

JUDICIAL RESTRAINT IN AN ERA OF TERRORISM: PREVENTION OF TERRORISM CASES AND MINORITIES IN INDIA

Shylashri Shankar*

The article assesses and compares the behaviour of India's higher judiciary on Prevention of Terrorism Act (POTA) cases with the pattern of rulings on previous preventive detention and anti-terror laws in India. It tests the hypothesis in Scaling Justice: India's Supreme Court, Anti-Terror Laws and Social Rights, that POTA cases would see more pro-state rulings, particularly after incidents of terrorism, but that Muslim minorities would not be unduly targeted by the judges. The findings from the 103 POTA cases affirm the hypothesis that the judgments of the high court and the supreme court do not exhibit a pattern of disfavoursing Muslim accused. However, a more disquieting element with worrisome consequences for civil liberties is apparent in the framing of the anti-terror cases. The court is more likely to rule in favour of the state when a case is framed as 'Islamic terrorism'. The impreciseness of this and other terms such as 'urgency' and 'security threat' have expanded the scope of the application of anti-terror laws, diluted the 'due process' protections, and reduced the ability of judges to make a distinction between the political aspirations and the religious affiliation of the accused. This has diluted the procedural and substantive protection for civil liberties of citizens and vulnerable minorities in India.

INTRODUCTION

Terrorism is one of the biggest tests of a democracy's ability to abide by its pre-commitment to fundamental rights. It induces higher levels of insecurity and greater willingness on the part of citizens to allow legislatures to enact laws that may allow secret trials, detention without trial, surveillance, and even torture. Anti-terror laws are particularly insidious because they bypass constitutional and

* Shylashri Shankar is Senior Fellow at the Centre for Policy Research, New Delhi.

Judicial Restraint in An Era of Terrorism: Prevention of Terrorism Cases and Minorities in India

procedural safeguards, thus instituting a ‘dual’ or ‘parallel’ system of justice.¹ Unlike the punitive nature of criminal law, detention and anti-terror laws are preventive, that is, an individual’s autonomy can be curtailed – by tapping phones, by reading e-mails, and by imprisonment - merely on the suspicion that he/she may commit an act that might infringe the security of the state.

Anti-terror legislation is usually enacted against secessionist or global jihadi groups, but, as studies show, the brunt of the enforcement (and the attendant mistakes) is borne by religious, ethnic, and political minorities.² About 140 countries have passed counter-terror laws since Al-Qaeda’s attack on September 11 in America;³ with little debate or reflection on the implications of increasing the draconian powers of the state. India’s Prevention of Terrorism Act (POTA), which expanded the discretionary power of the state to limit liberties in the name of terrorist and seditious activities, was passed by the Parliament on 28 March 2002 after barely ten hours of debate.⁴

The democratic failure school⁵ argues that minorities are most at risk during a terrorist threat because there is a tendency on the part of the state to barter their rights to pay for enhanced security of the majority. In such times, the majority

- 1 UJJWAL KUMAR SINGH, *THE STATE, DEMOCRACY AND ANTI-TERROR LAWS* 70 (2007); Upendra Baxi, *The Rule of Law in India*, 4 *Sur-Revista Internacional de Direitos Humanos* 6, (2007).
- 2 The US’s PATRIOT Act has been implemented in a way detrimental to the civil liberties of minorities, while Turkey’s Law to Fight Terrorism has been used against the Kurdish minority. See Yevgenia S. Kleiner, *Racial Profiling in the Name of National Security: Protecting Minority Travelers’ Civil Liberties in the Age of Terrorism*, 30 *B.C. THIRD WORLD L.J.*, 103 (2010); Edel Hughes, *Political Violence and Law Reform in Turkey: Securing the Human Rights of the Kurds?*, *JOURNAL OF CONFLICT STUDIES*, <http://journals.hil.unb.ca/index.php/JCS/article/view/4513/5324>.
- 3 *Global: 140 Countries Pass Counterterrorism Law since 9/11*, HUMAN RIGHTS WATCH, <http://www.hrw.org/news/2012/06/29/global-140-countries-pass-counterterrorism-laws-911>.
- 4 India is one of the few countries that provides for preventive detention as an ordinary legislative power in times of peace. H.M. SEERVAI, *CONSTITUTIONAL LAW OF INDIA* 50 (N.M. Tripathy ed., 3d ed. 1983). Explanations for this can be attributed to the view held by powerful members of the Constituent Assembly that (i) fundamental rights were seen as gifts of the state which could be curtailed, (ii) the state was seen as a benevolent entity, and therefore (iii) there was no need for courts to oversee the content or requirement of preventive detention. See Suhas Chakma, *Do Ends Justify Means?*, <http://www.india-seminar.com/2002/512/512%20suhas%20chakma.htm>, for a comprehensive list of preventive detention acts.
- 5 Bruce Ackerman, *Terrorism and the Constitutional Order*, 75 *FORDHAM L. REV.*, (2006); Jeremy Waldron, *Security and Liberty: the Image of Balance*, 11 *JOURNAL OF POLITICAL PHILOSOPHY*, 191-203 (2003); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 *MICH. L. REV.*, 2565-95, (2003).

opinion veers towards jettisoning rights and upholding the Roman adage, *salus populi primus lex* – the safety of the people is the ultimate law. The risk increases if these minorities belong to the same religious or ethnic group as those challenging the territorial integrity of a country.⁶

The judiciary, as the interpreter of anti-terror laws, is at the forefront of balancing the demands of security with the obligation of democracy to protect fundamental liberties. Do courts in democracies protect the rights of minorities accused under anti-terror laws? Those who answer in the affirmative see courts as providing a constitutional check on executive power and ensuring democratic accountability.⁷ Their reasoning is that judges are insulated from political preferences and therefore, from majoritarian prejudices, allowing them to act without fear or favour, and protect minorities. But empirical evidence supporting such a view is limited.

