

TENUOUS LEGALITY: TENSIONS WITHIN ANTI-TERRORISM LAW IN INDIA

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This paper examines the evolution of the anti-terror legislation in India from Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA), through Prevention of Terrorism Act 2000 (POTA) to Unlawful Activities (Prevention) Act (UAPA). This paper attends specifically to the jurisprudential tension between the promise of constitutional safeguards on the one hand, and the legal erosion of these rights inhering in these laws on the other.

The paper seeks to understand how this tension is resolved, philosophically and jurisprudentially in addressing challenges to these laws in the Supreme Court. How, first, did the Supreme Court respond to the allegation that these laws suffered from the “the vice of unconstitutionality”. Second, having upheld the constitutional wholesomeness of these laws, how did different courts respond in actual cases being tried under these laws – which legally subverted established evidentiary rules?

It is argued that the tension remains unresolved – despite professions to the contrary – and can be seen operating in the juridical field.

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I. INTRODUCTION

It has often been argued by laymen and experts alike that all laws are amenable to ‘misuse’ – that laws by themselves are inert and objective, but turn into a tool of prejudice or harassment only when in the hands of unscrupulous police and prosecutors. This paper examines the evolution of the anti-terror legislation in India from Terrorist and Disruptive Activities (Prevention) Act, 1987 (‘TADA’), through Prevention of Terrorism Act, 2000 (‘POTA’) to Unlawful Activities (Prevention) Act, 1967 (‘UAPA’) to test this hypothesis. To be clear, this is not an exercise in mapping the distance between “law in books” and “law on the ground”, but attends to the jurisprudential tension between the promise of constitutional safeguards on the one hand, and the legal erosion of these rights inhering in these laws on the other.

The paper seeks to understand how this tension is resolved, philosophically and jurisprudentially in addressing challenges to these laws in the Supreme Court - how, first, did the Supreme Court respond to the allegation that these laws suffered from “the vice of unconstitutionality”? Second, it looks at the tribunals constituted to examine the “reasonableness” of declaring an association as unlawful under the UAPA. It is argued that the tension remains unresolved – despite professions to the contrary – and can be seen operating in the juridical field.

We tend to think of exceptional laws as rather recent—and indeed distinct from ordinary laws – in provenance and scope. And yet, only a year after the Constitution was adopted, the First Amendment invoked ‘public order’ to impose restrictions on free speech, corroding the Constitutional promise of fundamental rights to citizens.¹ It summoned from recent history, repressive colonial laws, which had barely disappeared through the document for a new India. The immediate cause for the abridgment of freedom of speech by the government is said to have been a spate of judicial pronouncements that upheld citizens’ right to freedom of speech and expression against the executive’s attempt to censor it. In fact, the statement of ‘Objects and Reasons’ at the introduction of the First Amendment Bill quite plainly admitted that during the first “fifteen months of the working of the Constitution” the courts had held citizens’ rights under Article 19(1)(a) to “be so comprehensive as not to render a person culpable even if he advocates murder and other crimes of violence. In other countries with written constitutions, freedom of speech and the press is not regarded as debarring the State from punishing or preventing abuse of this freedom.”² In particular, Nehru had seized upon the Patna High Court’s assertion while rebuffing the state government’s censorship of a political pamphlet that “if a person were to go on

¹ GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE* 38-63 (1999).

² Among other reasons cited for the curtailment of rights was the plea that the government’s progressive agenda of Zamindari abolition and land reforms was being bogged down by litigation on the right to property.

inciting murder and other cognizable offences either through the press or by word he would be free to do so.”

There were vigorous debates over whether the Provisional Parliament based on a limited franchise was competent to bring about this amendment, and whether such an amendment would spell the death knell of free speech. In the end, the Select Committee had to prefix the restriction with the clause of ‘reasonableness’, which afforded some protection to the rights and freedom from arbitrary curtailment by the executive.³

A perusal of the parliamentary debates through 1951 to 1963 - when the Sixteenth Amendment was passed which further truncated the right to association and assembly, resulting ultimately in the passage of Unlawful Activities (Prevention) Act in the fifth Lok Sabha in 1967 - provides for depressing reading. As early as 1951, it was realized that curtailment of fundamental rights in the name of national security would be deployed to criminalize political dissent. That provisions of emergency laws were being incorporated into ordinary law by taking recourse to the sovereignty and integrity of India did not escape prescient members of the Parliament.⁴ Nonetheless, the UAPA was passed. The UAPA enabled the Centre to declare an organization as unlawful if it was of the opinion that the association “has become an unlawful association”. Throughout its life, the law has been fortified and made ‘stronger’ – and with each successive amendment, its scope has become broader, the state more powerful, and the right to association more fragile. Specifically, when POTA was repealed in 2004, in fulfilment of the election promise made by the incoming United Progressive Alliance, many of the provisions of the repealed law were absorbed wholesale through amendments into the UAPA. Thus, a new chapter on terror crimes and a schedule of terrorist organizations was added to the UAPA. Though POTA’s most contentious provision, that of admissibility of confessions as evidence, was renounced in the newly minted UAPA, the clause for punishment for malicious prosecution that at least theoretically existed in POTA was also excluded.

