weapons capable of mass destruction' was sufficient, whether or not the area had been notified, in order to continue the POTA charges, and reject the application for withdrawal. The bench directed that the accused appear before the Kanpur Special Court within seven days and apply for a fresh bail. It also ordered that they face trial under Section 4(b) of POTA for possessing arms within the specified area under the Arms Act and the Explosive Substances Act, apart from other provisions of the Indian Penal Code. The bench also directed shifting the trial to neighbouring Madhya Pradesh and said that the Chief Justice of the High Court would assign the case to a competent court. Raghuraj Pratap Singh subsequently resigned from the state Cabinet and surrendered to the POTA court on 14 November 2005.[140]

Perhaps the most significant aspect of the judgement is the tension which the judges identify between the public prosecutor's responsibility of conducting legal proceedings on behalf of the government, and on the other hand his role as 'an officer of the court'. While the former constrained him to act on the instructions of the government, the latter made it his duty as a legal officer to apply his mind to the facts of the case. The tension appears, the judges argued, when 'the latter after applying his mind to the facts of the case may either agree with instructions and file a petition stating grounds of withdrawal or disagree therewith having found a good case for prosecution and refuse to file the withdrawal petition. In the latter event, the Public Prosecutor will have to return the brief and perhaps resign, for it is the government and not the Public Prosecutor who is in the know of larger interest of the state'.[141]

The judges decided that the public prosecutor as an officer of the court 'cannot act like a post box or act on the dictates of the state government'. Similarly the Courts too were not bound by what the Public Prosecutor said and were also 'free to assess whether the prima facie case is made or not'. The process of extrication of an autonomous domain of law, irrespective of what the political executive feels in 'the larger interest of the state' is manifest in this delineation of the Public Prosecutor's role independent of the government. Moreover, the rolling back of the state government's decision of withdrawal of POTA case, and the direction to shift the case to a Special Court in Madhya Pradesh amidst the fear surrounding it, especially of 'the witnesses' fear of speaking against the respondents', and the 'non-seriousness' of the government, came as a serious indictment of the UP government. On 15 December, the Special POTA Court in Jabalpur, Madhya Pradesh, granted conditional bail to Raghuraj Pratap Singh,[142] who was subsequently re-inducted into Mulayam Singh's government in Uttar Pradesh.[143] In March 2006, the POTA court barred newspapers and other agencies from publishing court proceedings against Raghuraj Pratap Singh, conceding to the application by the latter's counsel that his image was being tarnished.[144]

While Raja Bhaiyya's arrest under POTA was being projected as a case of misuse and misapplication of POTA—politically motivated and unjustified—like the case of the members of Radical Youth League in Tamil Nadu, UP too had other POTA arrests, ostensibly 'justifiable' since unlike Raja Bhaiyya's case, few newspapers and no politician talked about them. The purpose of discussing in minute details the trajectory of Raja Bhaiyya's case as in Vaiko's earlier, was to show how the politics of power plays out at different layers. Members of RYF were offering a more fundamental resistance to the structures and frameworks of politics within which the Raja Bhaiyyas and Vaikos were implicated in the same measure as the Mayawatis, Mulayam Singhs, and Jayalalithas, among others, of Indian politics. It is no wonder then, that a spate of arrests of poor dalits and tribals in the Sonbhadra region of south-eastern UP, escaped public attention and were denied a systematic legal and political campaign for release. At a deeper level, their occlusion from the history of POTA also obscured from public attention and debate, the relationship between landlessness and poverty, and the ways in which state agencies and the law, far from protecting and ensuring the rights

of the poor, in specific contexts, collude with the powerful and the advantaged to perpetuate conditions of deprivation.

POTA and the 'Healing Touch' Process in Jammu and Kashmir

The unfolding of POTA in Jammu and Kashmir has to be seen in the context of the history of militancy in the state, the 2002 Assembly elections, and the declaration by the PDP–Congress coalition government headed by PDP leader Mufti Muhammed Sayeed, to avoid normalisation through recourse to extraordinary measures. The non-implementation of POTA became central to the 'healing touch' approach by the new government, which it advocated to keep avenues of dialogue and reconciliation open. While the reconciliatory approach brought the Centre and the state government intermittently on a collision course, disappearances, and arrests under the Jammu and Kashmir Public Safety Act, (PSA, 1978) and the Arms Act continued.

When POTO was promulgated on 24 October 2001, the NC government of Farooq Abdullah rejected it outrightly. While most opposition parties were against POTO, with several states including Bihar refusing to implement it, its non-implementation in Jammu and Kashmir had a special significance. Coming with the professed objective of preserving 'national security' in the context of what was being projected as rampant international Islamic terrorism, the refusal to implement POTO by the government of a state, which was at the core of the national security discourse in India, reflected ultimately the political nature of the Act. Five months later, however, with the Assembly elections likely to be held towards the end of the year, the state government, much to the pleasure of the Central government, went on a spree of POTA arrests. It booked 426 cases in a little over 150 days under the newly enacted POTA, including Hurriyat leader and chairman of Jammu and Kashmir Liberation Front (JKLF) chief Yasin Malik, who was arrested on 25 March 2002 for allegedly receiving money through the Hawala channel.[145] Malik was released on bail on 20 August 2002 by the Special Court on health grounds, but was rearrested within minutes of his release, under the Public Safety Act (PSA), which provided for detention for two years without being given bail.[146] The police clarified that Malik had not been

rearrested, but *detained* under the Act invoked against 'anti-nationals' and 'terrorists'.[147]Almost fifty per cent of those arrested under POTA were charged with sheltering or harbouring terrorists, or for *hawala* transactions for funding militant activities. A substantial number of cases were also based on recovery of arms, ammunition and explosives. By April 2002, the total number of persons in custody under POTA in the state was ninety-two.[148]

Apart from political arrests, POTA became a convenient instrument for security forces to intimidate people. In the first case under POTA in the state, the police arrested Ghulam Mohammad Dar, a resident of Sahib Safa Kadal in downtown Srinagar. Dar was picked up in December 2001 after the police recovered weapons of an arrested Hizbul Mujahideen militant from his house. Following the arrest, the police evicted his family which included his seventy-year-old mother and two children and sealed his house saying it harboured militants. The arrest provoked large-scale resentment in the Valley compelling the police to unlock the house within three days and allow the family to move back.[149] In another case, Ghulam Qadir Shah, a seventy-year-old resident of Baramulla district, moved the court when his son Rouf Ahmad, a revenue officer, 'disappeared' after he was picked up by the police for questioning. In 2001, the court took note of Shah's petition who had persisted with the case, despite being persuaded by the police to withdraw it. In March 2002, however, the army raided Shah's house and took him away. When Shah refused to withdraw his petition, even after being subjected to torture, he was booked under POTO and a grenade was shown as having been recovered from his possession.[150]

The Jammu & Kashmir police arrested six alleged KZF (Khalistan Zindabad Force) activists, on 7 April 2002, including a self-styled operational chief of KZF and a political leader for their involvement in the Kanak Mandi blast in January 2002 in which one person was killed and twelve injured, and the blast at Jammu Railway Station in June 2001 which killed one person and injured fourty-one.[151] Former chairman of the All Party Hurriyat Conference and Jamaat-e-Islami leader Syed Ali Shah Geelani and his sons-in-law Altaf Ahmad Shah and Iftikhar Geelani were arrested on 9 June 2002.[152] While the senior Geelani and Altaf Ahmad Shah were arrested in Srinagar under POTA

on charges of receiving funds from Pakistan's Inter–Services Intelligence Agency (ISI), Iftikhar Geelani who was the Indian correspondent for the Pakistani newspapers *Friday Times* and *Nation*, was arrested in Delhi under the Official Secrets Act for possessing classified information on his laptop computer including 'records since October 2001 of locations of Indian Army units, the number of personnel in each unit, and other strategic details'.[153] The arrest of SAS Geelani, the Hurriyat hardliner and his relatives was widely believed to have been made by the government in preparation for the Assembly elections, to pave the ground for the moderates to participate in the political process. The arrests were accompanied by disclosures by security agencies of Geelani's alleged links with Pakistan and his possible role in the murder of modertate Hurriyat leader Abdul Ghani Lone, who had initiated a process to facilitate participation in the Assembly elections.[154] Geelani's arrest was strongly condemned by the All Party Hurriyat Conference, which called for a general strike.[155]

The Assembly elections in Jammu and Kashmir in September 2002 opened up debates on the credibility of elections in conditions that were not seen as conducive to free, fair, and importantly, fearless exercise of franchise.[156] The All India Hurriyat Conference's announcement of a 'poll panel' as alternative Election Commission may be seen as a manifestation of the distrust of the election process in the existing circumstances.[157] James Lyngdoh, the then Chief Election Commissioner, alludes to this distrust and the subsequent contradiction in the role of the Election Commission in Jammu and Kashmir: '…I soon ran into the reality of the contradiction of an Election Commission otherwise held in high regard but seen in Jammu and Kashmir only as a tool of the Government of India'.[158] While the Hurriyat Conference did not participate in the elections, the two regional parties—Farooq Abdullah's NC and Mufti Mohammed Sayeed's PDP—apart from the BJP and Congress (I), were the main players in the electoral contest. The outcome of the elections was a hung assembly, and a coalition government based on the principle of power-sharing between the PDP and the Congress (I) replaced the NC government of Farooq Abdullah.[159] Under the arrangement envisaged by the coalition, the six-year tenure of Chief Ministership was to be split between the two parties on a rotational basis and the Deputy Chief Ministership was to be shared in the

same way with the office going to the partner not holding Chief Ministership. The PDP took the first turn at Chief Ministership, and upon assuming office, Mufti Mohammed Sayeed reiterated his government's commitment to hold dialogue with all sections of people, including separatists, and affirmed his intention to release the jailed Hurriyat leaders.[160]

In its election manifesto, the PDP had included issues such as withdrawal of the Special Operations Group and the scrapping of POTA. In their poll campaigns, both the NC and the BJP had accused the PDP of having struck a 'deal' with 'subversive elements' to overthrow the NC government in the state. The insinuation of nexus resurfaced shortly after the assumption of power by the PDP when the spurt in militant violence in the state came to be seen as a consequence of the new government's policy. The Common Minimum Programme (CMP) of the PDP–Congress coalition that was drawn and put before the people on 27 October 2002 proposed an agenda of governance based on 'reconciliation' and 'initiation of dialogue without conditions'. Central to this process of reconciliation was the pledge to stop the implementation of POTA, release of all detenus held on non-specific charges, and review of all cases of detention without trial, disbanding the Special Operations Group by merging it with the state police, and investigation of all cases of custodial killings and violation of human rights for identification of those responsible for appropriate punishment.[161] The CMP also promised to create employment, distribute resources equally among the three regions of the state, rehabilitate militants and their families, set up a Minority Commission and work towards creating conditions for the return of Kashmiri *pandit*s to the valley.[162] The agreement between the coalition partners on not implementing POTA was easy to arrive at since it was also the express position of the Congress. Mufti, however, went beyond a position of abstention, to propose the screening of all political prisoners for release, and to review 'the operation of all such laws that have been used in the past decade to deprive people of their basic rights to life and liberty for long periods of time without due legal process'.[163]

Significantly, the CMP also listed a pledge to cooperate with the NDA government in the Centre in combating cross-border militancy, urging the latter to initiate and hold 'wide-ranging consultations' for restoring peace.[164] While committing itself to supporting the 'national

effort' in fighting militancy, the CMP reserved for the state government the exclusive responsibility of providing the 'healing touch' in the state—'heal[ing] the physical, psychological and emotional wounds inflicted by fourteen years of militancy'—in order to 'restore the rule of law in the state', and 'complete the revival of the political process begun by the recent elections'.[165] In the weeks and months that followed, the autonomy in political decision-making that the state government had sought to allocate to itself with the promise of providing the 'healing touch', specifically by stopping the use of POTA and releasing political prisoners, became a matter of contest between the state government and the BJP, the Congress and the BJP, and the NC and the PDP, respectively.[166]

By the first week of November, the state government had set in motion the process of releasing jailed leaders on bail in a phased manner. By November 2002, nine militants had been released, the JKLF leader Shoukat Bakhshi among the first to be released followed by two others —Nazir Ahmad Shaikh of JKLF and Mohammad Ayub Dar of Hizbul Mujahideen. Both had been arrested in 1990 on charges of murder, which the police had not been able to prove during the twelve years of their confinement.[167] Yasin Malik, arrested in March 2002 under POTA, released in August and rearrested immediately under PSA, was released on parole on 11 November 2002.[168] While the POTA case against Malik was expected to continue, charges against him under PSA were dropped.[169] The release of Syed Ali Shah Geelani was also expected to take place soon. Simultaneously, the rehabilitation of families that were victims of militant attacks was activated with the Chief Minister handing out appointment orders.[170]

While the state police set itself with the task of looking for ways by which they could continue to hold those detained under various extraordinary laws,[171]Arun Jaitley, the then general secretary and spokesperson for the BJP, made it clear that the party found the CMP 'disturbing and distressing'. Describing the determination not to use POTA as a 'terrorist friendly decision', Jaitley reminded the state government of its obligation to ensure the arrest and continued detention of members of militant outfits like the Lashkar-e-Toiba which had been banned by the Centre under the Act.[172] The BJP President M. Venkaiah Naidu cautioned the Chief Minister against releasing Kashmiri militants

for the demoralising effect it would have on the security personnel. Moreover, the 'unilateral' release of militants in the absence of any offer of talks from them, he believed, would convey the impression of a 'soft' state, encouraging separatists.[173] Reacting in particular to Mufti's statement that the state Assembly 'if necessary' would review POTA, Jaitley responded by reminding Mufti that the state government had 'absolutely no jurisdiction in matters of legislation or the repeal of a law that deals with terrorism and the sovereignty of India'.[174] Jaitley blamed the Congress in particular for being 'either a mute spectator or an active participant' and found it 'regrettable that the party which had won a majority of its seats on a strong anti-terrorism plank was choosing to be a participant in this terror-friendly exercise'.[175]

Significantly, even as the political parties clashed, there was apparently no collision of purpose between the Central and the state governments. The declaration of the CMP on 27 October was followed by a meeting between Mufti and the Prime Minister, with the Deputy Prime Minister Lal Krishna Advani giving public assurances of cooperation with the new state government. Advani's assurance, however, focused specifically on the issues of cross-border terrorism and developmental programmes, steering clear of the issue of non-implementation of POTA in the state and release of detenus.[176] A few days later, even as BJP officeholders were making acrimonious statements in Delhi and Chennai respectively, Mufti was informing news reporters in Jammu of the enormous goodwill for the state that he saw among political leaders in Delhi: 'I had found a groundswell of goodwill for the state and it is the right time to build up a consensus on ways to bring peace to the state'.[177] The Jammu and Kashmir Governor G.C. Saxena was simultaneously meeting L.K. Advani, expressing the hope that the new government would act 'responsibly' and not take any hasty decisions on sensitive matters relating to the security of the state.[178]

A week later, with the release and rehabilitation programme having been made fully effective, the 'wait and watch' and 'hands off' policy of the Central government became conspicuous.[179] Having claimed the credit of setting in motion the electoral process, the Central government obviously did not want, so soon after the installation of a new government in the state, to appear to be undermining it. Moreover, the people-friendly approach handed out by the Mufti regime, was being seen in

some quarters as having the potential of recovering the political space that had been claimed almost irretrievably by the Hurriyat. There were other strands of opinion, however, that saw the 'healing touch' as embodying the 'ground reality' that 'a sizeable segment of the Kashmiris saw the Hurriyat as a group of honest and dependable interlocutors'. It made political sense, therefore, 'that its leaders detained on poll eve should be set free as a necessary step for creating conducive conditions for a purposeful interaction'.[180] That a space had indeed opened up for political dialogue, was evident in the challenge that Yasin Malik threw at Mufti for an electoral contest in the Valley to determine the real representatives of the Kashmiri people: 'Let Mufti *saheb* choose the best assembly constituency in Kashmir, rope in all the star campaigners, including his new friends Farooq Abdullah, his son Omar and Ghulam Nabi Azad for canvassing and fight elections with me. If he scores a victory, I will accept that he and not we (Hurriyat) are the real representatives of the Kashmiris', declared Malik a day after his release.[181] 'Let the released militants express their views and we will fight them politically', was the response by Mufti.[182]

In the meantime, militant attacks continued. The day Malik was released, the Hizbul Mujahideen militants blew up a bus full of CRPF men on the Jammu and Kashmir highway killing seven.[183] This was followed by a second attack by militants in the space of a year on the Raghunath Temple in Jammu and a shrine nearby, and before long, the Central and state governments were locked in a war of words over the release of political prisoners. Facing crucial state Assembly elections in highly communalised Gujarat, the BJP in particular was keen to use the attack on the Raghunath Temple to score an advantage over the Congress. BJP spokespersons writing or speaking in various fora, accused the state government of being soft on terrorism, and blamed its policies for 'raising the morale of the terrorists'.

In an article in the *Times of India*, Mukhtar Abbas Naqvi, BJP General Secretary and spokesperson, alleged that the 'Jammu and Kashmir government's soft policy had overturned the people's verdict against terrorism':

> …while one cannot say that the government's soft stand on terrorism led to the Raghunath temple episode, the release of terrorists, combined with the

> disbanding of the Special Operations Group and suspension of POTA sent out a clear message that the government there is soft on terrorism. People are trying to compare the attack on Akshardham with that on the Raghunath temple, but it is not a fair comparison. Those who attacked Akshardham wanted to provoke post-Godhra like riots, but *the attack on the Raghunath temple happened because the morale of the terrorists was high*.[184]

In an attempt to distance itself from the policy of release, public declarations were made that the state government ignored the Centre's advice of caution. The state government and the Congress party, however, maintained that no release was made without clearance by the central intelligence agencies.[185] On the other hand, newspaper reports suggested that while much was being made of the 'healing touch', the releases were in fact part of normal legal process. The government, the reports said, had actually released only six persons on one month's parole, and none of the released was an active militant.[186] The rest including Shoukat Bakhshi and Ayub Dar, were freed either on securing bail from the court, or on completing their jail terms in cases registered with the CBI.[187]

Congress's discomfiture over the issue of release encouraged the BJP to continue its attack on the party. When the two Houses of Parliament got together to pass a resolution condemning the terrorist attack on the Raghunath Temple in November, L.K. Advani who was also the Home Minister, made a statement in the Lok Sabha that the Union Home Secretary had advised the state government not to act in haste, and contrary to their claims the PDP–Congress government had not consulted the Centre 'at every stage'.[188] He repeated his statement (in a BJP Parliamentary Party meeting in Delhi on 26 November) chaired by Prime Minister Atal Behari Vajpayee. Venkaiah Naidu, speaking in Patna appealed to Sonia Gandhi to review the CMP, in particular the release of terrorists, non-implementation of POTA and the disbanding of the SOG. Similar statements were made by Arun Jaitley in Ahmedabad.[189] In response, the Jammu and Kashmir Pradesh Congress Chief, Ghulam Nabi Azad accused Advani of misleading the Parliament,[190]while Congress spokesperson Jaipal Reddy claimed that senior IB officers were consulted.[191] No restraint was shown on both sides as BJP spokesperson described Sonia Gandhi's remarks made in response to accusations of

being soft on terrorism as 'a sign of immaturity', while the Congress labelled Advani 'an incorrigible communal propagandist' more interested in scoring points in the context of Gujarat elections.[192] Eventually, the pressure of Gujarat elections took over the Congress as well, which advised the PDP to slow down the release till mid-December when the state went to poll. As a result, the release of several high-profile Hurriyat leaders including its chairman SAS Geelani were reportedly put on hold.[193]

Significantly, the Chief Minister stuck to the position that while complete understanding and cooperation with the Centre was needed and desirable at every level, the Centre could not overlook the fact that the state Assembly had a representative character and in all initiatives on Kashmir the Centre should take it into confidence first.[194] To the Centre's demand for a screening committee to oversee release of prisoners, the PDP maintained that such a screening committee already existed. It proposed, however, that a Centre's nominee could be included in the existing screening committee, to promote 'trust' for 'unitedly' ending militancy in the state. The state government reiterated that the guiding principles behind the release of prisoners had been that 'nobody will be released by any *ad hoc* or wholesale method', 'each case is studied properly', and following the Supreme Court's ruling, 'no person who was not entitled to be freed' is to be freed, keeping in mind, however, that 'detention of a person beyond the required period was illegal'.[195] While the state government admitted to have been flooded with applications for release, officials confirmed that no foreign militant would be freed, and proposed to release 250 'local militants'.[196]On 8 December, a high level team of the Union Home Ministry visited Jammu to discuss the setting up of a screening committee.[197] A joint screening committee was subsequently set up on 20 December 2002 by the state government, comprising the state Chief Secretary, state DGP and Additional Director CID, with the Joint Director, Intelligence Bureau as the Centre's nominee.[198] Headed by S.D. Singh, the Financial Commissioner (Home), the recommendations of the screening committee were to be overseen by the Special Secretary in the Union Home Ministry. With the setting up of the joint screening committee, it was expected that the process of release of prisoners would be resumed. The meeting of the joint screening committee could ultimately be held

on 5 March 2003, following delays under the 'compulsions' of state Assembly elections in Himachal Pradesh, where neither the Congress nor the BJP would have wanted to be seen as 'soft' on terrorism. The committee screened a list of eighty-two prisoners, most of whom were imprisoned under the Public Safety Act (PSA).[199] A list of seventeen prisoners was eventually forwarded for release to the Central government and on 15 March, the prisoners were released on the orders of the Chief Minister. The principles which reportedly guided the decision of release were, that the prisoners should not have been involved in any serious militancy related act, they should have already served more than the required period in jail even if they were yet to be tried and convicted, and that their freedom should not pose any danger to the state.[200] Speaking later in the state Assembly, the Chief Minister said that the process of release was to be a continuous one and that no innocent person would remain behind bars. Mufti informed the Assembly that 606 persons, including 130 foreign nationals, were held under the PSA in different jails. Of these 145 were detained without trial. Since October 2001, 168 persons were arrested under POTA, of which fifty-three were later detained under the PSA.[201]

The NC President Omar Abdullah criticised the government for deriving political mileage out of the release, asserting that the NC too had released a number of prisoners but never tried to get political mileage out of the 'humanitarian issue'.[202] Significantly, while defending the policy of release, the Chief Minister had consistently maintained that the earlier government too had been releasing prisoners, but was never subjected to censure in the same way as the PDP–Congress government had been in the last few months. Clearly, the release of prisoners as an express political policy and principle of governance was attracting attention and also causing unease and anxiety among political rivals. Incidents of terrorist attacks were, as seen earlier, immediately linked to the policy of release, the latest being the massacre of twenty-four Kashmiri Pandits at Nadimarg on 24 March 2003, three days before the second meeting of the joint screening committee was scheduled.[203] When the screening committee met a month later in April 2003, it recommended the release of eight more prisoners.