A contrary view is held by scholars such as Robert Dahl⁸ who was the first to rebut the hypothesis that a court ‘stands in some special way as a protector of minorities against the tyranny of the majority.’ Rather, judges are more likely to be “jurispathic agents of state coercion”⁹ and the principles of deference align the interpretive acts of judges with the acts and interests of those who controlled the means of violence. Other empirical work supports this view that more often than not, courts defer to the executive during a crisis because of constitutional, institutional, and patriotic reasons.¹⁰ This position has been referred to as national security maximalism or executive unilateralism. Citing evidence from the USA, Asia, and Europe, scholars argue that democracies are no better than authoritarian systems at protecting civil liberties during a crisis¹¹ and that they may even curtail

6 For arguments justifying democratically authorised abridgments of liberties of some in order to preserve the liberties of all, see M. Ignatieff, *Human Rights, the Laws of War, and Terrorism*, 69 SOCIAL RESEARCH 1137 (2002).

7 CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP*, (2002).

8 Robert Dahl, *Decision making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 JOURNAL OF PUBLIC LAW, 279 (1957).

9 Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, (1983).

10 Floyd Abrams, *The First Amendment and the War Against Terrorism*, 5 U. PA. J. CONST. L. 1 (2002); Philip B. Heynman, *Dealing with Terrorism: An Overview*, 26 INTERNATIONAL SECURITY, 24-38 (2001).

11 Tania Cruz, *Civil Liberties Post September 11, Judicial Scrutiny of National Security: Excessive Restrictions of Civil Liberties When Fears and Prejudices are Aroused*, 2 SEATTLE JOURNAL FOR SOCIAL JUSTICE 129 (2004); Eugene Rostow, *The Japanese American Cases- A Disaster*, FACULTY SCHOLARSHIP SERIES, http://digitalcommons.law.yale.edu/fss_papers/2155.

Judicial Restraint in An Era of Terrorism: Prevention of Terrorism Cases and Minorities in India

liberties. Crisis situations are defined as those where the security of the country is compromised by violent secessionist movements and/or threats from terrorist groups.¹² For instance, after the September 11 attack, when the United States Congress passed the PATRIOT Act giving authorities wide latitude to detain and convict citizens without customary burdens of proof, most of the detenus were Muslims.¹³

Cole¹⁴ highlights the four main reasons why traditional explanations would argue that courts are likely to fare poorly on matters of national security during a crisis. First, judges, notwithstanding their independence, are members of state institutions and are likely to identify with other institutions such as the Parliament and the Army when the security of the country is at stake. This, coupled with a ‘rally around the flag’ effect makes judges less likely to stand above the crisis. Secondly, crisis situations inherently push the judges to defer to the Executive since the court lacks complete information to assess the validity of the threat. As Cole and others point out,¹⁵ the US Supreme Court’s decision in *Korematsu*,¹⁶ where it deferred to military claims of necessity as sufficient reason for interning Japanese-US citizens, was later shown to be based on an inaccurate record. Thirdly, if the court rules against the executive on a matter of national security, they may face and most likely lose a challenge to their credibility and legitimacy. Finally, judges might worry that their decision might be followed at some subsequent cost to national security.

The reasons proffered by both approaches for a particular type of judicial behaviour could cut either way. Sunstein¹⁷ rightly points out that institutionally, judicial independence (structural and operational) does not guarantee impartiality

12 Lee Epstein, Daniel E. Ho, Gary King, and Jeffrey A. Segal, *The Supreme Court During Crisis-How War Affects Only Non-War Cases*, 1 N.Y.U. L. REV. 80 (2005).

13 The Council of American Islamic Relations received 1522 reports of abuse under the Act, but unreported cases are higher, says the BBC. See Jenny Cuffe, *US Muslims ‘alienated from Patriot Act’*, BBC NEWS, http://news.bbc.co.uk/2/hi/programmes/file_on_4/5145970.stm.

14 Cole, *supra* note 5. He argues that a less pessimistic evaluation of judicial performance on matters of national security is warranted if we ask what role have judicial decisions played over time in framing the options available to the Executive. He argues that courts have restricted the options for the Executive in the next Emergency.

15 *Supra* note 5.

16 *Korematsu v. United States*, 323 U.S. 214, 246 (1944).

17 R.Sunstein, *Minimalism at War (Preliminary Draft 12/3/04)*, SOCIAL SCIENCE RESEARCH NETWORK, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=629285.

or neutrality of judges or an inherent tendency towards the protection of the content of rights. For instance, judges cannot always know whether they are right, even about the meaning of the constitution.¹⁸ Even constitutional doctrine could be interpreted in various ways - the presence of the emergency powers doctrine in the constitution could facilitate deference to the executive, while a basic structure doctrine could allow judges to subject laws to strict scrutiny.¹⁹ It would, therefore, be more useful to assess the conditions under which a judge might protect or imperil the civil liberties of citizens, including minorities.