In the following pages, I first draw out a brief history of the anti-terror laws to illustrate the inherently partisan nature of these laws; in the subsequent section, I examine specifically the workings of the UAPA.

II. THE BIAS OF LAW: A BRIEF HISTORY

Before the UAPA was transformed into an anti-terror law meant to target not only unlawful activities but also terrorist ones, and even before POTA, there existed the TADA. Enacted in 1985, following the assassination of Mrs. Indira

³ Austin, *supra* note 1.

⁴ On Parliamentary debates on UAPA, see *The Terror of Law: UAPA and the Myth of National Security*, CDRO Report (2012).

Gandhi, and originally promulgated for areas designated as ‘terrorist affected’ – essentially Punjab – TADA quickly spread out, and at the time of its expiry, covered 23 states and two union territories. TADA departed dramatically from the principle of procedural fairness by allowing for admission of confessions made before police officers, adding new offences of abetment of terrorism without precisely defining “abet”, introducing summary trials and truncated appellate procedure and allowing for secret witnesses, thereby severely affecting the accused’s right to cross examine and defend oneself.

TADA’s appeal lay in its usefulness as a tool to quell dissent, suppress movements and torment minorities – all through a law legislated by the Parliament and sanctioned by the Supreme Court. In Punjab, thousands, virtually all of them Sikh, were arbitrarily arrested under TADA and detained for prolonged periods without being told of the charges against them. But the abuse of TADA was not limited to Punjab: statistics show that by August 1994, Gujarat had arrested 19,263 people under TADA – even more than in Punjab! In 1994, the National Commission for Minorities documented that 409 out of the 432 arrested under TADA in Rajasthan belonged to minority groups.⁵

Between the 1970s and 1990s, when struggles over land and labour intensified in Bihar, and bitter armed conflicts between the landless (always almost Dalit) and landlords (almost without fail, upper caste) broke out, the violence of the landless Dalits was met with the most draconian law at the disposal of the state: TADA. Even in the few instances when TADA was applied to leaders and foot soldiers of the upper caste private militias, it was swiftly withdrawn. One of the beneficiaries included Ramadhar Singh, leader of the Swarna Liberation Front, accused in the murder of 16 Dalits in Sawanbhigha and Barsimha (both in 1991).

In fact, only the rural lower caste poor were finally ever tried under TADA in all the cases of violence during those years. In a case of dispute over a water chestnut pond in Bhadasi (Arwal) dating to 1988, in which a police officer and three alleged ‘extremists’ lost their lives, twenty persons belonging to the poorest sections of society faced trial for the alleged commission of various offences punishable under the Indian Penal Code, 1860 (‘IPC’), TADA and the Arms Act, 1959. The accused were given life imprisonment (two died during trial and two were held to be juveniles) by the Sessions Judge Jahanabad-cum-Special Judge, TADA.⁶ Similarly, the Bhadasi killings of Bhumihar landlords by low caste landless labourers in 1992 in Gaya were tried and prosecuted under TADA. The designated court over a period handed out the following sentences: death sentences

⁵ Rohit Prajapati, Anti-terror laws: Tools of state terror, Submission to South Asia sub-regional hearing, International Commission of Jurists in New Delhi (27-28 February 2007).

⁶ *Madan Singh v. State of Bihar*, (2004) 4 SCC 622.

to four accused; rigorous imprisonment for life u/s 3(1) of TADA to another four; and death to yet another set of accused.⁷

The previous year, in 1991, the Swarna Liberation Front, Sun Light Sena and Jwala Singh's militia had killed over 54 Dalit agrarian workers. No one from these Senas was convicted – and as already noted above, TADA was invoked in a few of these cases, only to be withdrawn.⁸

In the violence in Mumbai (then Bombay) in 1992-93, TADA was invoked in the terrible communal violence that followed the demolition of the Babri Masjid as well as the serial blasts. However, the difference in preliminary investigation had already determined the judicial outcome of the cases. Not one person was convicted in the communal violence against minorities, while Yakub Memon was executed amidst controversy in 2015 for his role in the bomb blasts. The Special Public Prosecutor in the Blasts case, Ujjwal Nikam, dismissed charges of partisanship by pointing to the difficulties in tracing the accused. However, it is a matter of record that the victims had provided a list of assailants, with names and addresses, as many were neighbours. Nonetheless, a majority of the cases were closed with the files marked as: “true but undetected”.⁹ The cavalier approach towards communal violence can be contrasted with the urgency with which the Blast case was treated, for which a Special Investigation Team was set up under the supervision of the then joint commissioner of police M.N. Singh.¹⁰

TADA was allowed to lapse by the Parliament in 1995 when it was due to be reviewed and extended. The large-scale outcry that this law was a mechanism of persecution also received substantiation from Justice Ranganath Misra, the then Chairperson of NHRC. Misra, in a letter to Parliamentarians in early 1995 appealed to them to not renew the law, dubbing it “draconian in effect and character” and “incompatible with our cultural traditions, legal history and treaty obligations”.¹¹

POTA was enacted in March 2002 in an extraordinary joint session of the Parliament. The spectacular attack on twin towers in the USA in September 2001 had already created an international turn towards stricter anti terror legal

⁷ Appeals in Supreme Court resulted in either commutation or acquittal. See *Krishna Mochi v. State of Bihar*, (2002) 6 SCC 81; *Bihari Manjhi v. State of Bihar*, (2002) 4 SCC 352; *Vyas Ram v. State of Bihar*, (2013) 12 SCC 349.