As seen in the above discussion, the non-implementation of POTA and release of detenus as the major constituents of the healing touch

policy and the principle of governance in Jammu and Kashmir under the new dispensation became embroiled in the political configurations between the Centre and the state. On the other hand, the success of the policy was continuously measured against changes in militant activity in the state. While any spurt in militant activity was more likely to be explained by critics as an outcome of the state's 'soft' policy towards militancy in the state, the state government was more inclined to see it as a manifestation of the anxiety among terrorist groups over the 'encroachment' being made in their domain by 'democratic politics'. Muhammad Yusuf Tarigami, an MLA from Kulgam remarked: 'Democratic politics is encroaching on the control the jehadis have over their constituency, so they use guns to keep their flock together'.[204] Looking at the 'course of the healing touch', an article in the *Hindu* compared the first eight months of PDP rule (November 2002 to June 2003) with the National Conference rule from November 2001 to June 2002 on the basis of Home Ministry figures on the total number of acts of violence, the killing of civilians, or the death of security force personnel. The article concluded that while there was an apparent decline in violence, attack on civilian targets particularly Muslims who were perceived to be informants, political activists, or simply hostile to *jehadi* control of civil society, continued, alongside attacks on politicians, particularly PDP leaders and workers.[205]

On the other hand, concerns over state terrorism continued to be voiced from various quarters, including the PDP Vice-President Mehbooba Mufti.[206] Amidst the increase in militant attacks, the latest being the shootout outside the Chief Minister's house in October,[207] the government began considering a surrender policy for militants. Under the policy, militants were likely to be offered huge incentives to surrender including fixed deposits of Rupees 3,00,000 in banks, a monthly allowance and self-employment opportunities.[208] For the Jammu and Kashmir Human Rights Commission the problem was not just POTA. Presenting its annual report for 2001–2002 in the state Assembly, on 22 March 2003, it expressed concern at the continued use of the Armed Forces Special Powers Act (AFSPA), which was applied in the state in August 2001. The Act gave special powers to the forces to bypass civil authorities for carrying out search operations, without commensurate accountability.[209] Earlier, about a month after the new

government was formed, Justice A.Q. Parry, the Chairman of the State Human Rights Commission, speaking to students of Law in Kashmir University, said that most human rights cases that the SHRC put up before the government 'get diluted' under the AFSPA.[210]

Moreover, if the number of persons who 'disappeared' in the state since 1989 was taken into account, detention would appear almost benign. In November 2002, the Association of Parents of Disappeared Persons (APDP) demanded the appointment of a commission to inquire into all enforced and involuntary disappearances in the state.[211] The number of disappeared persons was debated upon by the government, the opposition, and the APDP, and the reasons behind disappearances were variously identified.[212] If the explanation offered by the security forces emphasised the luring of youth into militancy as a primary reason for young men to suddenly disappear, other explanations pointed at the killing of young men by both security forces and militants.[213] Following statements issued by the APDP, in May 2003, the National Human Rights Commission asked the Jammu and Kashmir government for a report, even as the Central government maintained that the disappeared were 'terrorists' and that some of them may have been killed in 'encounters'.[214]

By 2004 and the approaching Lok Sabha election, a thaw was noticed in the political process in the state, as the Hurriyat Conference agreed not to boycott the polls that were to be held in April–May 2004. Within the wider context of the ongoing peace talks with Pakistan, the Hurriyat claimed that participation in the ongoing peace process was more important than the polls, which was not a solution to the Kashmir problem. The issue was, however, allowed to slide, as the Hurriyat claimed concessions from the Central government in a 'review meeting' with the Deputy Prime Minister, L.K. Advani, on the issue of release of 'political detenus' and 'mechanisms for ensuring "zero level" human rights violations' in the state. The Central government agreed to release about a dozen more prisoners in detention and speed up the review of other cases of detention under POTA and PSA, under which 533 persons still remained in detention.[215] Earlier, following up on the talks between the Centre and Hurriyat leaders on 22 January 2004, the Jammu and Kashmir government had revoked the detention orders of thirty-four

persons detained under PSA. The revocation came after the joint screening committee was instructed by the Central government to expedite the process.[216] It must be noted that unlike the release of those detained under POTA, where trial under POTA continued, the revocation of detention under PSA meant withdrawal of charges under the Act. In November 2004, Mufti announced the release of another fifty-five detenus on the occasion of Eid-ul-Fitr.[217] State government records as cited in newspapers, showed that from November 2002 when the 'healing touch' was set in motion to the beginning of 2005, 553 detenus were released.[218] In September 2005, after Prime Minister Manmohan Singh's meeting with leaders of the Hurriyat Conference, a list of fifty detenus under PSA was cleared by the Home Ministry for review.[219] In October, the state government ordered the release of forty-four persons.[220]

The significance of the releases has to be seen, therefore, in the context of the CMP which apart from pledging to release detenus,[221] also added that 'there were enough laws in existence to deal with militancy. *Therefore*, it will revoke/not implement POTA' [emphasis added]. The non-implementation of POTA did not mean that other laws, more draconian than POTA could not be used with the impunity that they assured. While the PDP–Congress government did keep its promise by not booking anyone under POTA, the question remained as Parvez Imroz, a lawyer from Srinagar and an activist associated with the APDP put it in his deposition before the Citizens' Tribunal against POTA and other Security Legislation, '*whether it made any difference*':

> .... All these people have also been booked under other legislations like the Public Safety Act (PSA). If we look at security legislation in Kashmir, there are many acts, like the Subversion and Sabotage Act that was passed in 1965 during the Indo–Pak War. This is an equally draconian legislation because there is no provision of bail. The Public Safety Act is a statute, like the National Security Act, under which a person, whether he is a political activist or a non-political activist, can be booked for two years under preventive detention laws in the name of the security of the State. The people who are booked under POTA are also booked under the PSA. *If a person gets bail under POTA, he still continues to be incarcerated*, so if the representatives of the government said they have stopped booking people under POTA and provide a rosy picture outside, in effect they are trying to fulfil their promises with regard to very few people. *A majority of people booked under security legislation have been booked under the PSA*.....However, once the detenu is released, he

> continues to be kept in jail, as he is booked yet again under the PSA. …For example, Mushtaq Ahmed Bhat was taken from his home on 18 June 1990. He challenged the case against him in the High Court where he was granted bail in the various FIRs filed against him. However, for the last fourteen years the man has still been under detention. Five or six detention orders have been passed because the government has made it a point not to release him. He is a young man of forty years and he has almost lost his eyesight. Security legislations like the PSA and the Subversion and Sabotage Act are used selectively against political hardliners.[222]

Another example of continued arrest and detention is the case of Abdul Rashid who was arrested and charged under Section 3(4) of POTA on September 2002. While in detention under POTA, the District Magistrate detained him under PSA. The High Court ordered his release on 11 May 2004, but he was detained by the Lal Bazar police station where the case filed against him under POTA was lodged. He got the bail only to be rearrested on 6 August 2004 under PSA. Rashid's detention order was finally quashed on 28 May 2005, but he was not released.[223]

The non-implementation of POTA and the release of those accused under POTA or detained under PSA was significant, however, for setting in motion a process of democratisation and reclaiming a space for dialogue which had been stifled by militant activity as well as armed presence of the state. The process of release, however, as the discussion above showed was yet again riddled by the precarious balancing of power between the Centre and the state governments. Jammu and Kashmir's special constitutional status under Article 370 purportedly protected the state against inroads by the Centre in its constitutional autonomy. Yet, in the entire process of release of prisoners, the Central government insisted on a Joint Screening Committee, where the Central government could play a significant role in approving of the release. While POTA was a 'national' law in the sense that it came with a mandate of applying equally to Jammu and Kashmir as the rest of the country, the Public Safety Act of 1978 was enacted by the Jammu and Kashmir State legislature. Under the provisions of Article 370, the Jammu and Kashmir legislature has the exceptional protection of exemption from Entry 9 of the Union List and Entry 3 of Concurrent list, while all residuary powers also rest with the state. Under the Constitution thus, it is the state legislature and not the Parliament which has power to enact law

prescribing (*a*) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of Advisory Board in accordance with the provisions of Article 22 [4(a)], (*b*) the maximum period for which any person may in any class or classes of case be detained under any law providing for preventive detention, and (*c*) the procedure to be followed by an Advisory Board in an inquiry under Clause 4(a).[224] The release of political prisoners, however, saw the governments at both levels giving in to coalition pressures and to compulsions of electoral politics, conflicting and colluding intermittently. Significantly, it was in the moments of conflict between the Centre and the state that the boundaries between regional and national politics were blurred as the fault-lines coincided with those in national politics. On the other hand, it was ironically in moments of collusion, that elements of an autonomous regional politics, distinct from the national, were sought to be defined.

Ever since POTO and later, POTA, came into force, the list of persons detained and charged under the Act grew steadily. A close examination of POTA cases has shown that they are inextricably imbricated and enmeshed in the specific political contexts of different states and constitute a zone of tension in the politics of the state as well as between the states and Central government. It needs also to be reiterated that POTA like all extraordinary laws bypassed due process, so that abuse/misuse was woven into its provisions. The NDA, without finding fault with the Act itself, on various occasions sifted among cases to identify 'appropriate' POTA cases and cases exemplifying 'misuse'. The arrest of MDMK leader and Member of Parliament Vaiko by the AIADMK government in Tamil Nadu, and Raghuraj Pratap Singh's arrest by the Mayawati government in Uttar Pradesh were labelled by various constituents of NDA government as politically motivated and condemned as cases epitomising 'misuse' of POTA. In both the cases, the courts sought to locate the appropriateness of the case and procedures within the framework of legality outlined by POTA itself, revealing yet another area of contest constituted by POTA—between the political executive

of the state or the Centre and the judiciary. The Supreme Court judgement of 10 November 2005 in Raghuraj Pratap Singh's case manifests the manner in which the court ensured the minimal procedural norms for the operation of the rule of law amidst the closures that POTA proposed and prescribed. The judgement may be seen as having set in motion a process of reclamation of space for restoring procedures. The steps taken by the Supreme Court for upholding the procedural legality, were to be welcome, not for bringing the accused back under the purview of an extraordinary law, nor because the outcome of conviction may in a specific case be a preferred one, but primarily because the Supreme Court order brought back reasonable restraints on the processes of arbitrary decision-making. What is ironical, however, is that the space for restoration of procedural principles of rule of law was squeezed out from within an extraordinary law that annulled the fundamental principles of substantive notions of rule of law. In the next chapter, we shall carry the discussion forward, showing how these complexities have played out in the context of the repeal of POTA.

Notes

1. *Joint Sitting of the Houses of Parliament, Debates*, Vol. I, No. 1, Tuesday, 26 March 2002, Lok Sabha Secretariat, New Delhi, p. 23.
2. Though a non-bailable warrant is not necessary for arrest under POTA, the Tamil Nadu government and the police consciously chose to take recourse to this strategy to be seen as following the legal course. 'NBW issued against Vaiko', *Hindu*, 10 July 2002. 'POTA will be used against LTTE supporters', *Hindu*, 13 April 2002. On 12 June 2002, Jayalalitha met the then Home Minister in the NDA government L.K. Advani urging him to ban 'terrorist outfits and unlawful organisations' in Tamil Nadu, viz., Tamil Nadu Liberation Army (TNLA), Tamil National Retrieval Troops (TNRT), the Al-Umma and the Jihad Committee, under the Unlawful Activities Prevention Act and POTA. All these organisations were already banned in Tamil Nadu under Section 16 of the Criminal Law Amendment Act 1908 which empowers the state government to outlaw any association that 'interferes with administration or maintenance of law and order' or 'constitutes a danger to public peace'. 'Declare TNLA, TNRT unlawful: Jaya', *Hindu*, 13 June 2002.
3. On 9 July 2002, the Jayalalitha government arrested eight MDMK functionaries for speaking in favour of LTTE. After getting the arrest warrants from the Thirumangalam judicial magistrate on 8 July, the police arrested four of the accused at Madurai and one each at Erode and Kariakudi on 9 July. Two others were arrested later. 'Jaya cracks POTA whip, 8 MDMK men arrested', *Hindustan Times*, 10 July 2002. All the eight were charged along with Vaiko under POTA in connection

with the speeches made by them at the Tirumangalam meeting on 29 June 2002 and at other times after POTA came into force in the state on 28 March 2002. Going by police records, of the eight persons, none except the former MP and Erode district secretary, Ganesmoorthy, and the Madurai Students Wing organiser, Madurai Ganesan, made any reference to LTTE. Pudur Bhoominathan, the Madurai urban district secretary, welcomed the gathering and Nagarajan proposed a vote of thanks. The former MLA, P.S. Maniam, said that Vaiko was an able leader after C.N. Annadurai and the Madurai urban district secretary Veera Elavarasan said that though MDMK had faced defeat electorally, the party won politically. The police, however, held that all eight persons 'provoked' and 'instigated' Vaiko into speaking in favour of LTTE and their speeches were 'likely to endanger the nation's security and integrity'. 'More MDMK men may be held', *Hindu*, 18 July 2002. On 2 August 2002, Jayalalitha sent a letter to the Prime Minister asking that Kanappan, MDMK Minister in the NDA government in the Centre, be sacked from his Council of Ministers. 'Jaya targets Vaiko man at Centre', *Hindu*, 3 August 2002.

4. 'All set for Vaiko arrest', *Hindu*, 11 July 2002.
5. 'After POTA, Jaya declares whole TN notified area', *Indian Express*, 16 January 2003.
6. 'Vaiko, a consistent LTTE supporter', *Hindu*, 14 July 2002. 'Vaiko and MDMK take centre-stage, thanks to Amma', *Hindustan Times*, 12 July 2002. 'Jaya threat fails to cow down Vaiko', *Hindustan Times*, 4 July 2002.
7. Recalling the experience with Preventive Detention Act, the Defence of India Act, MISA and TADA, Vaiko had asked for changes in the POTO clause which compelled journalists to name their sources of information, reduction of the period during which the confessional statement is to be recorded from 48 hours to 24 hours, and redefining 'meeting' under the Act as the existing meaning was likely to be misused by the police. 'Centre in a bind', *Hindu*, 11 July 2002; 'Tastes bitter now but Vaiko once said let's all swallow POTO', *Indian Express*, 11 July 2002. Vaiko's arrest, triggered off a debate within the state over the question of support to the LTTE. S. Ramdoss, leader of the Pattali Makkal Katchi (PMK) stated that although the LTTE had been banned for many years, political parties in Tamil Nadu were for lifting the ban, which did not make them anti-national. Ramdoss cited the Madras High Court's permission to P. Neduraman to organise a conference in support of the Sri Lankan Tamils and LTTE. Invoking the provisions of the POTA for supporting the LTTE was against the freedom of speech guaranteed in the Constitution he argued. 'PMK will continue to support LTTE: Ramdoss', *Hindu*, 12 July 2002. Jayalalitha, however, announced that her government was considering taking steps to ban the MDMK because 'in their executive committee meeting they had passed a resolution that the very purpose of the existence of the party, the very purpose of their participation in the Central Government is only to support the Tamils in Eelam'. 'We'll take steps to ban MDMK: Jayalalitha', *Hindu*, 13 July 2002.
8. The DMK president M. Karunanidhi said that Vaiko's arrest had shown how POTA could be misused and it was now up to the Prime Minister and the Deputy Prime Minister to see whether the specific provisions which allowed for misuse should continue. 'Unwarranted, says Jaitley', *Hindu*, 12 July 2002. The BJP President Venkaiah Naidu called Vaiko's arrest 'undemocratic and unwarranted', stating that it sent out 'totally wrong signal' on the use of POTA. 'Undemocratic: BJP', *Hindustan Times*, 13 July 2002.

9. In a message from Chicago reacting to the letter written by the Chief Minister, Jayalalitha, to the Deputy Prime Minister, L.K. Advani, Vaiko pointed out that he had suffered imprisonment for a year under MISA and had gone to jail 23 times. He had not, however, been involved in violence in the past nor will he be involved in violence in the future. 'Vaiko dares Jaya to arrest him', *Times of India*, 4 July 2002; 'Arrest move politically motivated', *Hindu*, 5 July 2002; 'We have never indulged in violence', *Hindu*, 12 July 2002. In Sri Lanka, leaders of the Tamil National Alliance sat on a twelve-hour fast to express their anguish and met the Indian High Commissioner in Colombo to press upon the Central government in India to intervene. The Sri Lankan Tamils, they pointed out, had accepted the LTTE as their representative in the peace talks with the Sri Lankan government, and Vaiko's release would amount to a recognition by the Indian government of the peace process. 'Lankan parties to fast for Vaiko', *Hindustan Times*, 14 July 2002; 'Lanka pro-Tamil alliance slams Vaiko's arrrest', *Indian Express*, 13 July 2002.
10. In the meantime three organisations, the Tamil Nadu Liberation Army (TNLA), Tamil National Retrieval Troops (TNRT) and the Akhil Bharatiya Nepali Ekta Samaj (ABNES) were declared unlawful under POTA, taking the total number of unlawful organisations banned under POTA to 32. A Home Ministry press release noted that the three organisations were found to be involved in terrorist activities and therefore banned. 'TNLA, TNRT, banned under POTA', *Hindustan Times*, 3 July 2002.
11. 'POTA problems: BJP caught between Vaiko and Jaya', *Hindustan Times*, 11 July 2002. 'The situation last year was different', remarked a BJP functionary when asked to explain why the Centre had been more active when the DMK leaders had been arrested the previous year. 'The Centre had to act as the Jayalalitha government had arrested two Union Ministers', *The Tribune*, 14 July 2002. Ram Vilas Paswan, the President of the Lok Jan Shakti party, accused the Centre of 'indifference' in the arrest of the MDMK leader, asking it to intervene immediately, if not to scrap the Act altogether. 'Stop misuse of POTA, Paswan tells centre', *Hindu*, 14 July 2002.
12. An indication of the Centre's dilemma on the Vaiko affair came when the former Law Minister and the Bharatiya Janata Party spokesperson, Arun Jaitley, shied away from denouncing the Jayalalitha government, stating that it was a 'technical issue' and 'depended on the evidence available'. 'Centre in a bind', *Hindu*, 11 July 2002. Earlier, L.K. Advani responded in an interview to the news channel *Aaj Tak*, stating that he had asked the Home Ministry to give a report on the matter, expressing at the same time his helplessness, 'I have asked my Ministry to give a report. But it's a matter concerning the State Government. What can I say?. 'Advani calls for report from Home Ministry', *Hindu*, 4 July 2002. Minister of State for Home, I.D. Swami said, 'The Centre does not come into the picture. Law and order is a state subject', while the NDA convenor George Fernandes abstained from reacting on what he termed a 'legal matter'. 'TN files FIR against Vaiko under POTA', *Hindustan Times*, 5 July 2002.
13. 'Opposition corners government on Vaiko', *Indian Express*, 18 July 2002.
14. 'Government in a fix over Vaiko's arrest', *Hindu*, 18 July 2002. The then Defence Minister and NDA convenor, George Fernandes, after visiting Vaiko in Vellore Jail on 19 July 2002, declared 'I do not think what has happened to Mr Vaiko falls within the ambit of POTA. He should not have been here. POTA has been violated in this case. The NDA has made its stand very clear that this was not the purpose of POTA'. Asked about measures to prevent 'misuse', he proposed '…at some point

of time, the courts will have to decide on this'. 'It's misuse of POTA: Fernandes', *Hindu*, 20 July 2002.

15. The detention eventually became a point of friction between the NDA and the MDMK and, on 30 December 2003, the two MDMK ministers in the government, M. Kannappan and Gingee N. Ramachandran, resigned.
16. The Union Home Ministry officials insisted that the case against Vaiko was unlikely to hold in court, nor was he likely to be denied bail when the matter came up in due course. Much of this insistence came after Vaiko had made a public statement distancing MDMK from the violent ways of LTTE while professing his support for the Tamil nationalist cause. 'Centre says case unlikely to hold', *Times of India*, 13 July 2002.
17. 'Signal against terror', *Hindu*, 13 July 2002.
18. Applying for bail, Vaiko felt, would amount to accepting prima facie the charges made against him. 'Pressure on him to seek bail', *Hindustan Times*, 18 July 2002.
19. MDMK held that the arrest warrant issued by the Judicial Magistrate at Thirumangalam was not tenable since under Section 23(6) of POTA only a sessions judge or additional sessions judge, after being appointed as a special judge could issue the arrest warrant. 'Vaiko won't seek bail; MDMK to challenge arrest', *Hindustan Times*, 16 July 2002. The two MDMK ministers consulted with Arun Jaitley, the former law minister and other legal luminaries, and were convinced of 'patent illegality' of Vaiko's arrest and subsequent remand. 'MDMK to challenge Vaiko's arrest in Supreme Court', *Hindu*, 21 July 2002.
20. 'Poonamallee court to try POTA cases', *Hindu*, 20 July 2002. By 4 August 2002, another LTTE supporter P. Nedumaran was arrested under POTA and the government was considering banning his organisation Tamizhar Desiya Iyakkam (Tamil Nationalist Movement) under the Criminal Law Amendment Act 1908. 'Nedumaran outfit may be banned', *Hindu*, 4 August 2002. On 24 October 2002, the Tamil Nadu government constituted a two member review committee as required under POTA to review POTA cases in the state. 'POTA detention review panel in TN', *Hindu*, 25 Ocotber 2002.
21. 'Vaiko challenges POTA in SC', *Hindustan Times*, 17 November 2002.
22. In the 518 page chargesheet, eight other accused figured along with Vaiko. The prosecution charged Vaiko with 'arranging, managing or assisting in arranging and managing a meeting that he knew was to support a terrorist organisation, to further its activities and to be addressed by a person who belongs to the terrorist outfit' under Section 21(2) of POTA and 'addressing a meeting with the purpose of encouraging support to a terrorist outfit or to further its activities' under Section 21(3) of the Act. The prosecution submitted a list of 115 witnesses and placed 168 documentary evidences along with the chargesheet. 'Finally Vaiko chargesheeted', *Hindu*, 31 December 2002; 'Chargesheet filed against Vaiko, at last', *Hindu*, 31 December 2002; 'POTA adalat mein Vaiko ke khilaf aarop patra manjoor', *Rashtriya Sahara*, 3 January 2003.
23. On 15 July, the Special Court had dismissed the discharge petitions filed by all accused except Vaiko who had challenged the Act in the Supreme Court. 'Vaiko faces charges in POTA court', *Times of India*, 26 July 2003; 'POTA charges filed against Vaiko, eight others', *Indian Express*, 26 July 2003.
24. Amidst growing rapproachment between the DMK and MDMK, Karunanidhi blamed the Centre for inaction. 'Karunanidhi meets Vaiko in prison', *Hindu*,

6 November 2002. On 22 January 2003, a delegation of senior leaders of the MDMK met the Prime Minister Atal Behari Vajpayee and submitted a representation expressing concern. 'MDMK delegation calls on PM', *Hindu*, 23 January 2003. On 12 March 2003, a resolution passed by an all-party meeting convened by DMK from which the Congress and CPI(M) stayed away and BJP was not invited, urged the release of Vaiko and others, and stated that the arrest went against the Deputy Prime Minister, L.K. Advani's promise in Parliament that POTA would not be misused. 'POTA arrests go against Advani's promise', *Hindu*, 18 March 2003. On 29 March 2003, the leaders of major parties, again barring the Congress, CPI(M) and BJP, came together in Chennai to take part in a day-long fast to protest the continued incarceration of Vaiko and others. The PMK leader S. Ramdoss reminded Advani yet again of his promise that POTA would not be misused. 'Day long fast to protest Vaiko's arrest', *Hindu*, 28 March 2003. On 29 March 2003 at the commencement of the day-long fast, Karunanidhi declared that like the PMK, the DMK too was 'driven to a situation to support' the Bill. 'None of us wanted the POTA enacted', he claimed. 'We were driven to support POTA: DMK', *Hindu*, 30 March 2003. By the end of April, even after the Central Review Committee was constituted, the demand of DMK had moved onto a position demanding the revocation of POTA. 'DMK for POTA revocation', *Indian Express*, 25 April 2003.