I. SCALING JUSTICE AND ANTI-TERROR LAWS

In *Scaling Justice: India's Supreme Court, Anti-Terror Laws and Social Rights*,²⁰ I argued that judges, who want their judgements to be perceived as legitimate (i.e. principled, objective, and just), have to carve out legitimacy within the scope and opportunities offered by four elements: the presence and content of laws; institutional experience and norms; political configurations; and public concerns. The quest for legitimacy on the part of the judiciary, I argued, increased after a bout of political authoritarianism. I tested the argument through an econometric analysis of cases dealing with civil liberties and social rights (the rights to health and education), outlined the conditions and processes by which one element trumps the others in influencing a judgment, and assessed the implication for the content of the rights. The empirical evidence confirmed that the process of judging involved constant negotiation with multiple identities of a judge—as a member of a state institution that is subject to the influences of the political wings; as a member of a judicial structure with its own norms; and as a citizen-member of society.²¹ An econometric analysis of 185 cases (from 1950-2006) - 65 pertaining to preventive detention, and 120 to anti-terror legislation, the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA)- demonstrated that in the last six decades, successive Supreme Court judges crafted rulings that would be non-confrontational vis-a-vis

¹⁸ *Id.*

¹⁹ Epstein, Ho, King and Segal, *supra* note 12.

²⁰ SHYLASHRI SHANKAR, *SCALING JUSTICE: INDIA'S SUPREME COURT, ANTI-TERROR LAWS AND SOCIAL RIGHTS*, (2009).

²¹ A Supreme Court judge in India tends to be middle class, Hindu, from a professional family, predominantly male, armed with an LLB and some experience as a lawyer for a state government before joining the judiciary.

Judicial Restraint in An Era of Terrorism: Prevention of Terrorism Cases and Minorities in India

the state, while simultaneously supporting the rights of vulnerable groups. A Supreme Court judge typically upheld the petitions of Muslim minorities and other citizens who did not advocate secessionism, supported the state against those espousing Kashmiri separatist ambitions, and in framing a judgment, was more likely to focus on the facts of the case rather than decide on the basis of prior ideological or personal biases.²² The book concluded that it was apt to call an Indian Supreme Court judge an “embedded negotiator” who had a complex and nuanced relationship with the law, institutional rules, politics, and public concerns.

The analysis in *Scaling Justice* highlighted nuances in judicial behaviour on civil liberties that corroborated and challenged several aspects of existing theories. First, the deference of the court to the other wings of the state is determined less by institutional or constitutional dictates, and more by the nature of the crisis, adding texture to the executive unilateralism position. I compared judgments issued in the years that India was embroiled in a war with those delivered in non-war years, but did not find a significantly different treatment of the accused during wars.²³ The behaviour of India’s Supreme Court (henceforth, SC) during wars does not follow the conventional view that judges would be pro-state during a crisis. A judge seemed to distinguish between two types of threats. Terrorist attacks (rather than wars) evoked more deference to the other wings of the state, but not necessarily at the cost of incursions into the civil liberties of minority groups. A Supreme Court judge was more likely to rule in favour of the state after a terrorist attack than during a war. Why that is so is harder to answer. I had speculated that this was because terrorism’s targets were both citizens and soldiers, which brought concerns of public safety and a citizens’ security to the fore. In contrast, a war is

22 116 judges served on different benches to hear 194 anti-terror cases. Of these, 86 judges heard more than 1 case, and I created a new variable that pertained to this group, and had four sub-categories. About 40% of the judges were pro-state 50 to 75% of the time, 19% were pro-state 75 to 99% of the time, 10% were always pro-state, 7% were always anti-state, and 20% were anti-state less than 50% of the time. A probit analysis on the characteristics of these judges, like years served, religion, home state, and party configurations during their appointments to the higher judiciary, among others was conducted. The only significant finding was that judges who decided larger number of anti-terror cases were more likely to change their mind as compared to judges who decided fewer cases. Neither a probit nor a chi-square test produced any other significant results. Perhaps the statistical results could not pick up variations because these 86 judges may have had too many characteristics in common.

23 These cases involved civilians and pertained to grain hoarding, possession of explosives, and threats to state security, among others.

usually fought only by soldiers. The court's view in *PUCL v. Union of India*²⁴ seems to endorse my speculation. The petitioners, who were civil rights activists, challenged the constitutional validity of POTA. Pointing out that the fight against terrorism was not a regular criminal justice endeavour, but rather a defence of the nation and citizens, the court said that terrorism was a new challenge for law enforcement. It said, "To face terrorism we need new approaches, techniques, weapons, expertise and of course new laws (such as POTA)."

Secondly, the analysis revealed that even if the court is deferential to the executive during a crisis, it can protect the rights of minorities under certain conditions, such as in the immediate aftermath of political authoritarianism. The Supreme Court of India, which had failed to safeguard civil liberties during the Emergency from 1975-77, balanced two imperatives – its need for legitimacy in the eyes of citizens, and its desire to avoid overt conflict with the political elite. Questioning the validity of detentions under anti-terror laws would have pitted the judiciary against the other wings of government, and could even have tarred the institution with an anti-national and anti-citizen image—a charge the apex court was trying to reverse in the post-emergency period.²⁵ Therefore, on the one hand, judges followed the proclivity of the Indian Constitution towards giving the state immense power to discipline and punish recalcitrant individuals. Despite earning the tag of 'judicial activism' in the arena of socio-economic rights, there was a noticeable absence of such activism on the rights of detainees under anti-terror laws, and this was consistent with the hawkish position of successive governments that national security trumped civil liberties. On the other hand, they made a distinction between the religious and political affiliations of minorities, and protected those who did not have separatist political goals. Judgments were significantly less likely to favour the state against a Muslim litigant without separatist ambitions, but more likely to support the state when Kashmiri separatists were in the dock. Thus, overall, while the court supported the state's coercive position (confirming Cover's analysis of its jurispathic nature), the judges also found ways to oppose the violence of other state organs by scrutinizing cases registered against religious minorities. I assessed the Supreme Court's attitude towards Muslims charged under preventive

24 *PUCL v Union of India*, (2003) 4 SCC 399.