⁸ Chronology of Massacres in Central Bihar (1977 -2001), SOUTH ASIA TERRORISM PORTAL, <http://www.satp.org/satporgtp/countries/india/terroristoutfits/massacres.htm>.

⁹ Jyoti Punwani, Why there is no noise about the Mumbai Riots, REDIFF.COM (Feb. 4, 2014), <http://www.rediff.com/news/column/jyoti-punwani-why-theres-no-noise-about-the-mumbai-riots/20140204.htm>.

¹⁰ Jyoti Punwani, Tale of two crimes, THE TIMES OF INDIA (Sep. 19, 2006), <http://timesofindia.india-times.com/edit-page/Tale-of-two-crimes/articleshow/2003635.cms>.

¹¹ Justice Ranganath Misra, Annual Report 1994-95, NATIONAL HUMAN RIGHTS COMMISSION (1995), <http://www.rwi.lu.se/NHRIDB/Asia/India/Annual%20Report%2094-95.pdf>.

regimes internationally. The attack on the Indian Parliament in December that year cast the die in favour of a hard law. Still, opposition was rife. Opposing the Prevention of Terrorism Ordinance, 2001 ('POTO') introduced by the NDA government, S. Jaipal Reddy had laid out four grounds of objection to the Act: "First, it is destructive of the basic democratic liberties; second, it has been demonstrated empirically in our own country that this a remedy worse than the malady; third, it has been prompted, by malignant political motives; and fourth, it jettisons the basic established principles of criminal jurisprudence without a necessary protective shield."¹²

The fears of those who opposed the new Act did not prove unfounded. The experience with POTA was hardly different from that of TADA. In Gujarat in 2002, when the ordinance had not even been formalized into an Act, the state government filed charges under POTO against 62 Muslims (including seven minors) for their alleged involvement in Godhra train burning. Though public outcry forced the government to withdraw the charges then, a year later, POTA charges were reintroduced in the case against 121 individuals.¹³ In contrast, no one was ever charged under the anti-terror law for the mass violence and brutality against the minorities that occurred thereafter. Moreover, nine omnibus conspiracy cases were filed under POTA against Muslims for planning terrorist attacks in retaliation against the communal violence.¹⁴ By 2004, over 280 individuals had been charged under POTA in the state, all but one of whom were Muslim.

In Andhra Pradesh and Jharkhand, studies found POTA being used as a tool of political vendetta and suppression. By February 2003, an astonishing 3200 individuals had been accused under POTA (and as many as 202 arrested). In Andhra Pradesh, 50 cases involving 300-400 people were filed in the second year of POTA's existence. In both states, filing of charges under POTA was linked to the political activities or caste and tribal status rather than involvement in criminal activity.¹⁵

In 2004 after the UPA government came into power, POTA was repealed in fulfilment of its promise to scrap the law.¹⁶

¹² Combined Discussion on Statutory Resolution Regarding Disapproval of Prevention of Terrorism (Second) Ordinance, Lok Sabha Debates (Mar. 18, 2002).

¹³ MANOJ MITTA, THE FICTION OF FACT-FINDING: MODI AND GODHRA (2014).

¹⁴ MANISHA SETHI, KAFKALAND: PREJUDICE, LAW AND COUNTERTERRORISM 27 (2014); Manisha Sethi, *An Architect of Conscience: Mukul Sinha (1951-2014)*, 49(22) ECON. & POL. WKLY (2014), <http://www.epw.in/journal/2014/22/web-exclusives/architect-conscience.html>.

¹⁵ Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism and Security Laws in India*, 20(1) COLUM. J. ASIAN L. 148, 174 (2005).

¹⁶ According to one commentator, the repeal of POTA was at least partly a strategy to stitch together a ruling coalition, whereby the promise of repeal of POTA was made to win over the DMK, which had been a particular victim of the law. See Sanjay Ruparelia, *Managing the United Progressive Alliance The Challenges Ahead*, 40(24) ECON. & POL. WKLY 2407 (2005).

III. CONSTITUTIONALITY AND ANTI-TERROR LAWS

Both the TADA and POTA have received challenges in the Supreme Court. In *Kartar Singh v. State of Punjab* ('Kartar Singh'), the petitioners agitated that TADA was ultra vires on the grounds that, first, the Central Legislature had no legislative competence to enact the legislations, and second, that some of the provisions (especially § 15, which allowed for admission of confessions made before police officers as evidence) were in conflict with the fundamental rights specified in Part III of the Constitution. They also charged that TADA was "in utter disregard and breach of humanitarian law and universal human rights", lacked impartiality and miserably failed the basic test of justice and fairness, which is the touchstone of law.