25. Other members of the Committee were M.U. Rehman, IAS (retd.), former Secretary to Government of India and Arvind Inamdar, IPS (retd.), former Adviser to the Uttar Pradesh Governor.
26. 'Review committee to check misuse of POTA', *Hindu*, 14 March 2003.
27. 'Review panel not meant to dilute POTA, says Swami', *Hindu*, 15 March 2003.
28. 'Throw POTA out', *Hindu*, 28 October 2003.
29. 'T.N. questions jurisdiction of POTA review panel', *Hindu*, 28 July 2003.
30. The memorandum was signed by 301 MPs—240 from the Lok Sabha and 61 from the Rajya Sabha—representing 36 parties. It urged the Committee to take steps to release Vaiko without further delay. The Committee had already sent to the Tamil Nadu government a copy of the notification issued by the Centre defining its powers and asking it to review all 40 POTA arrests in the state. Justice Saharya said that the Committee was responding to the letter sent by the Tamil Nadu government questioning the Central Reivew Committee's jurisdiction. It was also asking the state government to reply to the Committee's questions regarding the arrest of R.R. Gopal, editor of the Tamil bi-weekly *Nakkheeran*. Notices to non-governmental organisations, regional and national political parties and journalists were also sent by the Committee to pass on to it information that they may have regarding POTA arrests, and advertisements inviting information from the public were also being issued to newspapers. If necessary, the committee also intended to go to the respective states and interact with them. 'Review Vaiko arrest, MPs tell POTA panel', *Hindu*, 15 August 2002. On 17 September 2003, the Committee informed newspapers that it had got no reply from the Tamil Nadu government for the three letters it had sent in July and August and was left with no alternative except to obtain information from the victims, complainants, media personnel and NGOs, and proceed without the participation of the state government. The Committee hoped to get the details by the end of September and start the procedure of review. 'POTA panel to review TN arrests without State's participation', *Hindu*, 18 September 2003.

31. Manoj Mitta, 'Why POTA Ordinance is a joke', *Indian Express*, 30 October 2003, p. 8. The numbers of cases under POTA have been different in reports by the Centre, the states, and independent monitoring groups. The responses received by the Review Committee by the states showed that 15 states and six Union Territories made no arrests under POTA. In the remaining states, 301 cases were registered involving 1,600 persons of whom 514 were in prisons and 885 reported absconding. The maximum number of complaints received by the Committee was from Tamil Nadu (23), Delhi (5), Maharashtra (6), Uttar Pradesh (3) and Jharkhand (2). For details of numbers arrested in each state see J. Venkatesan, 'No POTA application in 15 states, 6 UTs', *Hindu*, 2 October 2003.
32. Jharkhand has a record number of 702 accused under POTA, of whom 207 have been arrested. Manoj Prasad, 'Jharkhand drops POTA against 83', *Indian Express*, 2 April 2003.
33. Jayalalitha's letter brought up a situation where the MDMK ministers wanted a commitment of support from the Central government in case the threat of arrest under POTA against them materialised. 'Jaya closes in, BJP pushes POT(A) luck', *Indian Express*, 2 October 2003.
34. 'DMK backs Centre on POTA amendment', *Hindustan Times*, 17 December 2003. The DMK had remained firm on its decision to demand repeal of the Act, throughout this period despite attempts by the NDA convenor George Fernandes to convince it of the need for the Act. 'Fernandes mission on POTA fails', *Hindu*, 4 November 2003; 'George fails to move DMK on POTA', *Indian Express*, 4 November 2003.
35. Karunanidhi announced at a press conference 'as long as the NDA implements the National Agenda for Governance in letter and in spirit, we will support the NDA'. He also stated that the main reason [for the decision was] the Tamil Nadu [unit of] BJP. 'We did not want to see the same shift in policy at the national level too'. 'DMK pulls out Ministers, to extend issue-based support to NDA', *Hindu*, 21 December 2003.
36. In an interesting development, on 15 December 2003, a single-member Madras High Court Bench granted Vaiko's petition to participate in the debate in Parliament the following day on POT (Amendment) Bill and cast his vote. The order was, however, set aside late in the night by a two-member Bench which decided that there was no question of entertaining the writ petition in the absence of a right. 'Bench sets aside judge perimisison for Vaiko to participate in House debate', *Hindu*, 16 December 2003.
37. 'POTA review panel decision binding on executive: Advani', *Hindu*, 29 October 2003, p. 15.
38. Manoj Mitta, *Indian Express*, 30 October 2003, op.cit.
39. Akshay Mukul, 'POTA charge not enough says Justice A.B. Saharya', *Times of India*, 29 October 2003, p. 10.
40. 'Jaya gets another notice, this time on Vaiko', *Indian Express*, 14 November 2003, p. 2.
41. 'Show-cause notice to Tamil Nadu on arrests of Vaiko, Gopal', *Hindu*, 14 November 2003.
42. 'Tamil Nadu will object to Saharya panel jurisdiction', *Hindu*, 2 December 2003. A team of officials and lawyers for Tamil Nadu government presented their preliminary objections to the Review Committee, stating that the panel was to perform

only executive functions and as such it was not competent to traverse upon matters pending before judicial forums, especially when the nature of powers and jurisdiction which could be exercised by the Review Committee were 'not spelt out either expressly or impliedly in POTA'. 'Saharya panel to consider Tamil Nadu objections today', *Hindu*, 3 December 2002. The Chief Secretary of the state pointed out that if the Ordinance was given effect to, it would result in the Committee 'setting at naught the judicial pronouncement relating to trial and other criminal proceedings'. 'POTA panel will dispose of objections first', *Hindu*, 6 December 2003. Having heard the petition of the State government, the Review Committee directed the Central government to address the objections raised in the petition. 'Address state objections, Saharya panel tells Centre', *Hindu*, 9 December 2003; 'POTA panel to hear Centre on Tamil Nadu's objections', *Hindu*, 22 December 2003.

43. The Review Committee also decided that the cases of Vaiko, other MDMK leaders and R.R. Gopal will be taken up for further consideration and the final hearing on the basis of the available material would be held on 4, 5 and 6 February 2004. 'Tamil Nadu's objections fallacious: POTA review panel', *Hindu*, 24 January 2004.
44. 'HC softens bail terms for Vaiko', *Indian Express*, 5 February 2004.
45. After the Madras High Court decision, the Tamil Nadu government filed an application before the Central Review Committee seeking time. 'Supply documents on Vaiko', *Hindu*, 5 February 2004. The required documents were finally submitted to the Review Committee on 16 February 2004.
46. 'Stay order on POTA panel jurisdiction, state tells apex court', *Hindu*, 15 February 2004. 'State submits POTA documents to review committee', *Hindu*, 17 February 2004.
47. 'Amma's POTA luck running out', *Hindu*, 9 March 2004.
48. The Terrorist and Disruptive Activities (Prevention) Act 1985, 1987, which expired in 1995, amidst widespread criticisms of abuse, unlike POTA, did not have a provision for setting up a Review Committee. While looking at the constitutional validity of the Act, in the case *Kartar Singh vs. State of Punjab* (1994) the Constitution Bench of the Supreme Court suggested that a 'higher level of scrutiny and applicability of TADA' should be ensured by setting up a Screening or Review Committee. The Committee consisting of the Home Secretary, Law Secretary and other Secretaries were to review all TADA cases instituted by the Central government, as well as to have a quarterly administrative review, reviewing the application of TADA provisions in the respective states. Similar Screening or Review Committees were suggested at the state level as well.
49. 'SC gives it to Amma: you're misusing POTA', *Indian Express*, 9 March 2004, pp. 1–2; 'Amma's POTA luck running out', *Hindu*, 9 March 2004.
50. *People's Union for Civil Liberties and Another vs. Union of India*, Judgement dated 16 December 2003 in W.P. No. 389 of 2002.
51. Rajinder Sachar, 'POTA remains self-defeating' *PUCL Bulletin*, Vol. XXIV, No. 2, February 2004, p. 263.
52. Judgement delivered on 16 December 2003 in the case *People's Union for Civil Liberties vs. Union of India*, p. 981
53. The three petitions by PUCL, the All India Human Rights and Social Justice Front, and by Vaiko respectively were admitted in the Supreme Court on 13 January 2003. 'SC admits plea by Vaiko, others', *Hindu*, 14 January 2003.

54. Vaiko emphasised the impossibility of referring to the ethnic Tamil problem of Sri Lanka without mentioning LTTE, which had, he argued, emerged as the sole representative of Tamils, and supported by Tamils in North and East Sri Lanka as well as Tamils of Indian origin. 'Section 21 of POTA is unconstitutional: Vaiko', *Hindu*, 10 December 2003. In his statement of 11 August 2003, in the POTA Court against the charges framed against him, Pala Neduraman emphasises that speaking in support of LTTE could not be construed as a crime, since LTTE was not a 'terrorist organisation'. It was on the other hand, 'an organisation fighting for the liberation of the Eelam Tamils' in the same way as the Indian National Army (INA) fought under Subhash Chandra Bose. Neduraman raised the question, if the Indian Prime Minister and Deputy Prime Minister could hold talks in Japan and Delhi with representatives of banned organisations in the North-eastern states of Nagaland and Mizoram, was it an offence to talk in support of a banned organisation? The LTTE, moreover, was raising a voice 'against the bloody genocide by the Sinhalese', and their voice had been recognised as representatives of the Eelam Tamils by 51 countries of the world. 'Pala Neduraman's statement in POTA court' as cited in Confederation of Human Rights Organisation, 16 August 2003, www. humanrightsindia.com.
55. *People's Union for Civil Liberties & Anr. vs. Union of India*, paras 48–50, *Scale*, No. 10, 2003, pp. 967–998.
56. Ibid., p. 989.
57. 'Victory for freedom of speech: Vaiko', *Hindu*, 18 December 2003.
58. 'SC admits plea by Vaiko, others', *Hindu*, 14 January 2003.
59. 'Vaiko's speech an act of terrorism': Centre', *Hindu*, 30 March 2003.
60. 'TN allies force PM to give assurance, new stance in SC today', *Indian Express*, 31 March 2003.
61. 'Government to back Vaiko in POTA case', *Hindustan Times*, 31 March 2003.
62. 'Soli Sorabjee blames juniors', *Hindustan Times*, 31 March 2003.
63. In the new affidavit the government sought to delete paragraphs 12 and 13 of the original affidavit which had stated that Vaiko was drawing support for LTTE and the speech given by him constituted an act of terrorism. The new affidavit read: 'Government of India fully supports the constitutionality of POTA but is of the view that the speech delivered by Vaiko if properly interpreted and read in the entire context of the speech and the surrounding circumstances does not attract the provisions [Section 21] of POTA'. 'Centre corrests POTA wrong in ally Vaiko's case', *Indian Express*, 1 April 2003; 'Centre files fresh plea in POTA case against Vaiko', *Hindustan Times*, 1 April 2003; 'Centre corrects stand in Vaiko's case', *Hindu*, 1 April 2003.
64. Vaiko had consistently refused to seek bail believing that the case will not stand legal scrutiny. 'Vaiko likely to seek bail', *Hindu*, 31 December 2003. He moved a bail application on 12 January 2004, amidst noisy scenes at the Special Court when the Lok Jan Shakti Party leader Ram Vilas Paswan was prevented by the police from meeting Vaiko. 'Vaiko to move bail application today', *Hindu*, 13 January 2004.
65. The POTA judge laid down the following conditions: Vaiko will have to appear in person before the court on all working days and help conduct the trial on a day-to-day basis, so that it could be completed by 30 June, the deadline set by the High Court, he should not leave the city limits beyond Poonamallee and should surrender his passport, he will have to sign the register in the court on working days and on holidays, at the court of the Chief Judicial Magistrate in Egmore, in

the course of the trial he should neither interact with print or visual media nor make speeches in connection with the case, MDMK members should not comment on the case either, he would have to file a sworn affidavit and execute a bond with two sureties. If any of the conditions were violated, the investigating agency had the liberty to take appropriate steps to revoke bail. 'Court offers Vaiko bail, with curbs', *Indian Express*, 4 February 2004.

66. Vaiko's counsel objected to three conditions—the signing at the courts daily, residing at Chennai and the possibility of being held responsible for the acts of his party cadres. Relaxing the conditions, the High Court gave Vaiko the freedom to move on the condition that he informed the investigating officer about his schedule and it did not interfere with the 'day-to-day progress of the trial'. 'Madras High Court eases 'onerous conditions' for Vaiko's bail', *Hindu*, 5 February 2004.
67. 'Vaiko released, begins campaigning', *Hindu*, 8 February 2004. Vaiko's release was immediately followed by an appeal challenging the bail, by the Deputy Superintendent of Police (Q Branch CID), who contended that the Special Judge had failed to take into account the 'gravity and seriousness of the offence for which Vaiko was being tried'. 'Government challenges bail for Vaiko', *Hindu*, 8 February 2004.
68. The crux of the arguments made by the counsel for Tamil Nadu government was to ascribe 'criminal intention' to Vaiko, emphasising in particular that the speech at the meeting on 29 June 2002, was 'not an outburst' but 'pre-meditated and calculated' to extend support to LTTE and to encourage his partymen to support its crim-inal activities. Significantly, Justice Saharya took the position that Vaiko's support for LTTE was not in dispute, what was contested was whether the speech was 'a political view of a political leader' or 'intended to arouse terrorism'. 'Vaiko's speech will attract POTA: Tamil Nadu counsel', *Hindu*, 5 March 2004; 'Vaiko's speech calculated to whip up secessionist sentiments', *Hindu*, 6 March 2004.
69. To a question from Justice Saharya about the purpose of the meeting, the counsel for Vaiko and others read out a police report, which stated that the meeting was for the purpose of marking the ninth anniversary of the party. Incidentally, those who paid for the mike set and other expenses were charged under POTA. 'Vaiko speech won't attract POTA: counsel', *Hindu*, 4 March 2004. The panel pointed out that accused 5 to 9 had performed different roles including moving an application for license from the local police, placing orders for erection of platform/shed etc. which did not lead to the conclusion that persons carrying out such tasks would be aware of the content of the speeches that were to be delivered at the meeting. Again, speeches made by accused 2 to 4 could not be said to be speeches made for the purpose of encouraging support for the LTTE or for furthering its activities. 'They generally dwelt on the deaths of Tamils in Sri Lanka and opposition to the resolution adopted by the Assembly to secure extradition of Prabhakaran, which was part of the political philosophy of the MDMK party'. 'Charges against MDMK men baseless', *Hindu*, 11 April 2004; 'No prima facie case against Vaiko: Saharya Panel', *Hindu*, 9 April 2004.
70. 'Vaiko case: prosecution may clarify stand', *Hindu*, 11 April 2004.
71. 'Ask government to withdraw POTA proceedings, Vaiko urges High Court', *Hindu*, 27 April 2004.
72. The Madras High Court also reiterated its judgement of 4 February 2004 on the jurisdiction of the Committee, which was upheld by the Supreme Court. While upholding the constitutional validity of subsections 4, 5 and 6, it explained subsection 7

as follows: 'even if the Committee comes to the conclusion that there is no prima facie case against the accused, the prosecution cannot be deemed withdrawn automatically', '..if the Committee concludes that there is no prima facie case, then the administrative decision is binding on the government, which has to issue a letter to the prosecutor. With that the role of the Committee and the government comes to an end', '…it is for the prosecutor to apply his mind independently, taking into consideration the interpretation given for Section 321 by the Supreme Court. Even if he files a petition, the court is not bound to automatically accept the plea. It has to assess the factual situation by applying legal principles and then formulate its opinion'. 'POTA panel order binding on government: High Court', *Hindu*, 30 April 2004.

73. 'TN to withdraw POTA case against Vaiko, *Tribune*, 11 August 2004. The application for withdrawal was made under Section 321 CrPC (withdrawal of cases). 'Prosecution seeks to withdraw case against Vaiko', *Hindu*, 11 August 2004.
74. 'Court refuses to scrap case against Vaiko', *Indian Express*, 4 September 2004, p. 3.
75. 'POTA court dismisses withdrawal application', *Hindu*, 4 September 2004, p. 7
76. Ibid.
77. 'Vaiko plea to be taken up in apex court on 10 September 2004', *Hindu*, 7 October 2004.
78. 'POTA court proceedings stayed', *Hindu*, 9 October 2004.
79. Thirumangalam, where Vaiko addressed the controversial meeting, Vellore, where Vaiko was lodged in the central prison, and Poonamallee, where the POTA trial was conducted.
80. According to the prosecution, the accused, members of Radical Youth League, a front organisation of the banned Peoples' War Group, had entered into a criminal conspiracy on 24 November 2002 to commit acts of terrorism with the intention to 'over-awe' the state government and strike terror in the minds of people to achieve their objectives. The chargesheet stated under the pretext of training in karate, they had formed an unlawful assembly in Utharangari in Dharmapuri and when confronted by the police they had fired at the police party. 'POTA detenus move Madras HC for bail', *Hindustan Times*, 7 March 2004.
81. Prabhakaran's case has been discussed in Chapter Two under the discussion on bail under POTA.
82. The reasons for delay in the disposal of the plea included non-completion of prosecution arguments, and the over a month-long strike by advocates preventing the counsel for the detenus from mentioning the matter before the Court. The counsel for the detenus pointed out that apart from the fact that no chargesheet had been filed two years after the arrest, the case suffered from three lacunae: first, the police showed the recovery of arms, including pipe bombs, only during the second remand period and during the 15 day police custody, making the recovery inadmissible as evidence, secondly, at the time of the recovery of explosive material, Tamil Nadu had not been declared a notified area, thirdly, the Radical Youth League to which the accused allegedly belonged, was not a banned organisation. 'No champions for non-VIP POTA detenus?', *Hindu*, 5 September 2004.
83. Eleven of the twenty-four detenus went on strike which included three women detenus who went on hunger strike in Vellore Special Prison for women. Petition to the Governor of Tamil Nadu, dated 8 September 2004, by the forum in support of hunger striking POTA detenus, demanding immediate withdrawal of POTA cases and release of political prisoners on hunger strike.

84. 'High Court seeks report on health condition of POTA detenus', *Hindu*, 8 September 2004.
85. 'Gopal to get case documents, POTA prisoners end fast', *Indian Express*, 15 September 2004.
86. 'Deepavali in jail for these 'forgotten' POTA detenus', *Hindu*, 10 November 2004.
87. The Central Review Committee reconstituted after the POTA Repeal Ordinance was promulgated consisted of Justice Usha Mehra who was the Committee's new Chairperson, and R.C. Jha and Raj Pal. 'POTA panel meets', *Hindu*, 14 December 2004.
88. 'Bail for six women POTA detenus', *Hindu*, 29 April 2005.
89. 'Court moved against bail to women held under POTA', *Hindu*, 13 May 2005.
90. See also judgement dated 10 November 2005 in the case *S.K. Shukla and Others vs. State of UP and Others*. Writ petition (CRL) Nos. 132–134 of 2003.
91. 'The rise and fall of Raja', *Hindustan Times*, 2 February 2003.
92. On 20 May 2005, at a function organised by the Rajput Welfare Association of India, to mark the birth anniversary of Maharana Pratap, several legislators of the Rajput Community felicitated Raja Bhaiyya, out of prison on bail and installed as the Food and Civil Supplies Minister, the sixtieth minister in Mulayam Singh Yadav's government in UP. These legislators equated Raja Bhaiyya to the Maharana, and referred to him as the 'unquestionable leader' of the Thakurs in UP. 'We have read about Maharana Pratap in history books but have got a chance to see him in person in Raja Bhaiyya who fought with the draconian rule of Mayawati and finally won the battle by unseating her', said Yashwant Singh, a Thakur MLC. The Vice President of the association held: 'We want a king to lead us. At least there is one person in Raja Bhaiyya who has come from our community and holds the capacity to lead the state one day'. 'Thakur Bhaiyya is Rana Pratap', *Indian Express*, 21 May 2005.
93. 'Mayawati flays Rajnath's anti-crime drive', *Hindu*, 11 December 2001.
94. Mayawati, in an interview while gearing up for the February 2002 Assembly Polls. See 'Why didn't Govt bring about POTO when thousands were dying in J&K', *Indian Express*, Delhi, 17 December 2001.
95. Immediately before the Assembly elections, criticising the 'manuwadi' parties or parties of the upper castes/upper caste ideology, Mayawati accused the Congress and the BJP of 'dividing people on the basis of caste', while the BSP united people on the same basis: 'Everyone still remembers how both the BJP and the Congress opposed the Mandal Commission Report which referred to Article 340 of the Indian Constitution for a separate reservation for the socially backward. Today, suddenly, their hearts bleed for the ati-pichchra and ati-Dalit.' Ibid.
96. The Kunda MLA, Raghuraj Pratap Singh, popularly known as Raja Bhaiyya, entered UP Assembly for the first time as an independent candidate in 1991. He also won elections in 1993, 1996 and 2002. Raja Bhaiyya had 32 criminal cases, including murder, attempted murder, dacoity, and abduction, pending against him. He owned huge assets in Kunda, Pratapgarh and Lucknow. An AK–56 with three magazines, a telescope rifle, explosives, and human skulls and bones were recovered by the police from his palatial estates. Raja Bhaiyya was barred by the Election Commission from entering his own constituency Pratapgarh following complaints of torture intimidation and violence. During the course of the investigations, a key witness in the POTA case against him was shot dead, reminding once again that in the

context of the politics and social set up in the region, Raja Bhaiyya continued to be a 'law unto himself in Kunda'. 'Witness in Raja case shot', *Times of India*', 4 February 2003; 'Raja Bhaiyya and the law', *Hindu*, 6 February 2003. Rajendra Yadav, the witness who was shot dead had on 21 January 2003 given a confessional statement in court under Section 144 CrPC implicating Raja Bhaiyya in a murder case. Yadav had also given a confessional statement to the police, in the POTA case against Raja Bhaiyya, but was shot dead before he could appear before a magistrate. 'Kunda hots up with Bhaiyya double agent's murder', *Indian Express*, 12 February 2003.

97. POTA was imposed on them on the ground that they were plotting to kill the CM on Republic Day and the recovery of an AK–56 rifle and walkie-talkie sets was construed as proof of the same. See 'Maya slaps POTA on Raja Bhaiyya, father', *Indian Express*, Delhi, 26 January 2003, p. 4.
98. 'The rise and fall of Raja', *Hindustan Times*, New Delhi, 2 February 2003, p. 16.
99. 'POTA: BJP caught between Maya, Manu', *Indian Express*, Delhi, 3 February 2003.
100. Arun Jaitley, BJP General Secretary, sought to downplay the issue and was guarded in his reaction to the arrest. See 'BJP flak on POTA makes Mayawati tie ISI tag on Bhaiyya', *Indian Express*, Delhi, 28 January 2003, pp. 1–2.
101. 'New storm brews in UP as Rajnath Singh backs Raja Bhaiyya', *Hindustan Times*, 28 January 2003.
102. 'UP government misusing POTA, says Katiyar', *Times of India*, 27 January 2003.
103. 'New storm brews in UP as Rajnath Singh backs Raja Bhaiyya', *Hindustan Times*, 28 January 2003.
104. 'Maya hits Pot(a) of gold', *Indian Express*, 29 January 2003.
105. 'BJPs flak on POTA', *Indian Express*, 28 January 2003.
106. 'New storm brews in UP as Rajnath Singh backs Raja Bhaiya', *Hindustan Times*, 28 January 2003.
107. 'Maya's fresh blow: Apna dal ditches SP over POTA', *Indian Express*, 30 January 2003.
108. 'Raja Bhaiyya plays martyr', *Indian Express*, 11 February 2003.
109. With the Assembly session to be convened before 6 March 2003, efforts to win the support of smaller parties and independent MLAs was becoming important. See Maya's fresh blow: Apna dal ditches SP over POTA', *Indian Express*, 30 January 2003.
110. Veer Bahadur Singh, a Rajput Chief Minister of the Congress Party had brought TADA charges against Udai Pratap Singh in 1986. In 1981, he had faced charges under the NSA and criminal cases under the Goondas Act, the Gangsters Act, and Explosives Act had been filed against him in 1986, 1992 and 1993. 'It is caste bias, says Mayawati', *Hindu*, 2 February 2003.
111. As a newspaper article put it, Mayawati's 'grudge' against Raja Bhaiyya predated his attempt to topple her government. On 21 October 1997, during a clash in the UP Assembly, Raja Bhaiyya threw a slipper at Mayawati and 'followed it up by some vilest abuse'. 'Why is Maya gunning for him?', *Hindustan Times*, 2 February 2003.
112. Ibid. Significantly, newspaper editorial articles, pointed out that by imprisoning Raja Bhaiyya, Mayawati had shown her customary ruthlessness, often seen as the 'distinguishing feature of the BSP, in sharp contrast to the mild-mannered 'Congress dalits' of the previous generation: 'Mayawati has already secured a place in the history of UP. Her claim of being the harbinger of a new age would be made

even stronger if she acted with similar courage not only against her political rivals but against all those sinister forces who darken the politics of her state'. See 'Raja of crime: Even Manuwadi's won't object to Mayawati's crusade', *Indian Express*, 4 February 2003.