25 S.P. SATHE, *JUDICIAL ACTIVISM IN INDIA* (2002).

Judicial Restraint in An Era of Terrorism: Prevention of Terrorism Cases and Minorities in India

detention, TADA and POTA during those years when India was involved in a war. Judgments were 23% *less likely* to favour the state when a Muslim accused was involved in a case decided in a war-year, leading one to the conclusion that in a war-related crisis, vulnerable minorities are not more at risk in the legal arena.

What of a crisis induced by terrorism? I tested judicial behaviour towards Muslim plaintiffs/defendants after 2001 (this year saw the September 11 attack on the World Trade Centre in New York and the December 13 attack on the Indian Parliament), but the small size of the dataset did not allow me to reach a definitive conclusion.

Thirdly, the econometric models demonstrated that judicial independence was less of an explanatory variable in the way judges behave on civil liberties.²⁶ The crisis of legitimacy and the nature of the national crisis were more influential explanations for the court's judgments. Once such scrutiny was established, judges continued the practice because of institutional (collaboration with colleagues) and legal norms (precedents).

In the concluding discussion in *Scaling Justice*, I had hypothesised that POTA cases would see more pro-state rulings, particularly after incidents of terrorism, but that Muslim minorities would not be unduly targeted. Is my hypothesis supported by the empirical evidence? How has POTA been used, and what are the implications for civil liberties in general and for the civil liberties of Muslim minorities in particular? Does the protection for Muslim minorities continue in POTA cases particularly when there is no clear political (separatist) ambition? I will address these questions in the following sections.

The Scope of Anti-Terror Laws

India, the world's most populous parliamentary democracy with "the most powerful court in the world"²⁷ following the common law system, has a large Muslim minority with a complicated history of strife with the Hindu majority.

26 I took the *Second Judges'* case (Supreme court Advocates-on-Record Association and Anr. vs. Union of India, 1993 Supp (2) SCR 659) in 1993 (when the court decreed that the concurrence of the Chief Justice was required in judicial appointments thus minimizing the *de jure* dependence on the political wings) as the cut-off point and examined the probability of a pro-state ruling before and after 1993. There was very weak corroboration (at the 10% significance level) that post-1993 verdicts were more likely to be anti-state than pre-1993 rulings.

27 George Gadbois, *Indian Supreme Court Judges—a Portrait*, 3 LAW & SOC'Y REV. 317–36 (1968).

It has experienced secessionist movements in Kashmir, the North East, and Punjab. Polarization of Hindus and Muslims has increased in recent decades with a resurgence of Hindu nationalism and its ascendance to power in the national and regional arenas. The Indian state has designed a vast panoply of anti-terror and preventive detention laws since independence (see Appendix).

POTA included as crimes activities performed with an ‘intent to threaten’ national integrity, and allowed for admissibility of confessions extracted in police custody. The Appendix demonstrates that the definition of actions included in the scope of these laws has grown broader, and that the burden of proof has shifted from the prosecution to the accused, thus impacting negatively on civil liberties of all citizens. More recently, after repealing POTA (which was enacted by the BJP-led National Democratic Alliance coalition), the Congress-led United Progressive Alliance (UPA) government amended the Unlawful Activities Prevention Act (UAPA) of 1967 in 2004 and again in 2008. UAPA 2008 draconised some elements (the definition of intent included “likely to threaten”), reduced the stringency of other elements (detention without bail was reduced from six months in POTA to three months in UAPA 2008, and confessions made during police custody were not to be admissible as evidence), and retained some provisions (e.g. the accused can be in police custody for 30 days). The features retained by UAPA 2008 (drawn from POTA) that civil liberties activists have found troubling included: (i) a vague definition of ‘terrorist act,’ and ‘abetment’ (Section 15); (ii) absence of statutory procedures on including organizations in the ‘terrorist’ list, with the result that the onus of establishing innocence, without knowing the reason for their inclusion, rests with the proscribed organization; (iii) assignment of official immunity to state officials involved in counter-terrorism, which has the effect of impeding the prosecution of officials acting in bad faith (Chapter VII, Section 49), and; (iv) allowing the death penalty for those whose terrorist act shall, ‘if such act has resulted in the death of any person’ (Chapter IV, Section 16a). In the next section, we will assess the impact of the judiciary’s interpretations of POTA cases on civil liberties including the liberties of minority groups.

Comparison of POTA, TADA and Preventive Detention cases

First, a descriptive analysis of the POTA cases would be useful. Of the 103 POTA cases in the higher judiciary from 2001 to 2011, about 20% were appealed in the apex court. The High Courts of Gujarat and Tamil Nadu accounted for about 20% (each) of the cases, followed by Maharashtra/Bombay (13%) and Delhi (12%).

Judicial Restraint in An Era of Terrorism: Prevention of Terrorism Cases and Minorities in India

In 92% of the cases, the petitioners were non-state, which means that the judgments in the lower courts (trial/special courts) have been overwhelmingly pro-state. Over 80% of the cases dealt with bail, custody, challenge of interlocutory orders and writs, and clarifying the legal position vis-à-vis POTA. Over 70% of the cases were framed by the state as a terror case pertaining to actual and imminent attacks (48%), recovery of arms and funding of terror (23%). Of these, about 37% involved Islamic terror, 19% were Naxal-related, 8% pertained to the LTTE, and about 10% involved communal riots.