The Supreme Court hearing the petition noted that the petitioners made a "scathing attack seriously contending that the police by abusing and misusing their arbitrary and uncanalised power under the impugned Acts are doing a 'witch-hunt' against the innocent people and suspects stigmatizing them as potential criminals and hunt them all the time and overreact and thereby unleash a reign of terror as an institutionalised terror perpetrated by Nazis on Jews."(sic)¹⁷

Almost identical objections were raised by Peoples' Union for Civil Liberties (PUCL) against POTA ('PUCL').¹⁸ However, the allegation that these laws suffered from "the vice of unconstitutionality" – in terms of their provisions which attacked the fundamental right to fair trial by subverting established evidentiary rules and allowing the admission of confessions, secret witnesses, long detention etc. – were rebuffed in the voice of constitutionality. The Kartar Singh judgment upheld the constitutionality of TADA while the Supreme Court asserted that of POTA in PUCL. In both cases, the Supreme Court upheld the legislative competence of the Parliament to enact these laws since terrorism, in the court's view, dealt neither with "law and order", nor "public order" but with the "defence of India". In both judgments, the court invoked the spectre of terrorism to override concerns about civil liberties. In his trenchant critique of the Kartar Singh majority judgment, Balagopal has sardonically called it the "KPS Gill view of terrorism".¹⁹

In *Kartar Singh*, the Supreme Court affirmed the Constitutional wholesomeness of TADA by introducing some safeguards in the recording of confessions and by recommending a quarterly review of cases. It might be mentioned here that Justice Misra in his impassioned critique of TADA dwelt on the safeguards instituted by the Supreme Court in an apparent bid to make the provisions less harsh. Misra thought these safeguards to be a failure: "My honourable colleagues

¹⁷ *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569.

¹⁸ *People's Union for Civil Liberties v. Union of India*, (2004) 9 SCC 580.

¹⁹ K. Balagopal, *In Defence of India: Supreme Court and Terrorism*, 29(32) ECON. & POL. WKLY 2054 (1994).

and I in the Commission are aware of the fact that the Supreme Court in Kartar Singh case has made attempt to water down some of the harsh provisions. ... The quarterly review of cases, as directed by the Supreme Court, does not appear to have sufficiently met the grave situation arising on account of the abuse of statute. During these eleven months following the judgement, the expected result has not been achieved. The Commission has involved itself in the process with all seriousness; yet the desired effect remains illusive (sic).²⁰

And yet when the time came for a judicial examination of the clauses of POTA, Justice Misra's experience of TADA was disregarded. The adoption of safeguards in the recording of confessions (as delineated in § 32) as statutory provisions in POTA was hailed as a great advance and testimony to the will of the legislature to ensure a check on abuse of executive power.²¹

Thus, though the menace of terrorism trumps citizens' rights and liberties – because the fight against terrorism cannot be “regular criminal justice endeavour” (as held in PUCL) – the Supreme Court does not abandon that project altogether. By introducing safeguards and review committees, the Supreme Court continues to claim its role as a custodian of human rights. However, the gap between the promise of rights and the legal erosion of these rights through these laws was too great to be filled.

IV. UNLAWFUL ACTIVITIES PREVENTION ACT

We now move to the working of the UAPA, which allows the Central Government to ban an organization by declaring it as an unlawful association under § 3(1). Action under the Act can be taken by the Central Government “for activities of objectives which are secessionist or which are punishable under § 153 A (promoting enmity between different groups on grounds of religion, race, place of birth, etc.) or 153 B (imputations, assertions prejudicial to national integration)” of the IPC. Thus, if the central government comes to form an opinion that an organization is indulging in any of the above, it can proscribe it and punish those who continue to further its activities. However, § 4 of the Act also requires that within 30 days of such a declaration a tribunal be instituted, which

²⁰ Misra, *supra* note 11.

²¹ The Supreme Court held: “If the recording of confession by police is found to be necessary by Parliament and if it is in tune with the scheme of law, then an additional safeguard under Sections 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. Moreover, the Magistrate's responsibility to record the statement and the enquiry about the torture and provision for subsequent medical treatment makes the provision safer. It will deter the police officers from obtaining a confession from an accused by subjecting him to torture. It is also worthwhile to note that an officer who is below the rank of a Superintendent of Police cannot record the confession statement.” *People's Union for Civil Liberties v. Union of India*, (2004) 9 SCC 580.

“shall call upon the association affected by notice in writing to show cause ... why the association should not be declared unlawful.”