113. 'POTA: BJP caught between Maya, Manu', *Indian Express*, 3 February 2003.
114. 'Centre washes its hands of Raja Bhaiyya case', *Hindustan Times*, 3 April 2003, p. 9.
115. 'Proper coordination needed', *Hindu*, 2 February 2003.
116. 'Son of his father', *Hindustan Times*, 2 February 2003.
117. 'UP no 'sanctuary' for jailbird', *Indian Express*, 2 February 2003.
118. 'POTA: BJP caught between Maya, Manu', *Indian Express*, 3 February 2003. Thakurs form nearly 12 per cent of the total electorate in the state, and the community has its presence ranging from five to 12 per cent in each Assembly segment. 'SP sees plot to eliminate Raja', *Indian Express*, 6 February 2003.
119. The 37 BSP MLAs who broke from it, formed the Loktantrik Samaj Party which later merged with the SP taking its tally to 181. Mulayam Singh had the support of 16 Congress MLAs, 14 of the Rashtriya Lok Dal, 4 of the Rashtriya Kranti Party, 2 each of the CPI(M), and the Loktantrik Congress Party, 15 independents and 1 MLA each from the Apna Dal, the Janata Party, the Samajwadi Janata Party, the Samata Party, and the National Loktantrik Party. For details see Purnima S. Tripathi 'The Uttar Pradesh Drama', *Frontline*, 26 September 2003.
120. POTO figured in the election manifesto of Bharatiya Janata Party (BJP) in Uttar Pradesh Assembly elections. The then Chief Minister of Uttar Pradesh, Rajnath Singh, declared in his various election speeches that if voted back to power, the BJP government would enact POTO-type laws to effectively deal with terrorism in the State. 'Rajnath hints at POTO-type law in UP', *Hindu*, 28 January, 2002.
121. Mulayam Singh also ordered a review of other cases filed against them under the NSA and the Gangsters and Goonda Acts. 'Raja Bhaiyya samet sabhi chaar se POTA hata', *Rashtriya Sahara*, 30 August 2003; 'POTA charges withdrawn: Mulayam sworn in as Chief Minister', *Hindu*, 30 August 2003; 'Mulayam's first move: Raja Bhaiyya bailout', *Hindustan Times*, 30 August 2003.
122. 'We welcome the decision. If President's rule had been imposed in the state, we would have urged Governor Vishnu Kant Shastri to withdraw the charges', said Vinay Katiyar. 'Mulayam' first move: Raja Bhaiyya bailout', *Hindustan Times*, 30 August 2003.
123. 'Riding UP swing of fortunes, Raja Bhaiyya simply can't help grin', *Indian Express*, New Delhi, 8 September 2003.
124. Congress leaders in UP warned SP against the anti-dalit image which was getting associated with SP after Mulayam Singh's declaration of withdrawal of POTA case against Raja Bhaiyya. 'Bhaiyya stands between friends', *Indian Express*, 13 September 2003.
125. 'POTA court puts Raja in his place', *Indian Express*, 13 September 2003.
126. 'Don't tell this to Jaya: in UP, POTA is poetry', *Indian Express*, 31 October 2003.
127. 'UP sets up POTA review panel', *Hindu*, 16 September 2003.
128. 'POTA mamle ki vapasi ke bavjood Raja Bhaiyya ki rahein aasaan nahin', *Rashtriya Sahara*, 30 August 2003. Section 321 of CrPC, 1973 pertaining to withdrawal from prosecution, lays down that: The Public Prosecutor or Assistant Prosecutor in charge of a case may, with the consent of the Court at any time before the judgement is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and upon such

withdrawal,—(*a*) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences; (*b*) if it is made after a charge has been framed, or when under this Code no charge is required he shall be acquitted in respect of such offence or offences:

Provided that where such offence—(*i*) was against any law relating to a matter to which the executive power of the Union extends, or (*ii*) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or (*iii*) involved the misappropriation or destruction of, or damage to, any property belonging to the Central government, or (*iv*) was committed by a person in the service of the Central government while acting or purporting to act in the discharge of his special duty, and the prosecutor in charge of the case has not been appointed by the Central government he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central government to withdraw from the prosecution.

129. The petitioners had submitted that the withdrawal of POTA charges had been done without any mandate from the statute or the law and the state government could not usurp and exclude the jurisdiction of the court. 'SC to hear plea against withdrawal of POTA charges on Raja Bhaiyya', *Hindu*, 10 September 2003; 'SC will hear plea on Raja Bhaiyya case on September 12', *Times of India*, 10 September 2003.
130. 'Only Centre's say can free Raja Bhaiyya', *Times of India*, 19 December 2003, p. 6, 'Centre's nod must to lift POTA case', *Hindustan Times*, 19 December 2003, p. 5.
131. 'Bhaiyya a step closer to freedom', *Indian Express*, 22 December 2003; 'Raja Bhaiyya se POTA hatane ke liye Atal, Advani, Jaitley se miloonga', *Rashtriya Sahara*, 20 December 2003; 'Pota ka virodh jari rahega', *Rashtriya Sahara*, 26 December 2003; 'Release Raja Bhaiyya: Mulayam', *Hindustan Times*, 26 January 2004.
132. 'Centre blamed for Raja Bhaiyya's plight', *Hindu*, 22 February 2004.
133. 'Don't blame SP if Bhaiyya's still in jail, says Amar', *Indian Express*, 3 May 2004; 'SP, BJP vie for Rajput vote', *Hindu*, 4 May 2004.
134. 'Withdraw cases against Bhaiyya', *Indian Express*, 13 May 2004.
135. 'Raja Bhaiyya, father get bail', *Hindustan Times*, 18 May 2004.
136. 'Raja Bhaiyya appointed Cabinet Minister', *Hindu*, 17 July 2004.
137. 'Meet UP Minister 60: POTA-free, 32 cases down', *Indian Express*, 17 July 2004.
138. 'UP unilaterally withdrew POTA against Raja Bhaiyya: Centre', *Hindustan Times*, 16 September 2004.
139. Judgement dated 10 November 2005 in the case *S.K. Shukla and Others vs. State of UP and Others,* Writ petition (CRL) Nos. 132–134 of 2003.
140. See J. Venkatesan, 'Supreme Court quashes withdrawal of POTA case against Raja Bhaiyya', *Hindu*, 11 November 2005.
141. Judgement (p. 37), citing the judgement in the case *Sheonandan Paswan vs. State of Bihar and others* [1983 (1) SCC 510]
142. 'Court grants bail to Raja Bhaiyya', *Hindu*, online edition, 16 December 2005, www.hindu.com/2005/12/16/stories/2005121616640500.htm
143. Raja Bhaiyya re-inducted into Uttar Pradesh Ministry, *Hindu*, 22 Jan 2006.
144. 'Newspapers barred from publishing proceedings against Raghuraj', 23 March 2006. www.newkerala.com/news

145. Yasin Malik was charged under the Foreign Exchange Management Act (FEMA) and Section 22 of POTO, which laid down a jail term of 14 years for financing terrorism. Malik was arrested on the basis of a statement from Shazia Begum and Mushtaq Ahmad Dar who were allegedly caught by the police on the Jammu–Srinagar highway with $100,000, which they claimed they were carrying for Malik. They allegedly got the money in Nepal from Altaf Qadri, a senior JKLF member based in Pakistan. 'JKLF chief held on hawala charge', *Hindustan Times*, 26 March 2002. While Malik denied the charges, and the NHRC took notice of the case asking the state government for details of the case, immediately after Malik's arrest newspapers carried reports that police and intelligence agencies consider the All Party Hurriyat Conference as the largest recipient of foreign funds. The Jammu and Kashmir police had reportedly registered several FIRs charging senior Hurriyat leaders with receiving money through the hawala route. According to the police, some 200 crores of rupees had been pumped into Kashmir, primarily from Pakistan and Iran, over the years of militancy and since 1985, the Central government as well as the Income Tax Department had been issuing notices to individuals seeking details of funds received from abroad. Allegations of 'misappropriation of funds' had also been made against each other from within the separatist ranks, prominent among those against whom allegations were made were senior Hurriyat leader, Abdul Ghani Lone and Shabir Shah. 'Hawala funding of terror exposed', *Hindustan Times*, 26 March 2002.
146. 'Yasin Malik gets bail, held again', *Times of India*, 21 August 2002. This was the second time in 12 years that PSA had been clamped on Yasin Malik. The first time that he was detained under PSA was in August 1990. He was released in May 1994. 'Shortlived freedom for Yasin Malik', *Hindustan Times*, 21 July 2002.
147. 'Shortlived freedom for Yasin Malik', *Hindustan Times*, 21 July 2002.
148. 'J&K books 426 under POTA in 150 days', *Hindustan Times*, 8 April 2002.
149. 'Just Contagion', *Outlook*, 22 April 2002, p. 16.
150. Ibid.
151. 'Six Khalistani Militants held in Jammu', *Hindustan Times*, New Delhi, 8 April 2002.
152. SAS Geelani was lodged in the Birsa Munda Central Jail of Ranchi in Jharkhand state. Fearing that mercenaries might airlift Geelani from the jail, the jail officials sought permission from the state government to 'air-grill' his cell which basically meant that the cell would come to resemble an iron cage with the roof covering the cell, toilet and the adjoining parts of the jail building. 'Worried cops want Geelani cell air-grilled', *Hindustan Times*, 20 June 2002.
153. 'Geelani, sons-in-law held; ISI links found', *Hindustan Times*, 10 June 2002. At a hurriedly convened news conference, the Director General of Police, A.K. Suri said that the arrest of a Kashmir-based detective agency owner, Imtiyaz Bazaz, on 25 May 2002, had revealed Mr Geelani's involvement in channelising finances from Pakistan's ISI through a U.K. based Kashmiri expatriate and President of the World Kashmir Freedom Movement, Ayub Thakur for militant leaders including the Dukhtaran-e-Milat Chief, Asiya Indrabi. Interrogation of Bazaz and also investigations in the case revealed, said Suri, that Syed Salahuddin, Pakistan-based supreme commander of the Hizb-ul-Mujahideen had been sending money to his commanders through Dr Thakur and Mr Geelani. 'Geelani, son-in-law arrested under POTA', *Hindu*, 10 June 2002.

154. SAS Geelani had reportedly opposed the initiative by fellow Hurriyat members Lone and Mirwaiz, who had met in Dubai to discuss joining the October polls, terming it an attempt to 'travel on two boats'. Lone's murder followed soon after, derailing the Dubai initiative. The message this arrest intended to put across, pointed out a newspaper article, was largely symbolic: 'Geelani abandoned by Islamabad, in jail and unable to again sabotage a political process he feared'. To save the polls India reportedly needed to do two things: One, put an end to Islamabad's supply of kashmiri jehadis. With the infilteration stopped, security forces could kill enough of those in Indian Kashmir to ensure a safe campaign. Two, nullify Geelani in a manner dramatic enough to counter the impact of Lone's death. 'Geelani arrest a bold gamble', *Hindustan Times*, 10 June 2002.
155. 'Geelani, son-in-law arrested under POTA', *Hindu*, 10 June 2002.
156. A survey was conducted by the Centre for the Study of Developing Societies (CSDS) in collaboration with the Department of Political Science, Jammu University to measure how fair and free the election was. The analysis based on a detailed report from 77 constituencies that went to poll in the first three phases, concluded that compared to the elections in 1996, 1998 and 1999, the election of 2002 was the fairest. At the same time, the election was far from free owing to the 'ever-looming presence of the militants' which created a climate of intimidation and the presence of security forces which 'also contributed to making the people's choices unfree'. The participation in elections, the survey pointed out was as high as the rest of India. While, the voter turnout was close to 41.3%, on other indicators of participation, the level of popular enthusiasm and participation was in some ways higher than the rest of India. The level of canvassing and participation in campaigning in the state compared well with the all India figures, while the percentage of those who attended any election meeting, was higher in the state than the rest of the country, this despite the security threat. For details see Rekha Chowdhary and Yogendra Yadav, 'J&K polls 2002, the 'fairest of them all', *Indian Express*, 9 October 2002.
157. In February, 2002 the Hurriyat Conference announced its poll panel with Tapan Kumar Bose of the Kathmandu based South Asian Human Rights Centre and Sajjad Ali Shah as its two co-chairpersons. The Hurriyat declared that the alternative commission would help choose 'the true representatives of the people of Jammu and Kashmir', in both Jammu and Kashmir and PoK, who would discuss the future of the people in tripartite talks. 'Hurriyat forms poll panel', *Hindu*, 13 February, 2002.
158. James Michael Lyngdoh, *Chronicle of an Impossible Election*, Delhi 2004, p. vii.
159. The other parties that contributed towards arriving at the required number of seats in the 87-member legislative assembly were the People's Democratic Forum (led by Mohammad Yusuf Tarigami) and the Panther's Party (led by Bhim Singh). Initially, 19 of the 20 Congress MLAs in the state expressed displeasure over the 'betrayal' in conceding the CM's post to PDP chief. They claimed to have the support of seven independent MLAs from Jammu and the Valley that would enable them to form the government with the outside support of NC. 'Congress, PDP unveil common agenda', *Hindustan Times*, 28 October 2002.
160. *Times of India*, 'Talks will usher in peace', 6 November 2002, p. 7. Mufti's commitment to the political process in the state was being constantly judged at the initial stages of his tenure as Chief Minister against his tenure as the Union Home

Minister in 1989–91which was marked by the release of five JKLF militants in lieu of his daughter's safe custody in 1990. Moreover, some Hurriyat leaders were skeptical about his poll promise blaming him for excesses on people during his term as the Home Minister in the Central government. 'Will Mufti fight with an iron fist?', *Times of India*, 28 October 2002.

161. The SOG also known as the Special Task Force was a group raised from within the Jammu and Kashmir police force in 1994, especifically for carrying out counter insurgency operations. The force had played a major role in the anti-militant operations in the state, killing more than 1000 terrorists. It was, however, also charged with extra-judicial executions, killings, extortion and kidnappings, however. The orders for disbanding the much discredited SOG through assimilation in the Jammu and Kashmir police were finally issued by the government on 24 February 2003. As per the order, there would be no separate anti-insurgency wing of Jammu and Kashmir and the latter would continue its anti-militancy operations. These operations would now be planned and executed under the supervision of District Superintendents of Police, unlike the position earlier when the SP (Operations), heading the SOG in the districts, was not answerable to the SPs concerned despite being junior in rank to the latter. 'Valley waves bye to SOG', *Indian Express*, 25 February 2002; 'Mufti government disbands SOG', *Times of India*, 25 February 2002; 'Mufti finally disbands SOG', *Hindustan Times*, 25 February 2003.
162. 'No POTA, some clemency', *Times of India*, 28 October 2002.
163. 'Congress, PDP find common ground', *Indian Express*, 28 October 2002; 'Coalition aims to heal emotional wounds in Kashmir', *Hindu*, 28 October 2002.
164. 'Congress, PDP unveil common agenda', *Hindustan Times*, 28 October 2002.
165. 'PDP, Congress for talks with all segments in J&K', *Hindu*, 28 October 2002.
166. The official website of the government of Jammu and Kashmir, put forth the following elements as constituting the healing touch, after completing six months in office: 'The Healing Touch Philosophy encompasses various activities aimed at winning the hearts and minds of the people by (*a*) Addressing alienation (*b*) Providing jobs to the victims of militancy (nearly 1600 jobs provided so far) (*c*) Ensuring good governance (*d*) Checking regional discontent (*e*) Dispensing justice to all (*f*) Creating conditions for honourable return of migrants to valley (*g*) Providing relief to border migrants, arranging shelter sheds for more vulnerable ones (*h*) Improving power situation (*i*) Creating job opportunities in private sector (*j*) Expediting development and economic activity (*k*) Checking human rights violations and custodial killings (*l*) Preventing harassment of innocents during the fight against militancy (*m*) Raising standard of education (*n*) Building development infrastructure (*o*) Providing better healthcare facilities (*p*) Disbursing pension to aged, infirm and destitute at their doorsteps (*q*) Releasing innocents languishing in jails without compromising on security'.
167. 'Mufti keeps his promise, releases more militants', *Hindustan Times*, 8 November 2002.
168. Interestingly, the Central government avoided commenting on Malik's release, which, newspaper reports pointed out had also formed a part of the appeal by the Kashmir Committee led by Ram Jethmalani, which was in dialogue with the Hurriyat Conference. 'Yasin Malik released', *Hindu*, 12 November 2002.

169. On 15 July 2003, however, Yasin Malik was arrested yet again by the CBI in a TADA case that had been registered against him in 1992 in the TADA court of Justice Dhingra in the Patiala House courts of New Delhi. In the TADA case, Malik had been charged with receiving money from Pakistani secret service agencies in installments for steering terrorist activities in India. Arrested in 1992, Malik was released on bail by the Sessions Judge V.K. Jain. While Malik was relieved of the requirement of presenting himself in court during hearings owing to ill-health, he was now required by the court for recording his statement under Section 313 of CrPC. Not receiving any response from him to the various summons sent to him, the court cancelled his bail and issued a non-bailable warrant against him. His statement was recorded on 18 July 2003, where he asserted that the CBI had implicated him in a case so that he could remain in Delhi. According to Malik, the CBI arrested him while he was already placed in preventive detention by the BSF which had arrested him on 6 August 1990. Malik underwent an open heart surgery at AIIMS on 22 February 1992 and was moved from jail to a farmhouse in Mehrauli, from where the CBI arrested him on 13 February 1992. 'JKLF neta Yasin Malik giraftar', *Rashtriya Sahara*, 16 July 2003; 'JKLF leader gets bail, says he was wrongly arrested', *Hindustan Times*, 19 August 2003.
170. '4 more militants freed in J&K', *Times of India*, 15 November 2002.
171. 'POTA hatane ke Mufti ke ailan se police mahakma pareshan', *Rashtriya Sahara*, 1 November 2002.
172. 'J&K government decision on POTA criticised', *Hindu*, 6 November 2002.
173. 'BJP chief cautions Mufti against releasing militants', *Hindu*, 6 November 2002.
174. Jaitley resorted to both the general and specific (pertaining to the special status of Jammu and Kashmir) principles of distribution of powers between the Centre and the State to question Mufti's position on review of POTA by the state Assembly. So far as the general principles were concerned, he pointed out that it was 'mandatory for every state to implement this Act…Can any state say that it will not implement an Act of Parliament, like not collect income tax or implement the Indian Penal Code'. Specifically, under the 1975 accord between Sheikh Abdullah and Indira Gandhi, asserted Jaitley, while the residuary powers of legislation remained with the state, the Parliament continued to have 'the power to make laws relating to the prevention of activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India'. 'Come clean on POTA: BJP to Congress', *Indian Express*, 7 November 2002; 'BJP slams plan to revoke POTA', *Hindustan Times*, 7 November 2002.
175. 'J&K healing touch: Government to keep hands off, for now', *Indian Express*, 13 November 2002.
176. 'New government will get all support', *Hindu*, 28 October 2002.
177. 'Talks will usher in peace: Mufti', *Times of India*, 6 November 2002.
178. 'J&K governor briefs Advani', *Times of India*, 6 November 2002.
179. 'J&K healing touch: Government to keep hands off, for now', *Indian Express*, 13 December 2002.
180. 'In the right direction', editorial, *Hindu*, 13 November 2002.
181. 'Malik's thank you to Mufti: fight me anywhere in the valley', *Indian Express*, 13 November 2002.
182. 'Mufti defends release of militants', *Times of India*, 14 November 2002.

183. 'Yasin Malik released', *Hindustan Times*, 12 November 2002.
184. 'J&K: Iron Fist vs. Velvet Glove', *Times of India*, 30 November 2002.
185. The Congress spokesperson Jaipal Reddy stated that Chief Minister Mufti Muhammad Sayeed had met the Special Director, Intelligence Bureau, K.M. Singh, on 7 November regarding the release of the militants. 'J&K was cautioned against release of militants', *Hindu*, 27 November 2002.
186. The six actually released on the government's initiative were Yasin Malik, Abdul Aziz Dar, Parvez Dar, Abdul Rehman, Mukhtar Bazaz and Ghulam Muhammad Bhat.
187. A senior police officer claimed the releases were mostly 'routine'. The courts had for long been ordering release of jailed militants on bail or setting aside their detention orders when the prosecution failed to put up a valid case. He claimed that nearly 36,000 people had been arrested by the police and security forces in the last 13 years of which only 1,000 were in jail, the rest having been released by the courts or by previous governments. 'Releases in J&K: Court records rebut BJP claim', *Indian Express*, 27 November 2002.
188. 'Government fingers pointed at 'healing touch', *Indian Express*, 26 November 2002.
189. 'Advani repeats: J&K didn't keep us in the loop', *Indian Express*, 27 November 2002.
190. 'Advani misled Parliament', *Hindu*, 27 November 2002.
191. 'Advani, Congress spar over freed militants', *Hindustan Times*, 27 November 2002.
192. 'J&K government was cautioned against release of militants', *Hindu*, 27 November 2002.
193. 'Gujarat compulsions put J&K healing touch on hold', *Hindustan Times*, 28 November 2002.
194. 'Total understanding with Centre: Mufti', *Hindu*, 28 November 2002.
195. 'PDP ready for Central nominee', *Hindustan Times*, 6 December 2002.
196. 'J&K forms panel on freeing prisoners', *Hindustan Times*, 10 December 2002.
197. 'Freeing prisoners: Central team to visit J&K', *Hindustan Times*, 9 December 2002.
198. 'J–K forms panel on detenus', *Indian Express*, 29 December 2002.
199. 'J&K panel on detenus to meet on March 5', *Hindu*, 3 March 2003.
200. 'J&K orders release of 17 militants', *Hindu*, 15 March 2003.
201. 'No innocent man will remain behind bars: Mufti', *Hindu*, 19 March 2003; 'Ghati mein kaidiyon ki rihai jari rahegi', *Rashtriya Sahara*, 27 March 2003.
202. Ibid.
203. Twenty-four members of Kashmiri Pandit families including 11 women and 2 children were killed by unidentified militants in Nadimarg, South Kashmir on 24 March 2003. Posing as army personnel, the militants forced the sleeping villagers to line up for identification in the night after overpowering the local police picket posted just outside the village. While the strike was seen as a possible revenge for the killing of the Hizbul Mujahideen commander, Abdul Majid Dar, survivors complained that they had apprehension of possible attack and had appealed to the Deputy Commissioner, Anantnag. Reminiscent of the Sikh massacre in Chittisinghpura in March 2000 and the more recent attack on Hindu families in the Raghunath temple massacre in late November the previous year, this massacre was a reminder of the vulnerability of the 9,000 odd Kashmiri Pandit families who did not migrate in 1990. While, the apathy of the authorities towards these people was shocking, the fact that Muslim families immediately came to help the victims showed that lives of ordinary people may not always be built on suspicion and mistrust.