Table 1: Issues in POTA Cases

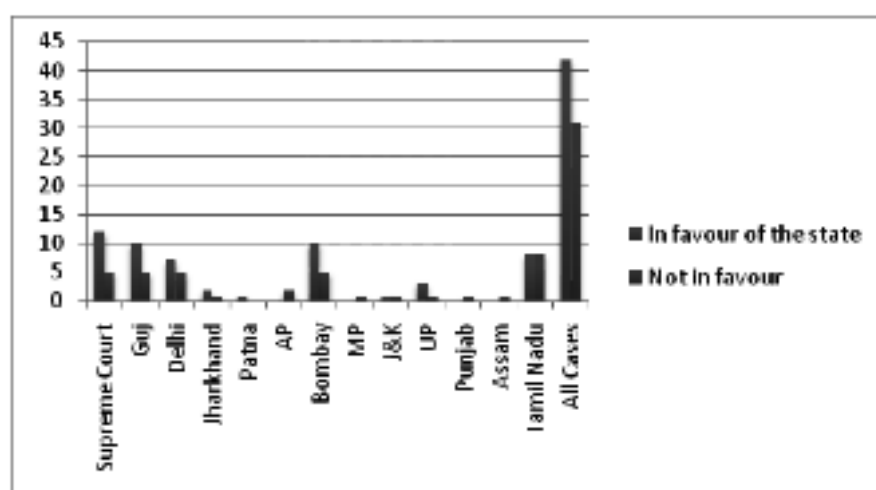
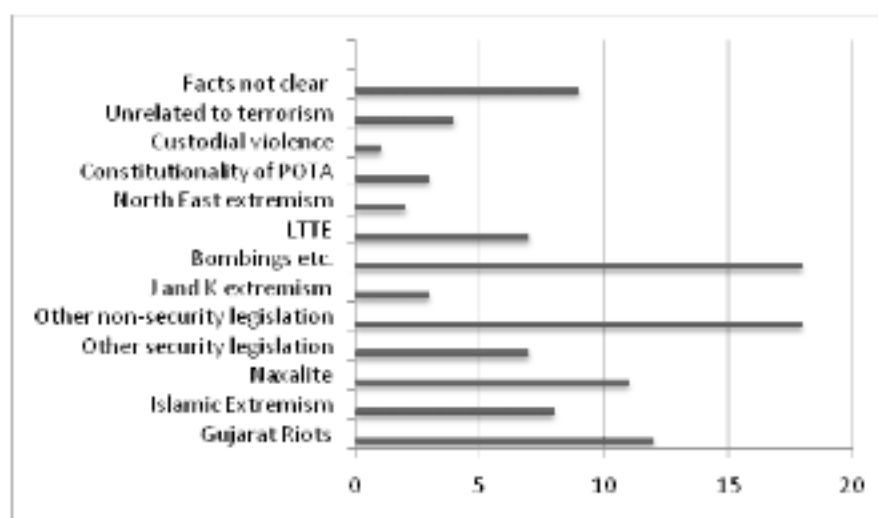


Table 2: Judgments in POTA



A comparison of judgments in preventive detention, TADA and POTA cases reveals the following:²⁸ First, there is a shift away from pro-state rulings after the Emergency i.e. in TADA cases (as compared to preventive detention cases) but a return to pro-state judgments in the POTA cases. The state obtained a favourable ruling in less than half the TADA cases, as compared to over 65% of preventive detention cases and 60% of POTA cases. In *Scaling Justice*, I argued that after a crisis regime like the Emergency rule of 1975-77 in India, the judiciary recovers public legitimacy by casting itself as a protector of vulnerable groups.²⁹ A judge was 48% more likely to give a pro-accused ruling in a TADA case as compared to preventive detention case, indicating a shift by post-Emergency judges. So what explains the switch to pro-state rulings in POTA? We shall explore some of the reasons for this behaviour shortly.

Secondly, in all three sets of cases, Supreme Court judges upheld the right of Parliament to make draconian laws, confirming that the judiciary follows the constitutional emphasis of privileging security over the rights of detenus.³⁰ Judges interpreted the laws in line with what they saw as the intent of the Constituent Assembly - fundamental rights were hedged in by restrictions imposed on grounds of National Emergency to be determined by the Parliament, and legal rights were suspended in cases dealing with state security. In *PUCL v Union of India*³¹ where the validity of POTA was challenged, the Supreme Court said that the need for the Act “is a matter of policy and the court cannot go into the same, once legislation is passed, the government has an obligation to exercise all available options to

28 Please note that while the TADA and preventive detention cases pertain to the Supreme Court of India, the POTA cases include the judgments of the High Courts and the Supreme Court.

29 The CJI's opinion in the *Habeas Corpus* (ADM Jabalpur V. Shivkant Shukla AIR 1976 SC 1207) case (which challenged an emergency law, the Maintenance of Internal Security Act, 1971) in 1976 that the judiciary should abandon all scrutiny of governmental control of individual activities once an emergency was proclaimed, was vilified in the public domain particularly since the Executive had egregiously misused such powers. One of the concurring justices, Chandrachud, who had agreed with the majority view even apologized to the public much later saying that he wished he had had the courage to resign during the trial. See Speech to FICCI on 22 April 1978, *Hindustan Times*, 23 April, 1978.

30 While special courts or the High Court functioned as trial courts for anti-terror cases, the Supreme Court had the final word on appeals and constitutional challenges to the anti-terror laws. In TADA cases, which were tried by special designated courts, appeals had to be lodged within 30 days in the Supreme Court.