The provision of the serving of notice, specifying the grounds, disclosure of the facts on which they are based, the adjudication of the existence of “sufficient cause” by the organization so declared unlawful, hold out a promise of procedural fairness as well as a guarantee that restrictions imposed under UAPA would be “reasonable”. The Act claims for itself objectivity and due process, the status of a judicial determination, which not only distinguishes it from preventive detention laws, but in fact places it at a plane superior to it. A distinction was drawn by the Supreme Court in the V.G. Row case²² between, on the one hand, preventive detention or externment which rests on suspicion and is perforce anticipatory, and on the other hand, the declaration of an association as unlawful, which could only be grounded in facts “capable of objective determination by the Court”. In *Jamaat-E-Islami Hind v. Union of India* (‘Jamaat-E-Islami’), where the constitutionality of UAPA was challenged, the Supreme Court reiterated the principle enunciated in V.G. Row and warned that the “tribunal is not required to be a mere stamp or give an imprimatur on the opinion already formed by the Central Government”.²³

The following section examines this gap between the formalistic legality of the UAPA and its actual effects, which can be patently unlawful and even illegal. It does so through examining the tribunals set up to adjudicate the ban on Students’ Islamic Movement of India (‘SIMI’). It will be shown that the state merely caricatures and parodies its practices in the tribunal. Beginning from the appointment of the High Court judge to head the tribunal, it is the executive which drives the proceedings, and indeed the outcome.

V. THE SIMI TRIBUNALS:

In September 2001, just days after the attack on the Twin Towers in the USA, the Government of India declared the Students Islamic Movement of India (SIMI) to be an “unlawful” organization. The government claimed that SIMI was in close touch with militant outfits and was supporting extremism/militancy in Punjab, Jammu & Kashmir and elsewhere; that it supported claims for the secession of a part of the Indian territory from the Union and worked for an International Islamic Order; that it published objectionable posters and literature which are calculated to incite communal feelings, the speeches of its leaders used derogatory language for deities of other religions and exhorted Muslims for Jihad; and that it was involved in engineering communal riots and disruptive activities in various parts of the country.²⁴

²² *State of Madras v. V.G. Row*, AIR 1952 SC 196.

²³ *Jamaat-E-Islami Hind v. Union of India*, (1995) 1 SCC 428.

²⁴ *Union of India v. Students Islamic Movement of India*, 2002 SCC OnLine Del 340: (2002) 63 DRJ 563.

Within a week of banning SIMI, hundreds of cases were booked against young men who had been associated with SIMI before its ban; or had known SIMI members; and sometimes just young men who could be shown to be members of the organization. Since then the ban has been renewed and re-imposed in 2003, 2006, 2008, 2010, 2012 and 2014. With the most recent amendment to the Act, the term of the ban will be five years and not two as it was previously. As per the requirement laid out in § 4, each declaration of the ban was followed by reference to a tribunal. Barring once in 2008, every single tribunal has upheld the ban on SIMI. The 2008 tribunal headed by Justice Geeta Mittal found that no fresh grounds had been presented by the state in support of its extension of the ban. The continuation of the ban was thus unwarranted in this tribunal's view. The state immediately appealed to the Supreme Court for a stay against the lifting of the ban, and was granted one instantaneously. Interestingly, the Supreme Court has never heard appeals filed by Falahi against the tribunal orders upholding the ban.

VI. THE QUESTION OF LOCUS: A GAME OF CHARADES

It is noteworthy that erstwhile members and office bearers of SIMI have consistently contested its proscription appearing in every tribunal seeking the revocation or quashing of the ban. Indeed, one of the touchstones of procedural fairness of banning an association under UAPA is said to be the opportunity given to the banned organization to demonstrate its lawfulness and challenge its proscription. But how does an organization, outlawed and criminalized, represent itself before the might of the law? Under the circumstances that an organization remains proscribed almost continuously – as has been SIMI – the very act of challenging the ban, as its former office bearers have, turns into proof of the continuance of the unlawful organization.

Shahid Badr Falahi, who was the all India president of the organization when it was banned in 2001, appeared before the tribunal to contest the ban. However, his appearance was looked at with suspicion by the tribunal. In 2006, for example, the tribunal noted that though a notice was served to him, it was in his capacity as an office bearer, and not as an individual. If the organization ceased to function and exist, Falahi had no reason to challenge the ban in the tribunal's view. "[N]ot only that he decided to contest the present ban against the respondent association in his individual capacity, he is also found to have been at pains to issue a press release on behalf of it", the tribunal noted.²⁵ The fact of this press release, in the court's view flew in the face of the assertion that the association had ceased to exist. The tribunal openly wondered why Falahi, who had stated that he had barely enough financial resources to sustain himself and his family after his release from prison, bothered to seek financial help from his friends

²⁵ Order of the 2006 UAPA tribunal headed by Justice B.N. Chaturvedi. Copy on record with the author.

and relatives in order to mount a legal challenge to the ban before the tribunal. Surely, the interest and the trouble that Falahi endured to ensure that the prescription did not go uncontested legally, the tribunal recorded that “it does appear that he continues to hold the reins of the respondent organisation in spite of having crossed the age limit for its membership.”²⁶

Though the 2006 tribunal did not deprive Falahi of his locus to challenge the ban, it did underline the vulnerability of those challenging the ban exposing themselves to the possibility of being prosecuted for continuing the activities of an “unlawful organization” under §§ 10 and 13 of the UAPA.