204. 'Is a storm brewing in the valley', *Hindu*, 13 July 2003.
205. 'Has Mufti's healing touch come a cropper', *Hindustan Times*, 22 October 2003. In June 2004, for example, militants fired 'leg shots' on the limbs of four workers of PDP at Aeshmuqam in Anantnag district, one of whom died on his way to the hospital. 'Wounds that make them curse the healing touch', *Daily Express*, 17 June 2004.
206. 'A people's movement against violence', *Hindu*, 13 July 2003. 'Has Mufti's healing touch come a cropper', *Hindustan Times*, 22 October 2003.
207. On 17 October 2003, a militant attack took place outside the Chief Minister's residence. Ironically, the attack coincided with the visit of the Union Home Ministry officials, led by the Special Secretary (Kashmir Affairs), B.B. Mishra to study the impact of the healing touch on the state. 'Is healing touch a hollow policy', *Hindustan Times*, 18 October 2003.
208. 'J&K healing touch: drop guns, get paid', *Hindustan Times*, 29 October 2003.
209. 'J&K rights panel wants 'draconian laws' withdrawn', *Hindu*, 23 March 2003.
210. 'Wronged in valley, elsewhere', *Indian Express*, 11 December 2002.
211. The APDP maintained that nearly 6,000 persons had disappeared in the state since 1989. The state government admitted that 3,184 missing cases were reported with it. Ibid; 'Probe panel sought on missing persons', *Hindu*, 27 November 2002.
212. On 27 February 2003, the Chief Minister reported in the Assembly that a total of 3,744 persons, had been reported missing. These figures were 1,553, 1,586, and 605, for the years 2000, 2001, and 2002, respectively. Except in Leh district, missing persons had been reported from every district, and most of these cases related to militancy. The highest numbers were reported from the districts of Baramullah, Kupwara and Doda. '3,744 persons missing in 3 years: Mufti', *Hindu*, 28 February 2003.
213. 'J&K missing figures: A lot of debate, no solution', *Hindustan Times*, 1 July 2003. In July 2003, three cases of deaths in different parts of the state, allegedly in army custody, resulted in protests by the people. The killing of Bashir Ahmed Sheikh, who the security forces claimed died in an encounter in the Ganderbal forests in a joint operation of the SOG and the army, and the villagers claimed was killed by the security forces after being summoned by them to Srinagar, drew massive protests. A magisterial probe was ordered into the deaths by the Chief Minister on 20 July 2003. '3rd in 3 days: 'Custody death' rocks J–K', *Indian Express*, 18 July 2003. On 19 July, a three-member committee including the Deputy Chief Minister, Mangat Ram Sharma, which enquired into the killing of 35 Sikhs at Chittisinghpora on 20 March 2000 recommended severe punishment to the 'guilty' officers. Investigations had revealed that the five had been picked up from the nearby villages of Brariangan, Halan and Anantnag town and were killed in a fake encounter at Zontengri peak at Panchaltan. 'Panel says punish guilty cops', *Indian Express*, 20 July 2003.
214. 'NHRC seeks details on missing Kashmiris', *Hindu*, 15 May 2003; 'How many missing, NHRC asks J–K', *Indian Express*, 15 May 2003.
215. 'Hurriyat softens on poll, government prisoners', *Indian Express*, 28 March 2003; 'Security with a human face, Advani promises Hurriyat', *Hindu*, 28 March 2004.
216. 'Government keeps its promise: 34 freed in J–K', *Indian Express*, 2 February 2004.
217. 'Release of 55 detenus ordered', *Daily Express*, 3 November 2004.

218. In November/December 2002, 29 detenus were released, in 2003, 274, in 2004, 223, and till January 2005, 27 detenus were released. 'Opposition, Government's latest rift over healing touch policy', *Himalayan Mail*, 10 March 2005.
219. 'Centre clears release of 50 J&K detenus', *Kashmir Times*, 28 September 2005.
220. These included seven Dukhtaran-i-Milat activists Nahla Nasreen, Sofi Fahmida, Razia Afrooqa, Noor Jahan, Rifat Rizwan, Bazigaa Parvez and Mehmooda Wani, who were arrested after Dukhtaran launched a drive against 'government sponsored degeneration of society'. 'State to free 44 prisoners', *Himalayan Mail*, 4 October 2005.
221. The CMP read, 'The government shall review all cases of detainees being held without trial for long periods. It will release all detenus held on non-specific charges, those not charged without serious crimes and those who have been held on charges that are such that the period they have spent in jail exceeds their possible sentence'. It also promised that the government 'shall review the operation of all such laws that have been used in the past decade to deprive people of their basic rights to life and liberty for long periods of time, without due legal process. Where the government deems that some special powers need to be retained, it will ensure, by instituting careful and transparent pre-screening that such powers are used sparingly and those entrusted with them are held accountable for any misuse'.
222. See Preeti Verma, 2004, pp. 212–213.
223. Gautam Navlakha, 'Human Rights in Jammu and Kashmir', *Kashmir Times*, 18 June 2005.
224. The powers of Jammu and Kashmir legislature are therefore wider than the power of other state legislatures. The various Acts, enacted by the state legislature are the Jammu and Kashmir Public Safety Act 1978, Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act 1988, the Jammu and Kashmir Prevention of Black Marketing and Maintenance of Supplies of Essentail Commodities Act 1988. See for details H. Ishtiaq Hussain, *Preventive Detention: Safeguards and Remedies*, 1990.

Conclusion

POTA and Beyond

The Silent Erosion

The discussion in the preceding chapters examined POTA from its inception as an Ordinance, its enactment, subsequent amendments, intricacies of specific cases, and the political contexts in which the law unfolded in multifarious ways. Following the violence of jurisprudence approach, the explorations focused not only on the law's words, but also on law's deeds and its effects on the lives of people, assumptions of justice, and the legal and penal structures of the state. In this concluding chapter, the discussion on violence of jurisprudence shall be carried forward by looking at the law's repeal in a somewhat similar vein as the *afterlife* of TADA.

We may recall from the discussion in the first chapter that the repeal of POTA figured prominently in the Common Minimum Programme of United Progressive Alliance (UPA) which replaced the National Democratic Alliance (NDA). The Ordinance for the repeal of POTA was tabled, predictably amidst protests from opposition parties.[1] The NDA accused the UPA of giving way to the pressures of coalition politics and for relinquishing an essential weapon in the nation's fight against terrorism. The spectre of the nation's vulnerability to international terrorism was recreated, reverberating from the discussions that had accompanied its enactment. This chapter will explore how the debates on repeal of POTA, obfuscated its continuing effect on existing laws, political and legal structures, and the lives of people. The jubilation over its repeal, moreover, shrouded other laws that continue to be in operation

in parts of India, namely, the *Maharashtra Control of Organised Crime Act* (MCOCA), the *Disturbed Areas Acts* in the states of the North–East and the *Armed Forces Special Powers Act* (AFSPA). While MCOCA is generally construed as the precursor of POTA for contributing to it some of its more 'effective' features, the AFSPA is particularly significant as an example of a 'permanent' law that was justified at the time of its enactment for *merely* shifting, under logistical compulsions, powers of ordinary policing to the army.

It is significant, moreover, that the repeal was accompanied by the amendment of the *Unlawful Activities Prevention Act* 1967 (UAPA), whereby specific provisions of POTA percolated into an existing law giving extraordinary provisions a hitherto elusive permanence, and making it a surrogate for POTA. This erosion of the boundaries between the ordinary and extraordinary may, however, be seen as a preferred official policy which as discussed below, was articulated in the recommendations of the Malimath Committee, the name by which the Committee for the Reform of the Criminal Justice System is more commonly known.

The Report of the Malimath Committee and the Fudging of Boundaries

The Malimath Committee, was constituted in November 2000 to identify areas for reform in the criminal justice system. The Committee started working in January 2001 and submitted its report on 21 April 2003, with 158 recommendations for changes in the Code of Criminal Procedure (CrPC), 1973, the Indian Evidence Act, 1872, and the Indian Penal Code (IPC), 1860. With the Malimath Committee Report, one sees the most explicit exposition of the process of normalisation of the extraordinary. The Committee's recommendations, as its terms of reference indicate, intended to reform the criminal justice system so as to bring it 'in harmony with the aspirations of the people', which included, 'simplifying judicial procedures and practices', and 'closer, faster, uncomplicated and inexpensive' and 'people-friendly' delivery of justice, to restore 'the confidence of the common man'.[2]

Significantly, the Committee's recommendations show a distinct shift towards incorporating in ordinary law, legal-juridical principles and practices that are associated with extraordinary laws. Declaring at the

outset its dislike for a law that 'should sit limply', while those who defied it went 'scot free', the report allows for the creeping into the ordinary law, provisions that are specific to laws catering to extraordinary situations and theoretically limited in their scope and temporality. In the process, it not only makes a case for a reversal of the philosophical premises of criminal jurisprudence, but also suggests the inclusion in the Criminal Code, through amendments and additions, some of the most controversial and contested extraordinary procedures for crimes of an 'ordinary nature'.[3]

The two primary areas of concern identified for rectification by the Committee, that is, 'the huge pendency of criminal cases' [owing to] the 'inordinate delay in disposal of criminal cases', and 'the very low rate of conviction in cases involving serious crime', were attributed to the existing 'adversarial system' for the dispensation of justice. The adversarial system, it averred, based as it was on the assumption of a 'neutral' judge who weighed the respective merits of the cases presented by the prosecution and the defence on the basis of substantive evidence, made the judge merely an 'umpire' to see 'whether the prosecution had been able to prove the case beyond reasonable doubt'. Such a system, proposed the Committee, 'did not impose a positive duty on the Judge to discover the truth', burdened him thereby with passivity, and loaded the case in favour of the accused.[4]

The second area of concern that is the low rate of conviction, was addressed by the Committee following the above line of reasoning. Touching upon issues of judicial incompetence and the need to increase the number of judges rather desultorily, the Committee directed the force of its recommendations towards the importation of specific features of the inquisitorial system, especially the dislodging of what it termed 'the well recognised fundamental principles of criminal jurisprudence', that is, the 'presumption of innocence' and 'the right to silence of the accused' and the 'burden of proof on the prosecution'.[5] While all these, it admitted, are better protected in the adversarial system, it was only the inquisitorial system, it argued, which could provide the dynamism required for a 'quest for truth'.[6] Some of its primary suggestions for instilling dynamism into the criminal justice system, and preparing it for the quest for truth, involved the inclusion of specific provisions of POTA, and the subsequent erosion of the protection afforded to the accused in the Constitution.

(1) The quest for truth and the negation of the 'right to silence: A direct offshoot of the proactive role for the judge envisaged by the Committee was its recommendation abbreviating the 'right to silence' of the accused guaranteed under Article 20(3) of the Constitution.[7] This right, the Committee felt, was an impediment in the quest for truth since the accused, in most cases, was 'the best' and 'critical source of information'.[8] In the search for truth, the judge was bound to tap this source of information. It is interesting that this 'tapping' was envisaged by the Committee as *a non-coercive* exercise despite the fact that failure to answer in a convincing way was to be construed as an evidence of guilt: 'The Committee feels that without subjecting the accused to any duress, the court should have the freedom to question the accused to elicit the relevant information and if he refuses to answer, to draw adverse inference against the accused'.[9] Moreover, the manner in which the interrogatory role of the judge was to be exercised, that is, through questioning the accused *generally immediately after the witnesses for the prosecution have been examined*, by *asking him to explain personally* any circumstance appearing in evidence against him, *at any stage of trial without previous warning*, and *even before the accused has called on his defence*, coupled with the recommendation that silence or refusal to answer any question would go against the accused, made way for the curtailment of the rights of the accused.[10] The inquisitorial role of the judge to elicit information from the accused was augmented by the Malimath Committee by bringing it in line with Section 27 of POTA that authorised the Special Court to take from the accused finger prints, foot prints, photographs, blood, saliva, semen, hair and voice sample of any accused person. Refusal to give such samples would allow the court to 'draw adverse inference against accused'.[11]

Significantly, the 180th Report of the Law Commission of India submitted to the then Law Minister Arun Jaitley in May 2002, concerned itself specifically with Article 20(3) of the Constitution of India and the preservation of the right to silence of the accused. In his prefatory note to the Law Minister, Justice M. Jagannadha Rao, the Chairperson of the Commission, stated that the Law Commission had taken up the theme *suo moto*, 'in view of some developments in UK and other countries, diluting the right to silence of the accused at the stage of interrogation and in criminal trial proceedings'. Since the report was presented to the Law Minister about a year and a half after the institution of the

Malimath Committee, and about a year before it submitted its recommendations for reform, the Malimath Committee would have been aware of the position of the Law Commission on the matter. The divergent views of the two is another manifestation of the dilemma that democracy presents. The fact that it was the position of the Malimath Committee that got prominence and recognition in official articulations, is yet again, an expression of how the dilemma gets resolved hegemonically. The Law Commission's report not only expressed an anxiety over a trend towards dilution of the right to silence by the legislature, especially in the context of the experience in the United Kingdom and Australia,[12] it reiterated the Constitutional and legal bases of the right to silence in India and its affirmation in various judgements.[13] The Law Commission, moreover, suggested that any change in the right to silence of the accused would be *ultra vires* of Articles 20(3) and 21 of the Constitution of India, recommending that 'no dilution of the existing right to silence need be made nor can be made'.[14]

(2) Increased role of the police—Confessions and longer duration of police custody: The induction by the Malimath Committee of the inquisitorial role of the court was accompanied by recommendations enhancing the role of the police. Suggestions under the head *Investigations* ask for the inclusion of provisions which are specific to extraordinary laws and have drawn criticism for circumscribing the right to life and liberty of citizens. The Committee recommended, for example, that 'Section 25 of the Evidence Act may be suitably amended on the lines of Section 32 of POTA, 2002 [so] that a confession recorded by the Superintendent of Police or officer above him and simultaneously audio/video recording is admissible in evidence subject to the condition that the accused was informed of his right to consult a lawyer'. In most trials under POTA as well as TADA, confession before the police, constituted the primary prosecution evidence and proof of the guilt of the accused. It is significant that nowhere does the Committee express the slightest apprehension about abuse of powers by the police, and the likelihood of the increase in custodial violence with the inclusion of this provision in the Criminal Code. On the contrary, it goes a step further to expand police powers by suggesting an amendment in Section 167 of the Criminal Code, which fixes ninety days for the filing of chargesheet failing which the accused is entitled to be released on bail. The modified section under

the Committee's recommendation would empower the court to extend the period further by ninety days, especially in cases where the offence was punishable with imprisonment above seven years.[15] This suggestion again sought to bring the Criminal Code in line with the stringent bail conditions that existed in POTA.

Moreover, the Committee also recommended that Section 167(2) of the Code be amended 'to increase the maximum period of police custody to thirty days in respect to offences punishable with sentence more than seven years'.[16] While suggesting these changes the Committee simultaneously expressed an implicit faith in the police, lamenting that the criminal justice system did not trust it.[17] It is interesting that the judgement of the Special Court in the Parliament attack case reposed a similar faith in investigating agencies, steering clear of what it termed the 'archaic notion' that 'actions of the police officer should be approached with initial distrust'. Thus, despite the fact that the investigating agencies could not present before the court public witnesses to testify to the arrests and seizures they made, the Special Court found 'no reason to disbelieve the testimony of any of the police officers'.[18]

(3) Invasion of privacy: As mentioned in earlier chapters, POTA provided for the admission of electronic interceptions as evidence against the accused. Under the ordinary legal procedure, telephone interception may not be produced as primary evidence against an accused. The Malimath Committee recommended, however, that 'a suitable provision be made on the lines of Sections 36 to 48 of POTA, 2003 for interception of wired, electric or oral communication for prevention or detection of crime'.[19] Apart from the fact that such interceptions constitute an invasion of privacy, the experience with the Parliament attack case has shown that electronic evidence is susceptible to tampering and selective presentation, and is not, therefore, reliable.

(4) Lowered burden of proof: It is not surprising then that the Committee's preoccupation with the low rate of conviction, and its recourse to extraordinary provisions to facilitate conviction, made the 'search for truth' effectively a lowering of the burden of proof. Moving out of the framework of justice that involved debating facts on the basis of evidence, the Committee suggested bringing down the standard of proof from

'beyond reasonable doubt' to 'clear and convincing standard', placing it thereby, in the realm of subjectivity. This dilution of standard was to be ensured by the insertion of a clause in Section 3 of the Criminal Code on the following lines: 'In criminal cases, unless otherwise provided, a fact is said to be proved when after considering the matters before it, the court is convinced that it is true'.

It is not a mere coincidence that judicial pronouncements in the last two years have been creating the space where the Malimath Committee's recommendations have stepped in. There is much that unites the perspective of the Committee with judgements in trials under extraordinary laws, cases that are often short on evidence and high on emotive appeal. In the Supreme Court judgement of 22 March 2002, in the TADA case *Devender Pal Singh vs. State of NCT of Delhi*, for example, one of the judges cautions against adhering to an 'exaggerated devotion to the rule of benefit of doubt' which 'nurtured [mere] fanciful doubts' and 'destroy[ed] social defence': 'Justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent. Letting the guilty escape is not doing justice according to law'.[20] It is not surprising that in its judgement in the Parliament Attack case, the Special Court cited this TADA judgement to reject the defence counsel's plea that accused SAR Gilani was entitled to benefit of doubt, since the prosecution had failed to discharge its burden of proving crime against him beyond reasonable doubt.[21]

A similar view echoed in the Supreme Court judgment of 15 April 2002 in a TADA case (*Krishna Mochi vs. State of Bihar*): '…These days when crime is looming large and humanity is suffering and the society is so much affected thereby, duties and responsibilities of the courts have become much more. Now the maxim "let hundred guilty persons be acquitted, but not a single innocent be convicted" is, in practice, changing the world over and courts have been compelled to accept that "society suffers by wrong convictions and it equally suffers by wrong acquittals".[22] More significant perhaps is the manner in which the view finds credence with judgements and depositions that are arguing from the 'other side of the divide', that is, those that aim to highlight acts of negligence or excesses of law enforcement agencies. The submission from the National Human Rights Commission, in its Special Leave Petition (SLP) in the Supreme Court against the 27 June 2003 verdict of the Fast Track Court

acquitting all the twenty-one accused in the Best Bakery Case, relating to the murder of fourteen Muslims in the communal violence in Vadodra on 1 March 2002 is an illustrative case. The SLP warns that a mechanical adherence to the principle that 'hundreds of criminals may escape, but one single innocent must not be punished', may result in adopting the easy course of acquitting the accused.[23] Again, in a recent observation, while delivering an order for compensation to a family in a case of custodial torture and death, the Supreme Court held that the increase in custodial violence was related to the exaggerated adherence to and insistence upon establishment of proof beyond reasonable doubt.[24]

Terrorism and Organised Crime: Spot the Difference

Before POTA was brought onto the statute books, the failures of TADA were identified to point out either the futility of anti-terror laws, or conversely, to work out a law that was more effective than TADA. The quest for 'effective' law meant an imbrication with laws brought for dealing with 'organised crime'. Subsequently, POTA came with extraordinary provisions that were hitherto part of Acts like *The Maharashtra Control of Organised Crime Act*, 1999 (MCOCA) which boasted of 76 per cent conviction rate, as opposed to the paltry conviction rates in the ordinary law and the lapsed TADA. Thus admission of interception of wire, electronic or oral communication as evidence were made permissible under POTA.

As the repeal of POTA assumed prominence on the government's agenda, one could identify two mutually contradictory trends unfolding at the level of state politics. Coincident with the announcement of the CMP, the Gujarat Assembly passed on 2 June 2004, the *Gujarat Control of Organised Crime Bill* (GUJCOC), on the lines of MCOCA, which was in operation in Maharashtra and Delhi since February 1999 and January 2002, respectively.[25] It is significant that a day before the Bill was passed, the Law Minister of the state had commented that the repeal of POTA would amount to an open invitation to terrorists to carry out their activities in the country.[26] Moreover, there was the apprehension that unlike TADA cases that still linger despite the law having lapsed in 1995, if the repeal of POTA became effective in retrospect, then cases

under the Act would peter out. The GUJCOC had provisions allied with POTA that would allow the holding of detenus without trial subject to a review committee's decision on the application of the Act. Thus, even if POTA was repealed, the Gujarat government could continue the detention of people held under POTA in the state in various cases under the new Act.

While the BJP government in Gujarat was looking for an 'alternative' on the lines of MCOCA, Maharashtra was reportedly 'doing a rethink' on MCOCA. On 4 June 2004, the Maharashtra government announced a three-member committee headed by Justice Chandrashekhar Dharmadhikari, a retired High Court judge to review MCOCA. The Review Committee members included former Mumbai Police chief Satish Sawhney and Nagpur Police Commissioner D. Sivanandan and it was expected that the Committee would submit in a month's time, a report on the loopholes in the provisions of the Act and its implementation. While the setting up of the Review Committee came amidst reports that MCOCA may eventually be withdrawn, there seemed to be another strand of opinion, constituted largely by the police officers in Mumbai, who argued that with its 'high conviction rate' MCOCA was extremely successful in regulating organised crime.[27] The figures for incidents of shootout, extortion, civilian killings and inter-gang rivalry in the years immediately following the implementation of the Act, they argued, had shown a rapid decline.[28] They emphasised, moreover, that the Act 'had been sparingly used' and 'there was little allegation of misuse'. A perusal of the conviction rate of MCOCA in Mumbai showed a con-viction rate of 60 per cent which when compared to 6 or 7 per cent in criminal cases in other parts of the country was definitely high. Figures given by the police stated that the total number of MCOCA cases in Mumbai was sixty-eight in which 280 persons were arrested. Of these cases, chargesheets had been filed in fifty-seven cases, and forty-nine of these had already been decided. Of these, thirty cases ended in conviction, nineteen in acquittals, eight were still under trial, while charges were dropped in eleven cases.[29]

While the security agencies argued for retaining MCOCA for its efficacy in gaining convictions, the provisions of the Act that made it desirable for its efficiency are precisely the ones that also make it draconian and extraordinary. Significantly, these were provisions that were in focus

in the debates in the joint sitting of Parliament on 26 March 2002, in which POTA was enacted.