31 *PUCL v Union of India*, (2003) 4 SCC 399.

Judicial Restraint in An Era of Terrorism: Prevention of Terrorism Cases and Minorities in India

prevent terrorism within the bounds of the constitution. Mere possibility of abuse cannot be a ground for denying the vesting of powers or for declaring a statute unconstitutional.”

Thirdly, the scope of issues to which anti-terror laws have been applied has expanded over the decades. In *Ram Manohar Lohia v. State of Bihar*,³² the Court explained the difference between three concepts: law and order, public order, and the security of the state by referring to three concentric circles. The largest circle represented law and order, the next represented public order, and the smallest represented security of the state.³³ The court’s view was that every infraction of law must necessarily affect order, but an act affecting law and order may not necessarily also affect the public order. Likewise, an act may affect the public order, but not necessarily the security of the state. Anti-terror laws were applicable only to those actions that affected the security of the state.

Let us use the court’s yardstick to classify the cases. Using the description in the judgment, we slotted the cases into seven categories.³⁴ These were village feuds, criminal cases, security of the state, arms and possession of country-made guns without a license, grain hoarding, and possession of explosives unrelated to security threats. The spirit of the law and the apex court’s delineation of the ‘concentric circles’ argument demands the use of a security law only if the person’s actions threatened the ‘security of the state’. About 53% of preventive detention cases and 65% of POTA cases pertained to security of the state, compared to only 35%

32 *Ram Manohar Lohia v. State of Bihar*, AIR 1966 SC 740.

33 The Court agreed with Lohia that the magistrate wrongly used ‘public order’ and ‘law and order’ synonymously. A threat to law and order, mentioned in detention order, was not the same as public order; hence the order was invalid.

34 I used the description of the case given by the judge, thus minimizing the effect of my own biases in the classification. If the judgment said that the case involved a dispute between villagers that did not threaten the security of the state, it was coded as ‘village feud’. These cases include instances such as confirmation by an eye witnesses that the accused shot a man with an AK-47 gun to take his tractor, or when a man in a village shot his neighbour with a gun for which he did not have a license. Criminal cases were those where the issue was criminal (for example, gang warfare) and the police used anti-terror laws to detain criminals. Cases where the judgment said involved a threat to the security of the state were coded as ‘security’. Cases involving grain hoarding (usually during a war) were present only in the preventive detention dataset. There were two more categories—possession of arms without a license, and possession of explosives unrelated to security threats (for example, an accidental explosion of firecrackers). Anti-terror laws were supposed to be used for cases in the ‘security of the state’ category.

of TADA cases. The judge made a distinction (particularly in the TADA cases) between those that dealt with criminal acts— in over 60% of such cases he rejected the use of anti-terror laws—and those that affected the security of the state. In POTA cases on the other hand, the trend seems to have reversed since the judgments of the higher judiciary classified about 60% of the cases as relating to a threat to the security of the state. Other evidence indicates that there is over-use of POTA laws.³⁵ What is also striking is that about a fifth of the POTA cases did not relate to terrorism.

It could be pointed out that we live in a more dangerous world and therefore POTA is being used more frequently. I tested to see if the perception that security threats have increased actually reflects reality. As a proxy, the sufficiency of the evidence in cases classified by the court as security threat to the state was assessed. Of the forty POTA cases framed by the prosecution as pertaining to the state security, the judiciary found sufficient evidence in only half the cases. This implies three things. First, that the tendency of the prosecution to frame the case as a ‘threat to security of the state’ has risen since over 50% of POTA cases had that rationale attached to them. In *Scaling Justice*, I had predicted that “if the state prosecution structures the case as involving terrorists or terrorism, the state is more likely to be the winner. Though the dataset on POTA is very small the higher success rate of POTA cases implies a worrying trend for civil liberties, particularly if the shift occurred because the cases were framed as involving terrorist threats to the state.”³⁶ The prediction has been borne out by the larger dataset. Secondly, the court has not blindly adopted the prosecution’s rationale since in 10 cases (one-fourth) it found insufficient evidence for such a claim. Thirdly, the perception of a threat seems to be exaggerated.

What does the comparison tell us about the effect of POTA on the civil liberties of citizens? First, it highlights the fact that in POTA cases, judges have not reduced the scope of over-use of security laws by the police and other authorities. The second implication is that in a ‘security-conscious’ environment, judges interpret

35 The over-use of anti-terror laws is evident in the gap between the numbers arrested and the ones actually tried and then convicted. The findings of three POTA Review Committees revealed that of the 1529 POTA accused, no prima facie evidences was found against 1006, that is, POTA was not applicable to two-thirds of the accused, most of whom were charged in the states of Gujarat and Jharkhand. See SINGH, *supra* note 1, for an analysis of POTA and TADA and the negative implications for democracy.

36 SHANKAR, *supra* note 20, at 103.

the laws in a manner that supports the state in the face of security threats, however broadly defined. In the TADA and preventive detention cases, there was a 19% increase in the probability of a pro-state outcome when the case pertained to security concerns, while in POTA cases this probability has doubled. This backs the arguments of a ‘conservative’³⁷ thrust of the court in its response to challenges to the territorial integrity of the state, and echoes the behaviour of judges elsewhere in the world. The third implication is that the civil rights activists are right to charge the police and other authorities with ‘over use’ of anti-terror laws to imprison criminals and others unrelated to terrorism. Such over-use debunks the emphasis by many (such as the Malimath Committee) on the need for strong anti-terror laws. It also provides a strong rebuttal to those who argue that the magnitude of possible destruction by terrorists necessitates firm and preventive response from the state through intrusive anti-terror legislation.³⁸ Instead, our findings support the view that such legislation could increase the propensity of state agencies to use these laws to arrest those unconnected with crimes against the state. Several studies and reports by civil rights activists and scholars show the vast slippages between arrests and convictions, the disproportionate arrests of Muslims, and the insidious normalization of these laws by their incorporation into ordinary criminal law.³⁹

Let us now turn to the effect of judicial interpretations of POTA cases on the civil liberties of minorities, particularly Indian Muslims.