On the contrary, Falahi’s contention that SIMI had ceased to exist after the ban led to the state objecting to his very participation in the tribunal in 2008 on grounds that he was “neither the office bearer of the association nor its member in view of his statement made before the tribunal that SIMI has ceased to exist after the first ban notification.”²⁷ The state thus urged the tribunal to disallow his counsel from contesting the prohibition or cross-examining any witnesses. The ASG insisted that a reading of § 4 of the Act showed that only the association / its office bearers or its members would be the adverse parties in the proceedings before the tribunal - and that Dr. Shahid Badar did not fall within the definition of “adverse party” as defined under the Indian Evidence Act, 1872.²⁸

Though this tribunal magnanimously permitted Falahi to participate in the proceedings “in the interest of justice”, the 2012 tribunal concurred with ASG that individuals, “who may have had an association with the banned organization earlier and have since ceased to be associated or claim to have detached themselves from the association, cannot be permitted to be represented in these proceedings.”²⁹ Reading the Act “literally”, it held that the words “office bearers” or “the members” cannot include ex-office bearers, thus denying them locus to respond to the notice issued by the tribunal. But in a sleight of hand, the tribunal allows them to participate surrogately (to invent a term in the spirit of the tribunal). “They are allowed to participate in the proceedings as members of a ‘continuing organization’”, the tribunal concluded. In so doing, the tribunal also concluded that the unlawful organization continued to function.³⁰

²⁶ *Id.*

²⁷ Order of the 2008 UAPA Tribunal presided over by Justice Gita Mittal. Copy on record with the author.

²⁸ *Id.*

²⁹ Order of the 2012 UAPA tribunal presided over by Justice V.K. Shali. Copy on record with the author.

³⁰ *Id.* The 2010 Tribunal in contrast liberally interpreted the words “office-bearers” and the said section was to give opportunity to contest the claim of the Central Government. This opportunity should be fair and not a mere formality. Tribunal headed by Justice Sanjeev Khanna. Copy on record with the author.

This renders the association in many ways unrepresentable. The unrepresentability of the banned organization is reiterated in many ways.

Notices of banning were served on the organization, as recorded in orders of the successive tribunals, at its head office at Zakir Nagar, New Delhi. One may note here that the said office was raided and sealed the day the organization was first declared unlawful and has continued to be sealed to this day.³¹

In contrast with the reluctance of the state to allow erstwhile members of the organization to challenge the ban in the tribunal, notices have been served to several people at their addresses to appear before the tribunal if they wished to challenge the ban. Indeed, the 2014 tribunal noted that it “received a number of representations claiming that notices issued to them should not have been issued as they were neither members of SIMI nor were they involved in any of their activities and that no case had been registered against them. In fact, during the hearing at Udaipur Zahir Mohammad Pathan, Kalim Mohammad Kazi and Mohammad Yasin Ali appeared in person and also filed affidavits stating that they had never been the members of SIMI, and no case had ever been registered against them. They also submitted that the tribunal may take any view on the issue of ban on SIMI. They submitted that despite the above, notices are served to them whenever a tribunal is constituted. The matter was enquired into by the tribunal and it was found that they were being issued notices on count of the information received from the state special branch in 2010.”³²

VII. VAGUE GROUNDS AND OBJECTIVE DETERMINATION OF “FACTS”

The bulk of the “grounds” for notifications through the years have been vague accusations such as that SIMI leaders out on bail have been regrouping³³ or “radicalizing, brainwashing the minds and indoctrination of Muslim youth by Jehadi propaganda and through provocative taqreers (lectures/speeches), CDs, etc.”³⁴, holding meetings including secret meetings, making strategies to induct new members discussing and raising funds and liaising with like-minded organisations like Popular Front of India and Hizb-ut-Tahrir”³⁵.

These allegations lack the tangibility that could invite a rebuttal on “facts” – the sacred benchmark of the UAPA’s reasonableness.

³¹ *Students Islamic Movement of India v. Secy., Home*, 2010 SCC OnLine Del 1111; ILR (2010) 6 Del 88.

³² Order of the 2014 UAPA tribunal presided over by Justice Suresh Kait. Copy on record with the author.

³³ Background Note on SIMI, Ministry of Home Affairs, 2006.

³⁴ Background Note, MHA, cited in 2012 order.

³⁵ Background Note, MHA, cited in 2014 order.

In so far as actual criminal cases are concerned, the basis for alleging these to be crimes of SIMI are the confessions under § 161, Code of Criminal Procedure – otherwise meaningless in a criminal trial – where the accused ‘confess’ to the police their continuing membership of SIMI. The admittance of confessions as evidence of SIMI’s existence – now as a clandestine and underground organization indulging in acts of ‘terror’ – has been challenged consistently in every tribunal, as has been the slipping in of sealed and secret material presented in almost every sitting of the tribunal as conclusive proof of the robust pace of the anti-national activities of the organization. However, these challenges now bear the character and feel of a ritualized drama whose denouement is predetermined and scripted.