MCOCA as a Precursor of POTA

MCOCA figured prominently in the debates in the joint sitting of the two Houses of Parliament where it was displayed as a model for the proposed legislation. NDA members consistently cited the success of MCOCA, especially its high conviction rate, as the reason for emulating the Act. As part of the ruling coalition in Maharashtra, the Congress was constantly called upon to explain its opposition to POTA, when its government allowed the operation of a similar law in the state. Others like Manohar Joshi, Shiv Sena leader and former Chief Minister of Maharashtra, sought to re-route the misdirected credit by claiming that 'the much talked about MCOCA' was in fact 'conceptualised' during his time.[30] Indeed MCOCA was not conceived during the Congress–NCP regime, but as Praful Bidwai aptly put it, it was 'a Shiv Sena–Bharatiya Janata Party (BJP) engineered product, a grotesque 'compromise' in a climate marked by a spate of fake 'encounter killings' by the police in the mid-Nineties'.[31]

An important consideration, for those arguing against POTA was that TADA had been a failure, partly manifested in the fact that the Act had an abysmally low conviction rate. This low rate of conviction, the detractors felt, showed that the investigating agencies often had no valid cases against the accused, and they used the law as a short cut to rigorous investigation, and at other times, as an instrument of control, arresting large numbers of people on mere suspicion. For the believers, however, the low rate of conviction was a manifestation neither of abuse nor of failure. It was rather symptomatic of 'mis-governance', and on the other hand, of certain weak areas that existed in TADA that needed toughening up in the new law. The trappings of a tough law came from MCOCA, a law first enacted and applied in the state of Maharashtra, extended later to Delhi, and replicated in other states like Andhra Pradesh and Karnataka, to deal with 'organised crime'.[32]

Maharashtra, it was argued was able to secure a high rate of conviction ever since they adopted MCOCA, and Manohar Joshi expressed the belief that the success of MCOCA could be repeated on a national

level against terrorism through POTA.[33] For achieving this success, however, it was essential that certain provisions of MCOCA that had emerged as especially useful for conviction be inducted into POTA. In the course of his speech initiating the motion for the consideration of POTA, the then Deputy Prime Minister and Minister for Home Affairs, Lal Krishna Advani declared:

> When we sent this proposal to the States, there were States like Maharashtra which told us that they have been able to secure a high rate of conviction ever since they have adopted the Maharashtra Control of Organised Crime Act which is a law against organised crime. While earlier in TADA the percentage of conviction used to be very low, in the case of MCOCA, after this law had been enacted, the percentage has been over 76. …*But it is also true that one single provision which has been incorporated in MCOCA that intercepts or intercepted communication would be deemed admissible evidence, has changed the whole perspective*…. [34]

Pointing at the consensus that apparently existed among the states over POTA, Arun Jaitley, Law Minister in the NDA government addressed the Congress critics:

> When your State governments were consulted, without a single exception, each one of your State Governments said that India needs such a law. Each one of your State Governments said it and some of them suggested improvements…stating that there was no provision for intercept of communication. *It was the Maharashtra Government that suggested to us that this law would be incomplete till such time that you have provision for interception*.[35]

In a replication of Sections 13 to 16 of MCOCA that authorised interception of wire, electronic or oral communication, POTA came with detailed provisions pertaining to interception of communication (Chapter V, Sections 36–48). Both MCOCA and POTA through their relevant sections lay down the procedure of authorisation, the appointment of competent authority to authorise interception, procedure for application for authorisation, authority competent to carry out interception, protection of information collected and the procedure of submission of interception orders to a Review Committee. Under the ordinary legal procedure, electronic interception may not be produced as primary evidence against an accused. MCOCA, however, set in motion the process

whereby such evidence was used as primary evidence against accused, for example, in Parliament Attack case (under POTA). In the Bharat Shah case (under MCOCA), the case against film financier Shah, producer Nasim Rizvi, his assistant Abdul Rahim Allah Baksh and Dubai-based diamond merchant Mohammed Shamshuddin was based on recorded telephonic conversation between the accused and the Karachi-based gang of Chhota Shakeel.[36]

The provision pertaining to confessions in MCOCA, however, carries forward from TADA. Unlike POTA, in MCOCA and TADA confession of a co-accused that the accused had committed the offence could be construed as ground for 'presumption of guilt' by the Special MCOCA Court or the Designated TADA Court. Section 18 of MCOCA lays down that certain confessions made to police officer not below the rank of the Superintendent of Police, shall be admissible in the trial of such person or co-accused, abettor or conspirator, provided that the co-accused, abettor or conspirator is charged and tried in the same case together with the accused.

Before discussing further the specific provisions of MCOCA, let us dwell briefly on the precise grounds on which Sonia Gandhi, the then leader of the opposition, criticised the POTO in the Joint Sitting of the Parliament. The Act, according to her, suffered from

> …some critical shortcomings: a Review Committee, in which a majority of members are Government appointees; a presumption under which a person is virtually deemed to be guilty until he proves himself to be innocent; the defective definition of terrorism in the law; admissibility of confessions to the police which could be extracted through mental and physical torture; and the provision for not disclosing the name of witnesses to the accused under certain circumstances.[37]

Moreover, she argued, POTO would usher in a system of jurisprudence that would go against the 'basic safeguards' that the fathers of the Constitution 'propounded' and 'nurtured', to protect the 'liberties of the citizens'. Such a system would 'sacrifice individual freedom' and 'weaken democratic institutions':

> POTO, I am afraid, will create a parallel system. It will create a separate system of legal procedures, of evidence and of courts. It will bypass the

> normal criminal justice system. In other words it will not be a system of justice, it will be a system of injustice and such a system is *repugnant to the fundamentals of democracy*.[38]

Much of Sonia Gandhi's apprehensions about POTA apply equally to MCOCA. Like POTA, MCOCA sets up a parallel system that sets aside ordinary legal procedures to transpose an anachronistic medieval system of justice based on assumption of guilt. Section 22 of MCOCA lays down that 'in a prosecution for an offence of organised crime punishable under Section 3', under specific conditions for example, proof of recovery of unlawful arms, finger prints at the site of offence, of rendering of financial assistance to a person accused of or suspected of an offence of organised crime, 'the Special Court shall presume, unless the contrary is proved, that such person has committed the offence under the said subsection'.

That evidence not normally acceptable as proof of guilt in ordinary law, forms the basis for conviction in MCOCA, such as electronic intercepts and confessions before a police officer, which has already been discussed. Moreover, MCOCA relieves the investigating agencies of any accountability by according them protection under Section 26, which provides that '[N]o suit, prosecution or other legal proceeding shall lie against the state government or any officer or authority of the state government for anything which is done in good faith or intended to be done in pursuance of this Act or any rule made thereunder or any order issued under any such rule'. The bail provisions in MCOCA as in POTA are stringent ensuring a long period of detention. The bail provisions are designed to deny bail as it assumes that the accused is guilty and eligible for bail only if the Court is satisfied of his/her innocence. There is, however, no provision for compensation for illegal incarceration in case the accused is either acquitted or sentenced for a period lesser than the time of imprisonment as an undertrial. Section 25 of MCOCA provides, moreover, that not only the act, but even a rule made by the state government under it or 'any order made under any such rule' will override any other law, state or Central. The provision is not only an encroachment of the Central's legislative powers by the state, but also an excessive delegation by the state assembly of its legislative powers.[39]

'Terrorism' or 'Organised Crime'

The distinction between POTA and MCOCA, it was emphasised in the debates in Parliament lay in the definition of 'organised crime'. Responding to criticisms levelled at the Congress for its stand against POTA while continuing the operation of MCOCA in Maharshtra, Congress MP Kapil Sibal stated:

> The definition of organised crime has nothing to do with the definition of terrorism. *These are two different concepts*. … 'Organised crime' under MCOCA means 'any continuing unlawful activity by an individual'. Before anything becomes an organised crime, the prosecution has to show continuing unlawful activity, which is also defined under the Act but there is no such definition under POTO because you do not have to do any continuing unlawful activity if you have to be a terrorist.[40]

While the concept of terrorism is indeed different from organised crime, the definitions of the two remain equally diffused, leaving open possibilities of slippage. Even if one were to take into account the distinction made above, one feels that there are ample grounds that allow for a collapse between terrorism and organised crime. Section 2(e) of MCOCA defines 'organised crime' as 'any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat 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'. The term *insurgency* is nowhere defined in the Act, but its dictionary meaning is 'a rising up or against; rebellion; insurrection' and the *insurgent* means someone 'who rises in opposition to established authority or a rebel'.[41] Moreover, in its 'Statement of Object and Reasons' MCOCA includes in its fold 'narco-terrorism' and 'terrorist gangs', 'cross border connections and networks', directly facilitating its applicability in certain cases of 'terrorism': '…It is seen that the organised criminal syndicates make a common cause with terrorist gangs and foster narco-terrorism which extend beyond the national boundaries'.

A careful perusal of a Supreme Court Judgement in a TADA case *Jayawant Dattatrya Suryarao vs. State of Maharashtra* (2002) shows that

compartmentalisation of 'organised crime' and 'terrorist activites' may not be possible, and in actual practice they may come to be seen as overlapping with each other. The case involved an incident of shoot-out in Mumbai's J.J. Hospital campus on 12 September 1992. According to the prosecution,

> …the accused persons *belonging to a criminal gang*, *engaged in organised crimes*, *extortion of money*, *smuggling*, *drug trafficking* and *eliminating or injuring persons* who do not follow their dictates, having made preparation, such as procuring sophisticated weapons like AK-47 rifles, pistols, revolvers, dynamites and hand grenades and by firing the shots through the said weapons, *committed murder of a person belonging to a rival gang* who was admitted in the hospital for undergoing treatment as well as two policemen who were on guard duty there.[42]

The five accused in the case were charged under Sections 3(1) [strike terror in the people, overawe the government] and 3(4) [harbouring terrorists] of TADA and Sections 302 (murder) and 212 (harbouring offender) of IPC. The Counsel for defence attempted to distinguish the offence of the accused from 'terrorist activities' questioning thereby the application of TADA: '…there is nothing on record that the accused intended to create any terror', 'at the most intention to commit murder could be inferred', 'there was no question of creating any terror in the mind of the public at large'.[43]

The judges, however, held that the offence amounted to 'terrorist activity' and TADA was, therefore, applicable in the case. They put forward the position that what constituted a terrorist activity has to be 'inferred from facts and circumstances of each case' since there would generally be no direct evidence [of terrorist activity]:

> In our view, it is not possible to define 'terrorism' by precise words. Whether the act was committed with the intent to strike terror in the people or a section of the people would depend upon facts of each case. Further, for finding out intention of the accused, there would hardly be a few cases where there could be direct evidence. Mainly it is to be inferred from the circumstances of each case.[44]

Thus, what could have also been construed as 'organised crime' under MCOCA, defined as 'use of violence', 'threat', 'intimidation', 'coercion', or 'other unlawful means' by 'mafia gang members' amounted to

'terrorist activity' in this particular case, showing that the possibility of one slipping into the other is not remote. It is not surprising that following the repeal of POTA, cases that would have otherwise invoked POTA provisions, have been booked under MCOCA. On 3 November 2006, the accused in the Malegaon serial bomb blasts case were booked under MCOCA.[45]

Repealing POTA and Amending the UAPA: Permanence of the Temporary

MCOCA, we have argued, was largely seen as providing a modular template of efficiency for POTA, slipping into anti-terror laws provisions that were part of laws dealing with organised crime. In this section, we shall see how the repeal of POTA was accompanied by the importation of POTA provisions into the UAPA 1967, giving permanence thereby to measures that were brought in as temporary. On 21 September 2004, the President promulgated two Ordinances, simultaneously repealing POTA and amending the provisions of the UAPA, 1967. In its winter session, both Houses of Parliament gave the Ordinances their approval, confirming the removal of POTA from the statute books and replacement of UAPA 1967 by UAPA 2004.

The promulgation of both Ordinances and their subsequent enactment, have to be viewed against the immediate backdrop of the UPA government's National Common Minimum Programme (CMP), and election promises by most of its constituent members, primarily the Congress party, to repeal POTA.[46] A careful reading of the promise to repeal POTA in the CMP is telling, however. While pledging to remove POTA, the UPA government also cautioned that it would not compromise in its fight against terrorism. It is no wonder then that the repeal of POTA came alongside the amendment of an existing law (UAPA 1967) to include specific POTA provisions pertaining to definition of terrorist activities and banning of terrorist organisations. Considering that it was the first time that an anti-terror law was being repealed, TADA having been allowed to lapse in 1995, by bringing in these changes through Ordinances, the government sought to send across a message of having kept its poll promise of repealing POTA, and at the same time having

adhered to the CMP that sought to repeal POTA while simultaneously amending and strengthening 'an existing law' for a continued 'fight against terrorism'.

It may be recalled here that the spectre of a 'legal vacuum' in dealing with terrorism had been raised persistently after TADA lapsed in 1995. The repeal of POTA alongside the passage of the UAPA 2004 incorporating POTA provisions, has confirmed a dangerous trend of making temporary and extraordinary measures part of the ordinary legal system, evident in the recommendations made by the Malimath Committee. The inclusion of extraordinary provisions in the ordinary law of the land not only gives permanence to measures that are otherwise brought temporarily to deal with specific situations, it also ends the periodic legislative review that extraordinary laws go through for their extension. The latter is important not only as a safeguard against an overbearing political executive but for democracy in general, because legislative reviews are expected to bring contested issues in the domain of public discussion and debate.[47]

While the repeal of POTA does away with provisions relating to bail and confessions that eroded personal liberties and subverted due process, its provisions pertaining to definition of terrorist acts, banning of terrorist organisations, and interception of electronic communication have been retained through importation into the UAPA. The retention of these provisions was justified by the UPA government in the debates in Parliament on the ground that investigating agencies needed legal guidelines to identify terrorist activities. The persistence of legal guidelines from POTA has meant that the definition of terrorist activities in POTA which was vague and devoid of any objective criteria, and repeatedly cited as the reason for the repeal of POTA and the time-bound review of POTA cases, has been retained through the UAPA. The vagueness of definition made it easy for various state governments including Tamil Nadu, Gujarat and Uttar Pradesh, to apply the provisions to a whole range of activities and people, labeling them 'anti-national' and 'terrorist'. Section 21 of POTA, which was invoked against the MDMK leader Vaiko in Tamil Nadu persists as Section 39 of the amended UAPA. Thus the restoration of certain personal liberties that the repeal of POTA assured, has also brought with it a continued erosion of specific rights that are fundamental to democracy and have been recognised as such in the Constitution of India.

A close reading of the CMP shows that the repeal of POTA was not because the UPA government thought that the law was inherently undemocratic, but because the law had been 'misused'. The determining logic behind the repeal, therefore, appears to have been that while the Act itself was fine, it had been, as the CMP said, merely 'grossly misused over the last two years'. This logic led to a situation where POTA was repealed but not rolled back, which is to say that while the Act may not be invoked anymore, cases already registered under the Act were sustained and put through a time bound review process. An especially empowered Review Committee was provided for, to identify 'appropriate' POTA cases, that is, cases in which according to the Review Committee POTA had not been 'misused'—for continued trial.

The Prevention of Terrorism (Repeal) Act, 2004, consisted of two sections, one specifying its title and commencement, and the other announcing the repeal of POTA 2002. The latter comprised of four saving clauses, which provided the guidelines for dealing with the cases that had accumulated over its short span of life. A careful reading reveals two premises on which the guidelines were prescribed, one laying down the *norm of continuity*, whereby punishment, liability, rights and privileges, as well as investigations and legal proceedings instituted under the Act would continue to apply in all POTA cases *as if the Act has not been repealed.* On the other hand, Section 3 of the Repeal Act directed that the legal-judicial process set in motion in cases under POTA shall be *put on hold* until the Review Committee gave its approval. Under its new and enhanced powers, the Review Committee was entrusted with the task of *reviewing all cases registered under the Act*, to see whether or not a *prima facie* case for proceeding against the accused could be made, *whether or not an appeal for review had been made* to the Review Committee under Section 60(4) of the Act. The task of review had to be completed within a year. While reviewing cases, the Review Committee had the powers of a Civil Court, and could order the production of specific documents or requisition public records from any court or office. If the Review Committee felt that there is no *prima facie* case against the accused, then even if the court had taken cognizance, such cases would be deemed to have been withdrawn. Similarly, cases that are still in the process of investigation would be closed. Further, in cases in which trial had not begun, the Act provided that no court could take cognizance of an offence under the repealed POTA one year after the commencement

of the Repeal Ordinance.[48] Thus, while the repeal of POTA meant the elimination of the system of parallel justice that the Act had set up, and the reinstatement of the due process laid down in the *Criminal Procedure Code*, 1973 in matters of arrests, bail, confessions, and burden of proof, the fact that the Act was not rolled back, that is, not repealed with retrospective effect, meant that a new and complicated procedure supplanted the existing review process.

As discussed earlier, cases that still continue under the lapsed TADA have led to a situation where the Act lives after its death. With the continuity of cases under repealed POTA and the provision giving the Courts the power to take congnizance of offences under the Act for a year after repeal, a similar spectre of life after death presents itself. The unfolding of specific cases under POTA in different stages of investigation and trial continue to raise a quandary, which has deepened after the setting up of the Central Review Committee under the Repeal Act, opening up zones of contest. In the past, the high profile cases of Vaiko and Raghuraj Pratap Singh *alias* Raja Bhaiyya have shown that trial and review procedures laid down in the Act have conflicted. Moreover, the state governments, the Central government, the Special Courts, the High Courts and the Supreme Court have figured in this conflict as contending parties. Tussle over the relative primacy of the executive and the judiciary, especially in cases which have gone beyond the stage of executive sanction for initiation of legal proceedings, to trial under the law, and on the other hand, resistance by respective state governments against interference in 'their' POTA cases by the Central government, has continued.

The post-POTA repeal development in the Godhra case has shown that the decision of the Central Review Committee that no *prima facie* case under POTA existed against the accused, and that POTA charges against them should be dropped, has met with resistance. The Gujarat government rejected the observations and recommendations of the Central POTA Review Committee, and on 31 May 2005, the Special Public Prosecutor while placing the opinion of the Central POTA Review Committee before the Designated Court in Ahmedabad, argued that the prosecutor was not compelled to agree with the findings of the Review Committee. On 10 June 2005, the state government counsel submitted the government's response to the Review Committee's recommendations before the POTA Court, emphasising that there existed

prima facie a case against the accused under the provisions of POTA, that there was indeed, 'more than sufficient evidence' to apply the provisions of POTA in the case, and that the Review Committee did not take into account the confessional statements of the accused 'in the right perspective as per Section 32 of POTA'. Moreover, the primacy that the Central government had sought in matters pertaining to invocation and withdrawal of POTA in specific cases, continued to be resisted, as the state government's counsel reiterated the position that 'the review committee cannot interfere in the judicial process… It can address the state government that the case is fit to be withdrawn and its role is limited only that far'.[49]

The three POTA Review Committees that were set up under the POTA Repeal Act in September 2004 submitted their findings to the Home Ministry in September 2005. These findings indicate that of the 1,529 POTA accused the Review Committees examined in the 263 POTA cases in the country in which trial was in progress or yet to begin, no *prima facie* evidence was found against 1,006, suggesting that POTA was not applicable to two–thirds of the accused. Nearly 100 of these 263 cases were lodged in Gujarat and Jharkhand.[50] The orders suggesting withdrawal of cases against large numbers of POTA accused means that the contests described above, may most likely be repeated in several of these cases as well.

The Unlawful Activities Prevention Act 2004: The Silent Erosion

As pointed out earlier, the promulgation of the Unlawful Activities Prevention Ordinance on 21 September 2004 alongside the POTA Repeal Ordinance, allowed the UPA government to obviate apprehensions of a legislative vacuum in dealing with terrorism following the repeal of POTA. The promulgation of UAPO while easing the repeal of POTA, almost imperceptibly siphoned of some of its extraordinary provisions into an existing law, making them permanent. At the same time, it also smothered periodic legislative review, which was a substantive safeguard in temporary laws dealing with terrorism. Another safeguard that was dropped from POTA was Section 58 of the Act which made it an offence if a police officer 'exercised powers corruptly or maliciously, knowing that there are no reasonable grounds for proceeding under this Act'.[51]

The UAPA 2004 substituted four new chapters (Chapters IV, V, VI, and VII) for Chapter IV of UAPA 1967 to include 'terrorist activities' alongside 'unlawful activities', specifying different procedures to deal with each.[52] With this substitution, specific provisions of POTA pertaining to definition, punishment and enhanced penalties for 'terrorist activities', and specific procedures including the banning of 'terrorist organisations' and interception of telephone and electronic communications, were inducted into UAPA.

The inclusion of POTA provisions pertaining to 'terrorist activities', and 'terrorist organisations' ensured that the amended UAPA like POTA and TADA replicated offences already listed under the ordinary law as 'terrorist'. The use of explosives, disruption of community life, destruction of property are, for example, already punishable offences under the law. Similarly sedition and waging war are also offences under Sections 124-A and 121 of the *Indian Penal Code*. We may recall that POTA had replicated offences, which were already part of the UAPA 1967.[53] This replication ensured that a range of activities could be converted into terrorist crimes, subject to special procedures of investigation and trial, and enhanced punishment. The Parliament Attack case showed that the charges under ordinary law when augmented by charges under POTA elicited the maximum possible punishment under POTA in the Special POTA Court judgement.[54] The augmentation or 'strengthening' of UAPA, 1967 as UAPA 2004 has inversed the process whereby POTA has flowed into UAPA changing the character of the Act. Alongside the process of interlocking discussed in Chapter One of this work, which involved intermingling and knitting together of the ordinary and extraordinary laws in a specific context, there can be seen now a trend whereby emergency provisions become incorporated into the ordinary criminal law which then becomes the standard, to which future extraordinary laws must adhere or surpass. Through a cyclical process of interlocking and strengthening, a standardisation of ordinary law takes place which not only softens people's sensibilities towards extraordinary laws, but also lowers the threshold of extra-ordinariness.

The consequences of this strengthening, and the standards made acceptable in ordinary law are not hard to gauge. Apart from the fact that the permanence given to extraordinary provisions have removed them

from periodic legislative review, their induction into UAPA has not been accompanied by commensurate safeguards. Thus whereas POTA provisions that were especially insidious have been dropped, that is, confessions to a police officer and the period of police and judicial remand before bail could be given, the provision giving evidentiary value to telephone tapping has been retained, without, however, the elaborate safeguards that were provided in the repealed POTA.[55] What is to be especially noted is that unlike POTA, UAPA 2004 does not provide for a Review Committee to see if *prima facie* a case under provisions pertaining to terrorist activities can be made out.

Apart from replication, the UAPA also comes with an innovation, that is, extraterritoriality. A careful reading of the definition of terrorism in POTA and UAPA shows that the latter comes with provisions that show enhanced scope of the territorial jurisdiction of the Act, extending the law, to terrorism in foreign territories. The scope of terrorist activities is no longer confined to acts that strike terror or disrupt supplies of essential services, among the Indian people or in the territory of India, or done with the intention of 'compelling' the Government of India. In each case, 'terrorist activity' is widened to include people and life of the community in India *and* in any foreign country, and the Government of India *or* the Government of a foreign country. This insertion of extraterritoriality may appear to suggest partnership in and a commitment to the United Nations resolution calling for international cooperation against 'global terrorism'. In actual practice, however, this is bound to affect the law of extradition and refugee protection.[56]

The process of replication and augmentation in the UAPA 2004 has, however, given rise to a strange contradiction within the Act. The UAPA 2004 imports the provisions prescribed in POTA for banning terrorist organisations, adding a separate chapter on 'terrorist organisations' and specifying the procedure for their banning.[57] Thus the UAPA as amended now has two different kinds of banning—a simple one for banning 'terrorist organisations' imported from POTA—and a relatively complicated one for banning 'unlawful organisations' persisting from UAPA 1967.[58] The banning of an organisation as 'unlawful' under UAPA requires that the notification of banning be accompanied by the specific grounds or reasons, and the notification becomes effective only when

the Judicial Tribunal set up under the Act headed by a sitting High Court Judge ratifies the declaration within six months, after which it is published in the Official Gazette. Moreover, the procedure allows the affected association to participate in the judicial proceedings. UAPA, 2004 introduces a different process for banning of terrorist organisations, which following the procedure under POTA, does not require that grounds for banning be given. There is, moreover, no requirement of ratification and judicial review. This basically means that while banning an organisation for unlawful activities has in-built mechanisms of control, such safeguards are absent while banning an organisation as 'terrorist'. Considering the interlocking between the UAPA 1967 and POTA as discussed in an earlier chapter, where organisations banned as unlawful under UAPA came under the purview of Chapter III of POTA consisting of Sections 18 to 22 pertaining to offences relating to membership in terrorist organisation, it is likely that in future more organisations would be banned as terrorist than merely unlawful. Significantly, if banning an organisation as 'terrorist' is easy, the procedure for denotification of terrorist organisations as laid down in Section 19 of POTA and retained in UAPA 2004 (Sections 36–37) is tedious.[59] It must be also noted that the provision of a Review Committee in UAPA 2004 under Section 37 is only for the purpose of denotification of a terrorist organisation and not for the review of cases of 'terrorist activities'.