II. IMPLICATIONS FOR CIVIL LIBERTIES OF MINORITIES

In preventive detention and TADA cases examined in *Scaling Justice*, neither Muslims nor Sikhs were targeted by the judges.⁴⁰ India’s Supreme Court judges made a distinction between the religious and political affiliations of the minority

37 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY- VOLUME 1 (4th ed.1991); M.P. JAIN, CONSTITUTIONAL LAW: VOLUME 1 AND 2 (2003); Baxi, *supra* note 1.

38 For arguments that war on terror requires surrendering some civil liberties, see Floyd Abrams, *The First Amendment and the War Against Terrorism*, 5 U. PA. J. CONST. L. 1, 5, 10–11 (2002); Philip B. Heymann, *Civil Liberties and Human Rights in the Aftermath of September 11*, 25 HARV. J.L. & PUB. POL’Y 441, 441–2 (2002).

39 Anil Kalhan, *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 COLUM. J. ASIAN L. 93 (2006); 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 (Preethi Verma ed., 2004); SINGH, *supra* note 1.

40 In Gujarat, the percentage of Muslims in the state was 9%, but they made up over a quarter of all jail inmates. Of the 75 instances of poor circumstantial evidence and due process not followed, only a quarter had Muslim litigants. This implies that cases with Muslim accused were not more likely to be dismissed for flimsy evidence.

litigants, and supported Muslim minorities without separatist ambitions, were anti-Kashmiri separatists, and pro-state after a terrorist crisis (without targeting minorities). More experienced judges were more likely to give the benefit of doubt to Muslim litigants.⁴¹ Judges, particularly Hindu judges, shunned majoritarianism and made a distinction between religion, separatism and security of the state, and between Sikh and Kashmiri separatism.⁴² A judge was more likely to be anti-state when the litigant had no political affiliation. A judge was 21 per cent less likely to favour the state when a Muslim was the plaintiff or defendant. In cases where the accused was a Muslim (not a Sikh or a Hindu), decisions by a Hindu judge (who comprised 87% per cent of all Supreme Court judges in our database) were 34% less likely to favour the state. TADA cases involving Muslim litigants were 38% less likely to be decided in favour of the state, as compared to preventive detention and POTA cases.

The models did not display significantly different treatment for Khalistanis. I had suggested that the harsh attitude towards Kashmiri militants could be because unlike Khalistani separatism, which was treated more as a law and order issue and tackled primarily by the police, the historical indeterminacy of Kashmir's status, the tussle with Pakistan, and the deployment of the Indian army contributed to the perception of Kashmiriyat as a threat to the integrity of the Indian state. In contrast, despite the utilization of the Indian army in Punjab on several occasions including Operations Bluestar and Black Thunder, Khalistani separatism was seen as an indigenous movement. Textual analysis of some judgments after 2000 shows that judges gave the benefit of doubt and weaker sentences to Khalistanis citing the pacification of militancy in the Punjab. Judges reverted to their old attitude of giving the benefit of doubt and weaker sentences to Khalistanis. For instance, the judgment in one case said:

41 We ran a similar regression with preventive detention cases, but found no significant results which means that judges deciding the pre-emergency preventive detention cases were neither more nor less likely to rule for the state when a Muslim accused (as compared to Hindus or Sikhs) was involved.

Note: Unless otherwise specified, the statistical significance of all the results discussed in the paper have p-values that range between .001 to .05.

42 We examined the judgment and if the judge linked the litigant to Kashmiri, Khalistani, extremism (Naxalite and other forms), then the litigant was coded as having a political affiliation. Otherwise, the case was coded as "no affiliation". This allows us to judge the judges on the basis of their statements without including one's own opinions. We had information on political affiliation drawn from the judgments for 104 (about 50% of our cases). Of these, 23% had affiliation with Khalistan (Sikh homeland), 24% with Kashmiriyat (Kashmiri homeland).

Judicial Restraint in An Era of Terrorism: Prevention of Terrorism Cases and Minorities in India

Nonetheless, we are inclined to show some leniency in the matter of sentence despite the largeness of the explosive substances involved. This is because the situation in Punjab has now admittedly improved very much and peace has come back to that region. Therefore, it is not necessary in this case to award a sentence beyond the minimum fixed by the statute. We, therefore, reduce the sentence of imprisonment to five years as for each of the appellants.⁴³

In TADA and preventive detention cases, the higher likelihood of pro-state rulings during single-party majorities did not correlate with an anti-minority attitude of Supreme Court judges.⁴⁴ This indicates that a sense of crisis rather than the dominant coalition partner's ideology influenced the pro-state nature of the judgments. The judges did not target religious minorities even when the political party in power had an ideological anti-minority preference. The BJP-led rule from 1998–2004 coincided with heightened security concerns induced by a low intensity war with Pakistan in Kargil in 1999, nuclear detonations by India and Pakistan in a bid for nuclear power status, and increased terrorist threats from global jihadis and separatist groups. Of the seventy one judgments issued during the NDA rule, 64% were anti-state during 1998–2000, while 70% of judgments were pro-state after 2001. Even in an atmosphere of increased concerns about terrorism by Islamist jihadi groups led by the Al-Qaeda and others after 2001, the Supreme Court of India did not target Muslims.⁴⁵ Does this pattern hold for POTA cases? What is POTA's impact on minorities?