Proceedings before the tribunal admittedly are not a criminal trial but a civil one where the rules of evidence are to be followed “as far as practicable” rendering the Indian Evidence Act inapplicable *stricto sensu*.³⁶ From the first tribunal onwards, it has been the cardinal principle that since the proceeding before tribunal is not a criminal trial against the accused persons but merely a civil adjudication to determine whether the organization was unlawful in its objectives and activities, the use of confessions would not be hit by § 25 of the Indian Evidence Act, 1872, which prohibits custodial confessions from entering evidence.

Jamaate e Islami too carved out exception within the due process which it had glowingly upheld, by cautioning that requirements of natural justice should be tempered when “the public interest so requires”. It thus stamped its approval on withholding “sensitive information” from the association and its members challenging the ban.³⁷

In 2006, the background Note issued by the Ministry of Home Affairs failed to mention a single new case registered against the organization between the period of last ban and the date of issuing of notification. And yet, the tribunal upheld the ban on SIMI on the basis of secret materials alone. In 2014, upholding the ban yet again, the tribunal conceded that there may be “defects, incoherency, contradictions and procedural irregularities during the recording of these statements [confessions] which may prove fatal during the trial when placed under the scanner of Indian Evidence Act”, but the confessions cannot be ignored for the purpose of determining the “sufficiency of cause”.

To give another example of the “jurisdiction of suspicion”, the UAPA heralds is the list of over ground organizations which the Centre alleges are fronts for

³⁶ Rule 3(1), The Unlawful Activities (Prevention) Rules, 1968 - “In holding an inquiry under sub-section (3) of section 4 or disposing of any application under sub-section (4) of section 7 or sub-section (8) of section 8, the Tribunal or the District Judge, as the case may be, shall, subject to the provisions of sub-rule (2), follow, as far as practicable, the rules of evidence laid down in the Indian Evidence Act, 1872 (1 of 1872).”

³⁷ *Jamaat-E-Islami Hind v. Union of India*, (1995) 1 SCC 428.

the SIMI which it submits as part of the background note. While many of these are fictitious, several are lawful organisations, even registered trusts undertaking charitable works, such as the Popular Front of India, Minority Rights Watch and Khair-e-Ummat Trust.³⁸

A. The Transaction between Civil and Criminal trial

What is interesting here is not simply the bending of evidentiary rules in the tribunal as much as the effects such a long-term ban on/criminalization of an organization like SIMI may have on the criminal trials in which actual persons accused of the crime of being a SIMI member are tried. One of the most pernicious consequences of the endless extension of the ban on SIMI has been the proliferation of SIMI cases across the country. The ban is extended citing the large number of SIMI cases, and Muslim youth are arrested and charged for being members of SIMI on flimsy grounds. It is a tragic tautology that has played out for the past decade and more.³⁹ At the heart of the UAPA are the twin arteries of membership (of unlawful organizations) and conspiracy (of furthering the activities of the unlawful organization). Both, membership to an organization that no longer exists legally, and nebulous charges of conspiracy, are notoriously difficult to pin down. Is it any surprise then that Khandwa police in its most high-profile operation yet ‘seized’ membership forms of SIMI – duly filled in by the accused – conveniently lying around their homes? That seized literature constitutes the bulk of evidence of the conspiracy?

Let me cite two examples here as illustrative of the way in which the ban feeds into the registration of cases and the manner in which it shapes the prosecution of the accused. In the first case from Kota (Rajasthan), several men were picked up or threatened into surrendering three months after the serial blasts in Jaipur in 2008.⁴⁰ They were only wanted for routine pooch taach (questioning) in connection with the blasts; no charges were to be pressed, the police repeatedly assured the frightened men and their families. Days of illegal detention and torture later, these men were accused of spreading communal venom against Hindu gods and goddesses, talking against national unity, integrity and secularism, of involving Muslim youth in anti-national activities, and of carrying on activities of SIMI despite it being outlawed. All of these charges remained vague, with neither the FIR nor the chargesheet making any precise link to any specific terror activity. Nonetheless, elliptical allusions to Jaipur and Ahmedabad serial blasts were made by the police, and the newspapers didn’t take long to present them as key suspects in these blasts.

³⁸ Order of the 2014 UAPA tribunal presided over by Justice Suresh Kait. Copy on record with the author.

³⁹ See *Guilt by Association: UAPA cases from Madhya Pradesh, Jamia Teachers’ Solidarity Association* (2013).

⁴⁰ See *The Case that Never Was: The SIMI trial of Jaipur, Jamia Teachers’ Solidarity Association* (2012).

Four and a half years later, the court acquitted the accused.⁴¹ Of the 43 witnesses lined up by the prosecution, 38 turned hostile, swearing in court that they had been made to sign blank papers by the police. The allegedly proscribed literature seized by the police turned out to be perfectly legal, as it dated to before the ban. This case is fairly representative of the manner in which UAPA cases are framed and prosecuted. The elusiveness of charges is matched only by the infirmity of evidences. Media trials, which link the accused to acts of terror they are not even formally charged with, are conducted; and bail applications rejected repeatedly. The prosecution hopes till the last moment that no one will miss the required sanction. Only, not everyone is as lucky as these men from Kota.