UAPA 2004 introduces another innovation—the terrorist gang as distinct from terrorist organisation. While laying down the punishment for terrorist activities in Chapter Four, it mentions punishment for being member of a 'terrorist gang' which is defined as 'any association, other than terrorist organisation, whether systematic or otherwise, which is concerned with, or involved in, terrorist act. A 'terrorist organisation' on the other hand means an organisation 'listed in the Schedule'. The definition of a terrorist gang gives scope to the government to include organisations that may not be explicitly listed in the Schedule. In other words, any association taking up democratic rights issues, or any civil society organisation for that matter, may find itself branded a terrorist gang. If the procedure for banning terrorist organisations under UAPA 2004 makes it possible for successive governments to snuff out political organisations from the public domain, the procedure for denotification remains difficult and ambiguous.

A similar widening of the legal net to include civil society groups may be seen in the recently passed Chhattisgarh Special Public Safety Act, 2006.[60] While the need for such an Act was declared by the state Home Minister in the context of a Naxal attack in September 2005, all Naxal groups are already banned and declared unlawful under the UAPA 2004. The Act dramatically broadens the ambit of what constitutes 'unlawful' going well beyond the definitions of 'unlawful activity' and 'terrorist act' in the UAPA. Thus Section 2(e) makes any act (or communication verbally or in writing or by representation) by a person or organisation 'unlawful'. Moreover, by making definition of unlawful generally vague and imprecise by including the 'tendency' to do certain acts (2(e) II and III)as a ground, makes for an arbitrary overreach of the Act by especially empowered district authorities.[61]

'They Want Our Land, Not Our People': Extraordinariness in the North–East[62]

The discussion around the enactment, amendment and repeal of POTA often obfuscates the distinctiveness of another extraordinary law—AFSPA—which burst back in public memory with the protest by a group of elderly and middle aged women from different organisations of the Meira Paibi against the rape of Thangjam Manorama by soldiers of Assam Rifles.[63] AFSPA, it must be noted is confined to and targets the buttressing of regions on the borders—Nagaland, Manipur and Jammu and Kashmir. It, moreover, gives unaccountable and extraordinary powers to the armed forces. The logic of this buttressing and the agency through which it is to be brought about determines the manner in which the territory and the people of these regions are incorporated into the national-political. While the security of the nation's territory is sought to be sustained by force, the manner in which the territory is secured, excludes the people of the border lands, as the 'enemy within'. What is significant, however, and it is here that AFSPA differs starkly from POTA is that entire populations inhabiting the region may be externalised and distanced from the political community.

The incorporation of the 'north-east' onto the political map of India as a 'frontier region' had significant implications for the manner of its inclusion within the constitutional framework.[64] Whereas the people of

the region have a commonality and bonding in terms of the geographical terrain, their racial characteristics, village systems based on familial ties, absence of the caste system, methods of cultivation, relative insularity in the past, they are also sharply divided along lines of historically defined identities into tribes and communities like Ahoms, Bodos, Nagas, Khasis, Garos, Mizos, Meities, Tripuris, Apatnis, Kukis and so on. But the construction of the region as a 'frontier', a land to be buttressed and secured, gave the people a 'frontier/marginal' existence. This meant that not only were the differences among the people of the area overlooked, the north-east came to be construed as a homogeneous unit, 'different' from the rest of India. Any popular assertion of difference was, however, construed as 'dangerous', invoking the label 'disturbed' for the region, whose control through extraordinary measures became imperative. The people of the region themselves were seen as 'defiant tribes' who had to be 'assimilated' and 'Indianised'. Thus movements for self-determination, sovereignty and autonomy in various parts of the region[65], were addressed by the state with its coercive might in the form of counter insurgency measures, backed by laws like the AFSPA, 1958. While the AFSPA caters to the especially 'extraordinary' situation of the north-east, other repressive laws which have been in use in the rest of the country, namely, the NSA, the UAPA 1967/2004, and the lapsed TADA are also in force here. In addition, other laws promulgated at the state level to 'further control the situation' are also in use, namely, the *West Bengal Security Act* that was extended to Tripura and replaced by the *Tripura Security Act*, the *Nagaland Security Regulation*, and the *Meghalaya Preventive Detention Act* etc.[66]

The AFSPA 1958 in particular is among the most draconian instruments of security and control that has been used in the North–Eastern states. The Act was first applied to the North–Eastern states of Assam and Manipur and was amended in 1972 to extend to Tripura, Meghalaya, Arunachal Pradesh, Mizoram and Nagaland. Under this Act, security forces are given unrestricted power to carry out their operations—to shoot, arrest and search, in the name of 'aiding civil power' and 'maintaining public order', once an area is declared disturbed.[67] Moreover, these powers are also unaccounted since the security personnel are protected from prosecution and legal proceedings for their actions unless the Central government sanctions it.

The rape and killing of Thangjam Manorama, an activist, while in the custody of the army, and the outrage that followed it has brought AFSPA back into public debate. The movement for the revocation of the AFSPA has, however, simmered for a long time. The fast unto death begun by Irom Sharmila Devi on 2 November 2000, in protest against the Act, has rallied people in her call for the 'right to justice' invoked as 'the foundation for peace'. The revocation of AFSPA became a central theme in the election campaign in Manipur in the Parliament elections of 2004, for all political parties. The militant group, the Revolutionary People's Front made the revocation a central election issue by calling for a boycott of the ruling Congress candidate for the Lok Sabha elections, blaming the Okram Ibobi Government for human rights violations by the armed forces.[68] About four months after the rape of Manorama and the protests by Meira Paibis, and continuing agitations for repeal of AFSPA, Prime Minister Manmohan Singh, visited Manipur in November 2004. A day before the visit, the Prime Minister announced the setting up of a Committee under Justice B.P. Jeevan Reddy to review AFSPA, promising that his 'government would consider replacing the Act with a more 'humane' law that would seek to address the concerns of national security as well as rights of citizens'.[69] The Committee heard and received submissions from individuals, organisations and institutions. The limited mandate of the Review Committee—of amending or replacing and not repealing AFSPA, compelled a number of groups not to participate in the process. The Reddy Committee submitted its report and recommendations for the consideration of the Home Ministry in June 2006. The report was not made public. Replicating the manner in which POTA was repealed, the Reddy Committee recommended that AFSPA be repealed and instead of enacting a new legislation, 'appropriate' provisions be inserted in the UAPA 2004.[70]

In a significant intervention, Upendra Baxi cautioned that the 'new discursivity' around the rule of law in the context of the post 9/11 reconfigured world order, poses some formidable tasks for our understanding and judgement. Much of the new explosion of the rule of law discourse, he points out, is 'unexamined' and assumes it to be a 'good thing'. Such an assumption, however, overlooks that the rule of law has historically meant different things to different people,

its prescriptive bases are contested, and that understood only in minimalist procedural terms it may also authorise Holocaustian practices of politics. Avoidance of 'this dreadful conflation' involves the 'task of defining Rule of Law as the rule of *good law*'.[71] This work has shown how procedures which embody extraordinary laws, legitimise exceptions in investigation and trial. The legitimacy of procedural exceptions derives from political decisions identifying and affirming the existence of a state of emergency that makes such exceptions imperative. These exceptions inject ambivalence in the rule of law that gets deepened with each specific exercise of state sovereignty in deciding the exception. Significantly, the identification of conditions that make exceptions essential is deeply embedded in a framework of security that is constantly invoked to provide legitimacy to the state of exception. While the decision on identification of exceptional conditions is deeply political and states of exception as discussed in Chapter One are the product of a specific kind of politics, the latter ultimately envisages a society which is thoroughly depoliticised, evened out of cultural and ideological plurality, and deeply conformist. The notion of such a society is ultimately corrosive of democracy and eats into structures and institutions that sustain it.

Democracy in India is rooted in liberal constitutionalism and the doctrines of rule of law imbued with values of justice and democracy are accepted as the guiding principles of government. The definition of extraordinary situations and the response to these situations through a separate set of laws are, however, legally and constitutionally recognised, and justified as *necessary* exceptions to the rule of law, both procedurally and substantively. In other words, it is assumed that in exceptional circumstances, not only will the normal legal procedures be set aside, the principles of justice and democracy will not be applicable either. Thus notions of 'public order' and 'morality' figure in the constitution as the grounds for waiving the fundamental rights of citizens. Yet the waiving of rights of citizens as prescribed in the Constitution has to take place within a framework of safeguards that the Constitution itself provides. Thus, when the Constitution provides for preventive detention it also lays down specific procedures and the limits on its duration. The legal and judicial discourses surrounding terrorism and anti-terror laws like TADA and POTA have shown that terrorism has provided the

most plausible justification for enhancing the powers of the state through extraordinary means, not only because it is most conducive to conjuring up the spectre of (in)security of the state but also of the people, precisely because of its association with 'violence'. The latter in particular makes it easy for the state to legitimise its own violence through law and outside it, and in the process greatly enhance its coercive powers. Assumed in the name of the nation's and people's security, these powers make themselves manifest in the daily lives of the people, effects changes in the structures of governance, and ushers in a politics of suspicion and distrust.

POTA, as stated at the outset, unfolded in a way so that competing visions of politics were marked out as antagonistic. The resolution it sought was not through deliberation or recognition of difference, but through its elimination and externalisation. Extraordinary laws, thus, are manifestations of a politics of negation. Processes that prolong the lives of such laws, and procedural interlocking and intermeshing that seek to give them permanence are symptomatic of a deepening of the politics of negation. Thus as the boundaries between the ordinary and extraordinary becomes blurred, the boundaries of suspicion and antagonism within society get ossified.

The AFSPA which, as discussed earlier, is confined to and targets the buttressing of regions on the borders, giving unaccountable and extraordinary powers to the armed forces and manifesting also the manner in which the territory and the people of the North–East and Jammu and Kashmir are incorporated into the national-political. While also targeting the 'enemy within', POTA works on the premise that the enemy is not confined to a specific territory, and unlike the 'populations' on the borders, the enemy is part of an amalgamated population, and is therefore, intangible and hard to identify. This in turn feeds into and augments the elements of urgency, immediacy, and enormity, in the discourse of 'factual danger' surrounding the state. The politics underlying such draconian laws and the manner in which they have unfolded has, however, shown that the spectre of this enemy that is always around, but hard to detect, envisages a civil society based on distrust and suspicion, drawing clear lines between groups rather than individuals. At the same time, again unlike in the case of the North–East and Jammu and Kashmir, the very nature of this enemy is such that it has to be

countered through and within the framework of civil authority, necessitating elaborate safeguards that are remarkable for their absence in laws like AFSPA, which assume the absence of a civil society of citizens.

While the justification of AFSPA and other extraordinary laws in these regions emerges from the definition of a permanent state of exception, where the norm has broken down and lost its 'immanent validity', the extraordinary empowering of civil authority, through laws like TADA and POTA is placed within the framework of normalcy-emergency dialectic. The discourse on anti-terror laws posits normalcy and exigency as two separate phenomena, the governing paradigm being that of 'normalcy-rule, emergency-exception'. The underlying legitimating principle of such a paradigm is linked to the popular belief that these laws will not be normalised, that is, will remain exceptional, and will stand outside or parallel to ordinary laws. This is turn raises the conviction that these laws will not affect ordinary law, nor will they apply to ordinary decent people, that is, people like 'us'. This feeds invariably into the official justifications of extraordinary laws and emergency powers that they are necessary correctives directed against a clear enemy or 'others', namely, the terrorists. The contours of conflict are therefore, clearly drawn around groups and communities rather than individuals. As Paddy Hillyard has put it most appropriately, the clearer the distinction between 'us' and 'them' and the greater the perception of threat 'they' pose to 'us', the greater the scope of powers assumed by the government and tolerated by the public. A 'bright line separation' of 'us' and 'them' not only allows for the piercing of the veil of ignorance, it paves the way for generating consent for more repressive emergency measures. The theory of emergency powers and counter-terrorism, in fact, thrives on and fosters 'theories of separation and bright distinctions'. The clearer the distinctions and divisions and the brighter the dichotomies, the stronger are the arguments for the use of emergency powers, particularly against specific communities.[72] What must be borne in mind, and repeatedly emphasised then, is that while the emphasis in anti-terror laws are on extraordinary procedures, which bring into existence dual systems of criminal justice, one ordinary and the other extraordinary, the two systems actually differ not only in terms of procedures but effectively in terms of the culture of suspicion they assume and

thrive on. The experience with anti-terror laws has shown that more often than not they are directed primarily at one section of the public, in a way that it becomes a suspect community.

The statement of objects and reasons of extraordinary laws, the debates that have surrounded them within Parliament and outside and the manner in which they have unfolded in practice have indeed shown how they have contributed towards making an entire community suspect in the eyes of law and in the eyes of the people. The stability of a constitutional democracy in these laws is assumed to rest on the homogeneity of the political community. Homogeneity in turn is seen as synonymous to 'political integration' ensuring that all who share a commitment to the state and its democratic regime form, are tied to their fellow citizens through an understanding of the commonality of their fate (as *a* 'people') and the recognition of equal liberties. Significantly, the presumption of commonality is seen as conducive to eliciting commitments and loyalties, the 'civic' values that bind people together. What cannot be denied, however, is that cleavages and differences, around identity, ideology and interests do exist, determining the contexts which enable, or disable a 'share' or bonding with the political community. Significantly, however, while one's differential positioning determines the nature and extent of one's participation in the political community, any attempt to assert a fuller measure of participation and belonging through an assertion of distinctiveness is construed as potentially undermining the coherence and integration of the political community. As the trajectory of POTA in this work has shown, extraordinary laws aspire for permanence either through extensions or through lengthening the period after which legislative review of the Act can be done. Their impact, moreover, is most significant on the legal system, which they silently and progressively erode, incorporating extraordinary provisions into the ordinary law, so much so, that they become the models for emulation in all future laws in criminal jurisprudence. Moreover, as was pointed out in the debates on the extension of the Prevention of Terrorism Act in the United Kingdom, in the manifestation of 'an insidious circular process, draconian laws soften us up to similar laws which become the desired standards for further measures'.[73] The changes that are then brought into law, and as seen in the discussions throughout this work, in the institutions and structures of government, are equally detrimental

for democracy and politics, since much of it is justified in the name of the people, and almost ominously, the legal system, statutory institutions, and the judiciary are implicated in this erosion. In the process of filling up a legal vacuum to deal with emergent conditions, these laws actually create a political and a rule of law vacuum, in the sense that they set aside and override the latter and justify it in the name of securing and protecting the state. The discourse on security is articulated by the state in a way that any violence by the state, including legal, is seen as necessary, precise, surgical and corrective in nature, against the malignant and disruptive violence of the 'terrorists'. In this work, we have seen that the vague and wide definition of terrorist activities used in the Acts, facilitated the arrest and detention of a whole range of people, political adversaries, people laying claims to a right over resources, or over territories and religious minorities, eventually making for the sustenance of specific regimes, socio-economic structures and ideologies.

The ongoing and proposed changes in the criminal justice system indicate a pattern whereby the coercive aspects of the state are being progressively strengthened. The arming of the state with greater powers of surveillance and control over citizens prepares the ground for authoritarianism, albeit through the democratic path. This pattern shows that the so called 'strong' (read dictatorial) state is not necessarily the outcome of a violent takeover by a military regime. More dangerous perhaps is the donning of 'authoritative control' by the state, sustained by claims of preserving democracy and representing the will of the people. While the repeal of POTA has indeed meant restoration of constitutional rights of a person to fair trial, the expansion of the scope of Unlawful Activities Prevention Act has significant ramifications. By inserting specific provisions pertaining to terrorist activities into the Unlawful Activities Prevention Act, 1967, the UAPA is intended as a surrogate for POTA. The Unlawful Activities Prevention Act, 2004, confirms a dangerous trend, whereby extraordinary law becomes a model for remapping ordinary criminal jurisprudence. Moreover, notwithstanding the ill logic of continuing the inherently undemocratic and unjust legal/judicial procedures of a dead Act (POTA), the functioning of the review panels that have been appointed to sift through POTA cases vis-à-vis the various

state governments and the courts is fraught with contests and uncertainty. The UAPA, 2004, came amidst popular movements in Manipur opposing the AFSPA that has been in operation for the last nearly forty years, giving the army extraordinary powers without commensurate accountability in the region. Considering that all such laws are political, serving the purpose of subduing and snuffing out political and ideological opposition, the changes in the UAPA should be a cause for grave concern. The repeal of POTA should also be seen in the context of other laws that have been used against political dissent like the AFSPA and the *Disturbed Areas Acts* in the states of the North-East and Jammu and Kashmir, as well as laws like MCOCA, and its replicates which have been and have the potential of being used against political opposition.

Significantly, judicial responses to petitions challenging the constitutional validity of anti-terror laws have always been confirmatory of extraordinary laws, affirming thereby the authority of the executive to decide on the existence of an extraordinary condition and specific policies including legal measures to deal with it. While upholding the constitutional validity of the anti-terror laws, the Supreme Court has not only endorsed extraordinary procedures on the 'rationale of supreme necessity not covered by regular law', it has also upheld the executive's delineation of 'necessity', for example, public order, national security, waging war against the state, conspiracy against the state, terrorism etc. In the PUCL petition challenging the constitutional validity of POTA, for example, the Supreme Court focussed on the question of 'legislative competence', while choosing not to interrogate the 'need' for such a law, on the ground that it was a 'policy matter' and hence not subject to judicial review (*PUCL vs. Union of India* Writ petition 129 of 2002, decided in December 2003). In the process, the Supreme Court expanded the legislative authority of the executive, giving it the overreach by means of which, it transcended the areas of potential contest over what the state perceives as necessary power, and what the law actually makes available. The Supreme Court's decisions upholding the constitutional validity of POTA and TADA may be seen as attributing legality to the various procedural exceptions these laws prescribed. Yet, there are layers within the judgments and the other judgments that followed (for example, The Parliament Attack case) where spaces of substantive liberty are sought to be carved out, by the Supreme Court.

Yet, substantive liberty, which, holds out the promise of weaving rights into legal formalism, based on the assumption that citizens have moral and political rights,[74] the latter to be enforced by and through the courts, remains inadequately realised, precisely because the safeguards are sought to be woven into laws founded on principles of procedural exceptionalism.

Notes

1. On the night of 21 September 2004, the President promulgated two Ordinances. One of these repealed the Prevention of Terrorism Act (POTA) a month before it was to come up for legislative review, and the other amended the provisions of the Unlawful Activities (Prevention) Act 1967, (UAPA). In its winter session both Houses of Parliament gave the Ordinances their approval. This means that POTA is no longer on the statute books and UAPA 1967 has been replaced by UAPA 2004.
2. *Report of the Committee on Reform of the Criminal Justice System*, 2003, pp. 3–6.
3. Examining the implications of the Malimath Committee's recommendations for human rights, Upendra Baxi points out that the claim made by the report about presenting the accumulated wisdom of what 'has been said before', is a dangerous normalising augury, lulling an unwary reader into complacent acquiescence. Behind the mask of wisdom, he argues, is an extraordinary discontinuity between prior sane and safe thinking on restoration of efficiency and equity in the Criminal Justice System and the proposals being made for a wholesale departure from human rights oriented criminal justice system. See Upendra Baxi, *The (Malimath) Committee on Reforms of Criminal Justice System: Premises, Politics and Implications for Human Rights*, Amnesty International, Delhi, September 2003, p. 6.
4. Report of the Committee on Reform of the Criminal Justice System, 2003, pp. 23–24.
5. Ibid., p. 6.
6. For the Committee's discussion of the adversarial system see ibid, pp. 23–37 and for its recommendations on the same ibid, pp. 265–70.
7. The right to silence is a fundamental right under Article 20(3) of the Constitution guaranteeing protection against self-incrimination. It provides that 'no person accused of any offence shall be compelled to be a witness against himself'. To be fair to the Committee, it does ask that the several rights of the accused, guaranteed under the Constitution and the relevant laws, 'liberally extended by the Supreme Court', be collected together, and incorporated in a schedule in the Criminal Code. It also suggests that these rights should be collected in the form of a pamphlet and translated in the respective regional language by each state for free distribution to the accused and the public. Ibid., p. 269.
8. Ibid., p. 267.
9. Ibid.
10. The Committee recommends that Section 313 of the Criminal Procedure Code should for this purpose be substituted by Section 313A, 313B and 313C, all of which enhance the role of the judge in the trial. Ibid.
11. Ibid., p. 276.

12. In the United Kingdom, the Criminal Evidence (Northern Ireland) Order 1988 permitted inferences to be drawn from the silence of an accused when the accused had a duty to speak. Later changes along the same line were carried out in 1994 in the English Law—Criminal Justice and Public Order Act, permitting 'proper inference' to be drawn from the silence of the suspect during interrogation or the accused at the trial. *The 180th Report of the Law Commission of India on Article 20(3) of the Constitution of India and the Right to Silence of the Accused*, May 2002, p. 9–11.
13. The Commission pointed out that in the Indian context, Article 20(3) guaranteed a fundamental right against self-incrimination and Article 21 a further fundamental right to life and liberty, stating that the liberty of a person cannot be taken away except according to a procedure laid down by the law. The *Maneka Gandhi vs. Union of India* case (1978(1) SCC 248) further interpreted that the procedure envisaged by Article 21 is a procedure which must be fair, just and equitable. The CrPC 1973, moreover, contains several protections: Section 161(2) grants a right to silence during interrogation by the police—'Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have the tendency to expose him to criminal charge or to a penalty or forfeiture'; Section 313(3) protects the right to silence at the trial—'The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them'; Section 315(1) contains a proviso and clause (b) of the proviso precludes any comment by any of the parties or the court in regard to the failure of the accused to give evidence—'his failure to give evidence shall not be made the subject of any comment by any of the parties or the court or give rise to any presumption against himself or any person charged together with him at the same trial'. 'In other words', states the Commission, Sections 161, 313 and 315 raise a presumption against guilt and in favour of innocence, grant a right to silence both at the stage of investigation and at trial and also preclude any party or the court from commenting upon the silence' and the law is therefore, 'consistent with Articles 20(3) and 21 of the Constitution. Ibid., pp. 39–47.
14. Ibid., p. 3.
15. Report of the Committee on Reform of the Criminal Justice System, 2003, p. 275.
16. Ibid., p. 275.
17. Ibid., p. 19
18. Judgement, *State vs. Mohd.Afzal*, p. 188.
19. Report of the Committee on Reform of the Criminal Justice System, p. 276.
20. Supreme Court judgment dated 22 March 2002 in *Devender Pal Singh vs. State of NCT of Delhi and Another*, *Supreme Court Cases*, (Cri) 978, Para 53.
21. Judgement, *State vs. Mohd.Afzal*, p. 261.
22. Supreme Court judgement dated April 15, 2002 in *Krishna Mochi vs. State of Bihar*, 2002, *Supreme Court Cases* (Cri), 1220, Para 32.
23. V. Venkatesan, 'For a Fair Trial', *Frontline*, 29 August 2003, p. 6. The Supreme Court issued notices to the Central and Gujarat governments, based on the National Human Rights Commission's petition seeking a retrial of the Best Bakery Case.
24. 'Supreme Court frowns on custodial deaths', *Hindu*, 11 September 2003, p. 1.
25. The Gujarat Control of Organised Crime Bill was originally passed and sent for Presidential approval on 26 March 2003. The Bill was returned by the President with the suggestion that Sections 14, 15 and 16 which gave blanket powers to the District Collectors and the District Superintendents of Police to intercept and record telephonic and other means of communications, violated the privacy of citizens.