In *State v. Irfan* (FIR No. 251/01, PS Gwaltoli, Indore), the accused was convicted despite a glaring lack of evidence. The prosecution case was that, on the intervening night of 27-28 September, 2001 (the day SIMI was banned) at 12.15, Irfan was pasting posters of the banned organization SIMI on pillar number 14 of the Sarvate bus stand (Indore). He was screaming that though the government had banned SIMI, he would continue to be its member. His antics attracted a crowd. He was arrested and charged under § 10 of the UAPA. The prosecution presented seven witnesses. Of these, three were police witnesses including the Investigating officer; two were from the Ministry of Home Affairs who confirmed the signatures of the authority who granted the sanction for prosecution under the UAPA. The only two independent witnesses – Chandar and Rajesh – denied the police story totally. An expert witness testified that the Urdu literature seized contained nothing against the State or society, and in fact only consisted of veneration of God. It was also accepted by the prosecution that there was nothing against the State in the seized material.

The court convicted Irfan under § 10 of the UAPA, sentencing him to two years of imprisonment and Rs 500 as fine because the police witnesses had testified that they had seen the accused pasting SIMI posters and propagating the banned organization SIMI. Such is the basis of numerous convictions across the state: police witnesses, dubious seizures and little else.

Then there is the domino effect. The Pithampur case of Dhar (FIR no. 120/2008), one of the most prominent SIMI cases of Madhya Pradesh, is also significant in that it set off a chain reaction resulting in the registration of near identical cases across the state. Arrests of 13 leading SIMI activists were allegedly made on 27 March 2008. Immediately after the arrests, on 29 March 2008, the Senior Superintendent of Police, Dhar, shot off letters to various districts of Madhya Pradesh asking for registration of similar cases. These letters immediately set off a chain reaction, resulting in 18 cases within one month, and another four over next six months. This surely must have been a record of sorts! How can we be sure that it was the SSP's letters that produced this result? Not only

⁴¹ *Id.*

do some of these cases so registered make an explicit reference to this letter (for example FIR No. 180/2008, PS Neemach Cantt., dated 08.04.2008), the Investigating officer of the case, B.P.S. Parihar, himself produced 18 of these letters in the SIMI UAPA tribunal in 2010.

In the Pithampur case, the court overruled all objections of the defence, dismissing the lack of panchnamas, overlooking the missing signatures of policemen who recorded the disclosures, and details such as FIR number from the disclosure statements of the accused, rejecting the absence of site map of the farm house from where recoveries were made, as mere procedural lapses. On the other hand, it gave no credence to the delay between the alleged raid in a factory called Silver Oak in Pithampur, and the bakery in Indore, the fact that seizures had not been proved, the presence of the same witnesses throughout the operation which lasted over several days, the absence of local witnesses, and even non-intimation to the local thana in Indore by the raiding party, as perfectly natural and understandable.

It turned down the argument put forth by the lawyer for two of the accused from whose farmhouse the recoveries had allegedly been made, that there was no evidence to prove their culpability in any unlawful activity. True, said the court, nothing documentary has been placed before it to prove their guilt. "However, this does not have an adverse impact [for the prosecution's case] because it is not usually possible to find such proof; one cannot in fact expect or desire formal proof."

The defence also argued that the printed material seized from the farmhouse was literature of a religious nature and therefore not banned. Therefore, no crime could arise from the mere possession of such literature. To this the court said "PW 24 BPS Parihar in his cross examination has refused the suggestion that this literature does not pertain to sedition but only to religion. This seems appropriate since there is Jihadi talk about seeking revenge and it also excites feelings against other community and class. It is a clear and pernicious articulation of the ideology of the banned terrorist organization, and as such may be deemed to be banned, whether or not a notification to that effect has been issued or not."

First, the court does not provide any details of this so-called combustible printed material, which had the potential to excite passions against a particular community or against the State. All it says is that "from the Hindi translation of the texts, it is clear that the following is written: SIMI members are ready to offer any sacrifices on the path of God". It also quotes from another article on Babri Masjid. It similarly refers to lectures and articles in CD and pen drives with titles such as "Jihad in Islam" but does not explain in any length how precisely they may be inflammatory or seditious.

VIII. CONCLUSION

It would appear that the loosening of standards of evidence in the tribunal – a civil adjudication – which leads to the continuous banning of SIMI seeps into the criminal trials as well where due process is short circuited and weak evidence is seen as satisfying the requirements for conviction. The judges while upholding the constitutionality of TADA and POTA had already placed anti terror laws outside the criminal justice regime – as a kind of ‘public order plus’, an excess of law which alone could deal with the problem of the magnitude of terrorism. The UAPA, with its avowed procedural fairness inhering in the tribunal and deference to “objective determination of facts” rather than executive decision making pretends to approximate a criminal justice system rather than a preventive detention regime. But thrives as it does, on paranoia and sense of threat, it is barely masked jurispathy.