The revised Bill was passed on 2 June 2004 after deleting these sections. Unlike MCOCA which explicitly targeted organised crime 'fuelled by illegal wealth generated by contract killing, extortion, smuggling in contrabands, illegal trade in narcotics, kidnappings for ransom, collection of protection money and money laundering, etc.', there was no such explanation of what comprised organised crime in GUJCOCA. Its intent was vaguely presented as making 'special provisions for prevention and control of, and for coping with criminal activity by organised crime syndicate or gang, and for matters connected therewith or incidental thereto'. Moreover, it was surprising that Gujarat should be requiring a stringent law to tackle organised crime, which the Modi government repeatedly claimed, had a low crime rate. 'Pota sounds benign compared to Modi's Gujcoca', *Times News Network*, 5 June 2004. Speaking in New Delhi, on 18 September 2004, Narendra Modi, explained the need, stating that POTA had been useful in 'punishing and deterring terrorists'. With its repeal, 'in Gujarat, which is a border state, we need to be very cautious and keeping that in mind, the state government has come up with a (proposed) new law Gujarat Control of Organised Crime Act'. 'Gujarat brings new legislation after repeal of POTA', http://in.news.yahoo.com/040918/139/2g5cj.html, accessed on 26 August 2005.

26. 'Gujarat is ready with 'alternative' if POTA is repealed, *Hindu*, 2 June 2004, p. 13.
27. The first MCOCA case in Mumbai became an example, not of efficiency and precision, but of misuse and the casual approach of investigating agencies that was associated earlier with TADA, and later with POTA. Farooq Abdul Gafoor Chifa, was arrested on 13 March 1999, soon after MCOCA was promulgated as an Ordinance on 24 February 1999. After a month in police custody, Chifa was remanded to judicial custody where he stayed for another month before his case was brought before the Court of the Additional Chief Metropolitan Magistrate K.H. Holambe-Patil. Under the provisions of the Act (Section 23), the investigating officer, not below the rank of Additional Director General of Police could present the prosecution's case. While the investigating officer failed to present himself in the Court, no progress in the investigation could be shown either, compelling the Magistrate to reproach the police for not taking the arrest seriously. Moreover, while arrest under MCOCA was being carried out, Special Courts for trying offences under the Act, were not yet set up by the state government. The Metropolitan Magistrate declared lack of jurisdiction over the case and handed Chifa back into police custody. As the case lingered, it became obvious that Chifa was not a lead player in the gang he was accused of being a member nor in the offence he was charged with. Ironically he was of no use to the police anymore, who had nothing more to extract from him, but being booked under MCOCA, Chifa could be kept in detention for 90 to 180 days. For details see Susan Abraham, 'The case against the state', *Times of India*, 6 June 1999.
28. Between 1999 and 2003 incidents of shootouts had come down from 93 cases in 1998 when 101 people were killed and 15 injured to 41 cases in 1999 and 10 incidents in 2003. Cases of extortion had similarly come down from 367 cases in 1998 and 344 cases in 1999 to 142 cases in 2003. Figures given by Satya Pal Singh, Joint Commissioner, Crime, Mumbai police. 'Maharashtra police officials against repeal of Act', *Hindu*, 4 June 2004, p. 12.
29. A total of 806 persons had been arrested under MCOCA in Maharashtra. Ibid.
30. Debates, Joint Sitting of the Houses of Parliament, 26 March 2002, p. 32.

31. Praful Bidwai, 'Victim of macho nationalism', *Hindustan Times*, 10 January 2002.
32. By a notification dated 2 January 2002, the Ministry of Home Affairs extended MCOCA to the National Capital Territory of Delhi. The *Karnataka Control of Organised Crime Bill* was passed by the State Legislature in 2000, *Andhra Pradesh Control of Organised Crime Act* was passed in 2001, and the *Arunachal Pradesh Control of Organised Crime Ordinance* was promulgated on 3 April 2002 which became an Act with the Governor's consent on 3 October 2002.
33. Debates, Joint Sitting, p. 36.
34. Ibid., pp. 17–18. [emphasis added]
35. Ibid., p. 75. [emphasis added]
36. Apart from specific offences under Sections of Indian Penal Code, i.e., 120–B (conspiracy), 115 (abetment of offence punishable with death or life imprisonment) read with 302 (murder), Shah and others were charged with offences under Section 3(2) of MCOCA (abetting organised crime), Section 3(4) (member of organised crime syndicate) and Section 4 (possessing unaccountable wealth on behalf of crime syndicate).
37. Debates, Joint Sitting, p. 30.
38. Ibid., p. 31. [emphasis added]
39. See A.G. Noorani, 'Rule of law and Organised Crime: Maharashtra Control of Organised Crime Bill', *Economic and Political Weekly*, 1999. Section 25 of MCOCA lays down that 'the provisions of the Act or any rule made thereunder or any order made under any such rule shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having the force of law'.
40. Kapil Sibal, Debates, Joint sitting, p. 105. [emphasis added]
41. The meanings are taken from the *Chambers English Dictionary*.
42. *Supreme Court Cases* (Criminal) 2002, p. 898. [emphasis added]
43. Ibid., p. 924.
44. Ibid., p. 925. For arguments given by judges in response to similar contentions by counsels of defence may be found in other cases, e.g., *Hitendra Vishnu Thakur vs. State of Maharashtra*, SCC (Cri) 1087, and *Girdhari Parmanand Vadhava vs. State of Maharashtra*, SCC (Cri) 159.
45. 'Malegaon Visphote Mein Aaropiyan par MCOCA Laga', *Rashtriya Sahara*, 4 November 2006.
46. The CMP was released on 27 May and the item concerning POTA repeal read as follows: 'The UPA has been concerned at the manner in which POTA has been grossly misused in the past two years. There will be no compromise in the fight against terrorism. But given the abuse of POTA that has taken place, the UPA government will repeal it, while existing laws are enforced strictly'.
47. It must be remembered that POTA came with a provision that required that the Act be reviewed by the Parliament every three years. For TADA this period was two years. By inserting specific provisions of POTA into the amended UAPA, the government has managed to give permanence to these provisions. While POTA and TADA came up for periodic review before the legislature, opening them to political debate and public scrutiny, the inclusion of POTA provisions in UAPA has removed them from such periodic scrutiny.
48. Section IV(3) of the POTA Repeal Act lays down, 'Notwithstanding the repeal of Section 60 of the said Act, the Review Committee constituted by the Central

Government under subsection (l) of that section, whether or not an application under subsection (4) of that section has been made, shall review all cases registered under that Act as to whether there is a *prima facie* case for proceeding against the accused thereunder and such review shall be completed within a period of one year from the commencement of this Ordinance and where the Review Committee is of the opinion that there is no *prima facie* case for proceeding against the accused, then,

(*a*) in cases in which cognizance has been taken by the court, the cases shall be deemed to have been withdrawn; and

(*b*) in cases in which investigations are pending, the investigations shall be closed forthwith,

with effect from the date of issuance of the direction by such review Committee in this regard. The Review Committee constituted by the Central Government under subsection (l) of Section 60 of the said Act shall, while reviewing cases, have powers of a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely:

(*a*) discovery and production of any document;

(*b*) requisitioning any public record or copy thereof from any court or office.

The Central government may constitute more review committees, as it may consider necessary, for completing the review within the period specified in subsection (3).

49. 'On Godhra, Gujarat rejects POTA review panel report', *Indian Express*, 10 June 2005.

50. The three Committees were headed by former High Court Judges—Justices Usha Mehra, S.C. Jain and P.N. Nag, respectively which conducted detailed hearings in all these cases, and gave detailed orders for each of the 1,006 accused giving reasons as to why POTA could not be applied to them. The Jain Committee which reviewed the Godhra case, for example, has given an 80–page order arguing against the application of POTA in the case. 'Reviews slap misuse slur on terror law', *Hindustan Times*, 29 September 2005. In Delhi 43 persons were booked in 19 POTA cases, of which the POTA Review Committee chaired by Justice Usha Mehra examined 10 cases in which 31 persons were implicated. The other members of this Review Committee were A.A. Ali a retired IAS officer, Ganesh Jha, retired Inspector General of the Central Industrial Security Force, and J. Minhas, a retired IAS officer. 'Kai Nirdoshon par bhi chala POTA ka sota', *Rashtriya Sahara*, 26 September 2005.

51. A.G. Noorani, 'Repeal of POTA and UPA's Bill', *Economic and Political Weekly*, 2005, p. 11.

52. Terrorist acts were defined under POTA under Section 3 as: Section 3(3) Whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to a terrorist act….(4) Whoever voluntarily harbours or conceals, or attempts to conceal any person knowing that such person is a terrorist….(5) Any person who is a member of a terrorist organisation, which is involved in terrorist acts….(6) Whoever knowingly holds any property derived or obtained from commission of any terrorist act or has been acquired through the terrorist funds….(7) Whoever threatens any person who is a witness or any other person in whom such witness may be interested, with violence, or wrongfully restrains or confines the witness. These were retained in UAPA 2004 in Section 17 (Punishment for raising funds for terrorist act), Section 18 (Punish-ment for conspiracy), Section 19 (Punishment for harbouring), Section 20 (Punish-ment for being member of terrorist gang or organisation), Section 21

(Punishment for holding proceeds of terrorism), Section 22 (Punishment for threatening witness).

53. Refer to table in Chapter One.
54. Charges and Punishment in the Parliament attack case (PUDR, *Trial of Errors*, 2003)

Charge	*Description*	*Accused*	*Punishment*
121 IPC	Waging or attempting to wage war or abetting waging war against Government of India	Afzal, Shaukat, Gilani	Life imprisonment + Rs 25,000 or addl. 1 yr. RI
121–A IPC	Conspiracy for Section 121 IPC	Afzal, Shaukat, Gilani	10 yrs. RI + Rs 10,000 or addl. 6 months RI
122 IPC	Collecting arms etc. with the intention of waging war against Government of India	Afzal, Shaukat, Gilani	Life imprisonment + Rs 25,000 each or addl. 1 yr. RI
123 IPC	Concealing with intent to facilitate design to wage war	Afsan Guru	5 yrs. RI + Rs 10,000 or addl. 6 months RI
302 read with 120–B IPC	Conspiracy to murder	Afzal, Shaukat, Gilani	Death sentence + Rs 5 lakhs
307 read with 120–B IPC	Conspiracy to attempt murder	Afzal, Shaukat, Gilani	10 yrs. RI + Rs 1.75 lakhs or addl. 1 yr. imprisonment
3(2) POTA read with 120–B IPC	Terrorist act	Afzal, Shaukat, Gilani	Death sentence + Rs 5 lakhs
3(3) POTA	Conspiracy, attempt, abet etc. to terrorist act	Afzal, Shaukat, Gilani	Life imprisonment + Rs 25,000 or addl. 1 yr. RI
3(4) POTA	Harbouring or concealing terrorist	Afzal, Shaukat	Life imprisonment + Rs 25,000 or addl. 1 yr. RI
3(5) POTA	Membership of terrorist gang	Afzal, Shaukat, Gilani	Life imprisonment + Rs 25,000 or addl. 1 yr. RI
4(B) POTA	Unauthorised possession of explosives etc.	Afzal, Shaukat, Gilani	Life imprisonment + Rs 25,000 or addl. 1 yr. RI
3 Explosive Substances Act	Causing explosion, threatening life or property	Afzal, Shaukat, Gilani	Life imprisonment + Rs 25,000 or 1 yr. RI
4 Explosive Substances Act	Attempt to cause explosion	Afzal, Shaukat, Gilani	20 years RI + Rs 25,000 or addl. 1 yr. RI

Source: PUDR, *Trial of Errors*, 2003.

55. Though the police always had the option under the Indian Telegraphs Act 1885, of tapping phones to aid their investigation, they could not produce any intercepted communication as evidence in the court till POTA made it admissible in terrorist cases. POTA, it must be recalled was the first law to make phone and e-mail intercepts admissible as evidence, and elaborate safeguards were provided in the Act. Under Section 38(1) of POTA, a police officer not below the rank of Superintendent of Police supervising the investigation of a terrorist act under POTA could submit an application in writing to the Competent Authority for an order authorising interception, including with the application a statement of the facts and circumstances relied upon by the applicant, the type of communication to be intercepted, and the identity of the person whose communications are to be intercepted. These facts had to be specified in the order of the Competent Authority along with the nature and location of communication facilities, the agency authorised to intercept and the period or time during which interception was authorised. Under Section 39(1), the Competent Authority was required to submit a copy of the order to the Review Committee headed by a retired high court judge with all the relevant papers. Under Section 46, the Review Committee could review every order passed by the Competent Authority. Section 47 prohibited interception and disclosure of wire, electronic or oral communications, except as specifically provided in Section 39. Section 45, which made the evidence collected through the interception of wire, electronic or oral communication admissible as evidence against the accused in the Court during the trial of a case, also provided that the contents of the interception may not be received in evidence or disclosed in any trial, unless each accused had been furnished a copy of the order ten days before trial. Section 48 provided that annual reports of interceptions be prepared giving full accounts of interceptions, under the instructions of the Central or state governments. Any police officer found to misuse the power to intercept communications, was liable to be punished under POTA with imprisonment up to one year. Under Section 46 of UAPA, evidence collected through interception of wire, electronic or oral communication under the provisions of the Indian Telegraph Act, 1885 or the Information Technology Act 2000, was made admissible as evidence against the accused in the court during the trial of a case, provided that the accused had been furnished with a copy of the order. Unlike POTA, however, there is no provision of recourse to the Review Committee or legislative review.
56. In 2002 the Government of India deported several Nepali students and journalists to Nepal, despite the fact that they were likely to be (and were) politically persecuted in their home country. The Delhi High Court upheld the deportation on the ground that the Indian government was simply exercising its legitimate sovereign authority. What it overlooked was the fact that under the extradition treaty with the Nepalese government, the Indian government was obliged to hand over to the Nepalese government all 'wanted' Nepalese, but it retained with it the right not to deport a person who was wanted for a political offence. The right not to be deported, of persons likely to face torture and political persecution in their home country, translates into a responsibility of the state to offer protection to such persons. This responsibility is augmented if read alongwith the convention of non-refoulement under the international human rights norms. The principle of non-refoulement has been laid down in Article 33(1) of the 1951 Convention on the Status of Refugees which states that 'no refugee should be returned to any country where he or she is

likely to face persecution or torture'. While the Nepali students were not refugees in India, the fact that they would face persecution on their return to Nepal brought them under the purview of non-refoulement. With the inclusion of extraterritoriality, it would be easy to label an act as 'terrorist', filter it out of the category of political, and the protection it was thereby entitled to. See PUDR, *Quit India: Ban, Deportation and Rights of Nepali People*, 2002.

57. A 'terrorist organisation' was defined under POTA as follows: Section 18(4)—For the purposes of subsection (3) an organisation shall be deemed to be invloved in terrorism if it (*a*) commits or participates in acts of terrorism, (*b*) prepares for terrorism, (*c*) promotes or encourages terrorism or (*d*) is otherwise involved in terrorism. In addition Section 20 deals with offences relating to membership of a terrorist organisation, Section 21 deals with offences relating to support given to a terrorist organisation and Section 22 deals with fund raising for a terrorist organisation. It was retained as such in UAPA 2004. An 'unlawful organisation' under the UAPA 1967, as continued in UAPA 2004 means any association—(*i*) which has for its object any unlawful activity, or which encourages or aids persons to undertake any unlawful activity, or of which the members undertake such activity; or (*ii*) which has for its object any activity which is punishable under Section 153A or section 153B of the Indian Penal Code (45 of 1860), or which encourages or aids persons to undertake any such activity, or of which the members undertake any such activity. Nothing contained in sub-clause (ii) shall apply to the State of Jammu and Kashmir.
58. Section 18 of POTA lays down the procedure for banning a terrorist organisation as follows: 18 (1) For the purpose of this Ordinance an organisation is a terrorist organisation if, (*a*) it is listed in the Schedule, or (*b*) it operates under the name as an organisation listed in that schedule, (2) The Central government may by order in the Official Gazette, (*a*) add an organisation to the Schedule; (*b*) remove an organisation from that Schedule (*c*) amend that Schedule in some other way. There is no need to specify the grounds on which an organisation is declared terrorist. Under Section 18(3), an organisation can be declared as a terrorist organisation 'if it (the Central government) believes that it is a terrorist organisation'. An unlawful organisation can be banned under the UAPA in the following manner. Section 3 (1) Central government is of opinion that any association is, or has become, an unlawful association, it may by notification in the Official Gazette, declare such an association to be unlawful. (2) Every such notification shall specify the grounds on which it is issued and such other particulars as the Central government may consider necessary: Provided that nothing in this subsection shall require the Central Government to disclose any fact which it considers to be against the public interest to disclose. (3) No such notification shall have effect until the Tribunal has, by an order made under Section 4, confirmed the declaration made therein and the order is published in the Official Gazette: Provided that if the Central government is of opinion that circumstances exist which render it necessary for that government to declare an association to be unlawful with immediate effect, it may, for reasons to be stated in writing, direct that the notification shall, subject to any order that may be made under Section 4, have effect from the date of its publication in the Official Gazette. (4) Every such notification shall, in addition to its publication in the Official Gazette, be published in not less than one daily newspaper having circulation in the state in which the principal office, if any, of the association affected is situated, and shall

also be served on such association in such a manner as the Central government may think fit and all or any of the following modes may be followed in effecting such service, namely: (*a*) by affixing a copy of the notification to some conspicuous part of the office, if any, of the association; or (*b*) by serving a copy of the notification, where possible, on the principal office bearers, if any, of the association; or (*c*) by proclaiming by beat of drum or by means of loudspeakers, the contents of the notification in the area in which the activities of the association are ordinarily carried on; or (*d*) in such other manner as may be prescribed.

59. The process of denotification as laid down under POTA (Section 19) and retained under UAPA 2004 (Section 36–37) is as follows: 19 (1) An application may be made to the Central government for the exercise of its power under clause (b) of subsection (2) of Section 18 to remove an organisation from the Schedule. (2) An application may be made by—(*a*) the organisation, or (*b*) any person affected by inclusion of the organisation in the Schedule as a terrorist organisation; (3) The Central Government may make rules to prescribe the procedure for admission and disposal of an application made under this section. (4) Where an application under Subsection (1) has been refused, the applicant may apply for a Review Committee constituted by the Central government under subsection (1) of Section 59 within one month from the date of receipt of the order by the applicant. (5) The Review Committee may allow an application for review against refusal to remove an organisation from the Schedule, if it considers that the decision to refuse was flawed when considered in the light of the principles applicable on an application for judicial review. (6) Where the Review Committee allows review under subsection (5) by or in respect of an organisation, it may make an order under this subsection. (7) Where an order is made under subsection (6) the Central government shall, as soon as the certified copy of the order is received by it, make an order removing the organisation from the list in the schedule.

    Under the UAPA 1967 and persisting in UAPA 2004, the process of denotification of unlawful organisations is as follows: Where any association has been declared unlawful by a notification issued under subsection (1) of Section 3, the Central government shall, within thirty days from the date of the publication of the notification under the said subsection, refer the notification of the Tribunal for the purpose of adjudicating whether or not there is sufficient cause for declaring the association unlawful. On receipt of a reference under subsection (1), the Tribunal shall call upon the association affected by notice in writing to show cause, within thirty days from the date of the service of such notice, why the association should not be declared unlawful. After considering the cause, if any, shown by the association or the office bearers or members thereof, the Tribunal shall hold an inquiry in the manner specified in Section 9 and after calling for such further information as it may consider necessary from the Central government or from any office bearer or member of the association, it shall decide whether or not there is sufficient cause for declaring the association to be unlawful and make, as expeditiously as possible and in any case within a period of six months from the date of the issue of the notification under subsection (1) of Section 3, such order as it may deem fit either confirming the declaration made in the notification or canceling the same. The order of the Tribunal made under subsection (3) shall be published in the Official Gazette.

60. The *Chhattisgarh Vishesh Jan Suraksha Vidheyak* 2005 was introduced by the ruling BJP in the state and passed by the state Assembly in December 2005. It received the Presidential assent in March 2006.
61. For a detailed discussion of the Act see, *Casting the Net Wider! The Chhattisgarh Special Public Security Act 2006*, PUDR, Delhi, April 2006.
62. This title is borrowed from 'They Want Our Land Not Our People', Report on the North-East Regional Workshop on 'Women and Regional Histories', Guwahati, June 24–25, 1999, in *In Search of Pasts? History, Women's Movements and Women's Studies*, Indian Association for Women's Studies, January 2000, pp. 145–148.
63. On 11 July 2004 Thangjam Manorama, a 32-year-old woman, was picked up from her home in Imphal at night by the soldiers of Assam Rifles, tortured and raped, and her corpse was left at the highway. Manorama's was the 19th death that year and would have gone unnoticed if four days after her death the Meira Paibis had not gathered in a unique and courageous protest in front of the Kangla Fort, the headquarters of the Assam Rifles, naked and daring the army to rape them. See for details of the AFSPA in Manipur, 'Why the AFSPA must go', a fact-finding report by the Committee for the Repeal of the Armed Forces Special Powers Act, February 2005.
64. The consolidation of the North-East as a 'frontier region' dates back to British military expeditions into the region after 1826 when they first reached Assam. By 1904, the British had consolidated their hold over the region. Up to 1935 they experimented with different types of governance of the area and eventually created the Excluded and Partially Excluded Areas Act of 1935. The Indian Constitution in turn created the VI Schedule to make the North-East a governable unit. See 'Where 'peacekeepers' have declared war', a report on violation of democratic rights by security forces and the impact of the Armed Forces (Special Powers) Act on civilian life in the seven states of the north-east, April 1997, p. 1.
65. The reasons are manifold—historical rights to sovereignty, issues of underdevelopment, inadequate revenues received by the state, unchecked illegal migrations etc.
66. '*Where 'Peacekeepers' have Declared War*', 1993, p. 3.
67. The use of the armed forces is seen as justified in terms of aiding civil power. AFSPA, however, does not, lay down any machinery, procedure or mechanism for the 'aid' to be provided to the civil power. On the other hand, it confers under Section 4, wide powers on to the armed forces immediately on the notification of the area as disturbed. Moreover, once an area is notified as disturbed and the armed forces 'empowered' by AFSPA have come to the so-called aid of civil authorities, the latter takes the backseat, while the armed forces exercise their powers under AFSPA without drawing on the support etc., of the civil authorities in specific situations. Under ordinary law, the civil authorities have to assess the situation and ask for the help of armed forces in a specific situation.
68. Sushanta Talukdar, 'Human Rights Violations take Centre Stage in Manipur, (piece under Poll Theme: Special Powers Act), *Hindu*, 10 April 2004.
69. The Committee was Chaired by Justice B.P. Jeevan Reddy and its other members were S.B. Nakade, P.P. Shrivastava, Lt. Gen (Retd) V.R. Raghavan and Sanjoy Hazarika. The Review Committee called for representations on whether it should recommend to the Government of India to: (*i*) amend the provisions of the Act to bring them in consonance with the obligations of the government towards protection of Human Rights, or (*ii*) replace the Act by a more humane legislation. It held hearings in

various parts of the country including the North-east, and invited comments from individuals, organisations, institutions and non-governmental organisations.

70. See Report of the Committee to *Review the Armed Forces (Special Powers) Act*, 1958, GOI, 2005, pp. 74–75.
71. See Upendra Baxi, Rule of Law in India: Theory and Practice' 2004.
72. Paddy Hillyard, *Suspect Community*: *People's Experience of Terrorism Acts in Britain*, 1993.
73. J. Sim and P.A. Thomas, 'The Prevention of Terrorism Act', *Journal of Law and Society*, 1983, p. 75.
74. Ronald Dworkin contrasts the substantive account of the rule of law with the formal 'rule-book' version. For Dworkin the former i.e., the substantive version is the 'rights' (as distinct from 'rules') conception of the rule of law. It is in several ways more ambitious than the rule-book conception. It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. Dworkin insists that these moral and political rights be recognised in positive law so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type. The rule of law under this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule-book conception does, between the rule of law and substantive justice; on the contrary it requires, as a part of the ideal of law, that the rules in the rule book capture and enforce moral rights. Ronald Dworkin, 'Political Judges and the Rule of Law', 64 *Proceedings of the British Academy* pp. 259–87 (1978).

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