⁴³ Jeet Singh and Anr v State of Punjab, (2000) 9 SCC 588.

⁴⁴ Judges were strongly likely to be anti-state during a coalition/minority government as compared to single-party majority rule (Table 4.1, Model 5, Scaling Justice). In 53% of the judgments, the Congress party led the Central Government (either as a single-party majority or as the head of a minority or coalition set up), while the BJP lead a coalition for 44% of the judgments, and other parties for the remaining 3%. A judge was 17% more likely to favour the state when the BJP was in power heading a multiparty coalition at the centre (Model 1, Scaling Justice). This is a puzzling result since judges were more likely to rule against the state during coalition governments. Our results support the view held by scholars that courts will be more willing to scrutinize rights-based cases during coalition rule because of the partisanship and immobilism besetting the elected institutions. See MARTIN EDELMAN, COURTS, POLITICS, AND CULTURE IN ISRAEL (1995).

⁴⁵ In *Scaling Justice*, I tested the behaviour of judges towards Muslim litigants after 2001, but found no significantly different treatment of these litigants.

First, the Muslim minorities who are only 13.4% (2001 Census) of the population, comprise almost 40% of the accused in POTA cases. In about 65% of the cases with Muslim accused, the prosecution framed it as a terror case, and over 80% of these cases were classified as Islamic terror. The state emerged the victor in about 66% of these cases where a Muslim was among the accused, while the corresponding percentage for Hindu accused was 49%. I ran a probit on the characteristics that increased the marginal probability of a pro-state ruling. Cases in the Gujarat HC are more likely to be pro-state than cases in other high courts, while the cases in the Supreme Court are neither more nor less likely to favour the state. However, the religion of the judge and of the accused did not show significance, implying that an anti-Muslim bias is not apparent on the part of the judge, thus continuing the pattern from the earlier TADA and PD cases.

Secondly, the state has increasingly framed POTA cases as involving terrorists or terrorism, and the court has agreed with such a framing in about 70% of the POTA cases. This is a departure from the pattern in TADA cases. While judges tend to rule for the state in cases dealing with security threats, the more problematic aspect is the question of what constitutes a security threat since the parliament did not include definitions of 'terrorism' and 'terrorist act' in the content of TADA and POTA. In TADA cases, the judges used the scope offered by ambiguities in the definitions to dismiss cases but less so in the case of POTA. This could be because of the larger scope offered by the definition of an act that is a threat to the security of the state — intent to threaten in POTA, and intent that is likely to threaten in UAPA 2008 (see Appendix). The large ambit of the definition could be a reason why a majority of the POTA and post-POTA cases are classified by the prosecution and by the court as terror-related cases, as compared to 42% of TADA and preventive detention cases. A more worrying phenomenon in POTA cases (albeit a few), particularly for the Muslim minorities, is that in some instances where the court saw a threat to the security of the state, it was liable to ignore lapses in the procedures and the paucity of evidence and rule in favour of the state. It sends worrying signals for the 'due process' aspects of the law in anti-terror cases.

Thirdly, we saw in preventive detention and TADA cases that the Court made a distinction between the religious faith of the litigant and political goals of separatism and punished only those espousing separatist goals. Judgments were significantly less likely to favour the state against a Muslim litigant without separatist ambitions, but more likely to support the state when Kashmiri separatists were in the dock.

Judicial Restraint in An Era of Terrorism: Prevention of Terrorism Cases and Minorities in India

The problem in POTA is in the way the cases are framed (as Islamic terrorism) and the greater leeway given by the court to the state for some types of framing. Cases framed as 'Islamic terrorism' were more likely to receive a pro-state verdict than cases framed as Naxal, LTTE, communal riot and other cases. But the term 'Islamic terrorism' is vague and does not carry with it a separatist intent as 'Khalistan' and 'Kashmiriyat' do. As a result, judges seem less able to make a distinction between the religious and political aspirations of the litigants in POTA cases.

CONCLUSION

The profile of POTA cases affirms the claim of civil rights activists that the tendency of the police and the prosecution to classify criminal and other non-security of the state related crimes as "terrorism", has shrunk the civil liberties of citizens and of vulnerable minorities. The judiciary's interpretations, which show an increasing propensity to allow more cases under such laws while also diluting the protection of civil liberties, have worsened matters. For instance, the court allows for non-compliance with the requirement for judicial custody at times of 'urgency', but the notion of urgency is ambiguous.

In *Scaling Justice*, a cross tabulation suggested that over 60% of the judgments favoured the state when there was a single-party majority government, as compared to only 46% during coalition rule. The econometric results affirmed it; judges were strongly (27%) likely to be anti-state during a coalition/minority government as compared to single-party majority rule. If courts, who make a distinction between a terrorist strike and war, are also more likely to be pro-state after a terrorist attack, the possibility of more pro-state rulings in anti-terror cases is much higher in a political scenario where terrorism occurs during a majority government. The emergence of a majority government led by a party that espouses a Hindutva ideology in a situation of domestic and international attacks by groups claiming to be Islamic, creates a situation of majority party government and a crisis situation. The saving grace is that judges in India's higher judiciary do not demonstrate an anti-Muslim bias, thus contradicting the general applicability of a theory that judges will be biased towards their own ethnic or religious groups after a terrorist attack. Shayo and Zussman for instance, have found an in-group bias (by Arab and Jewish judges towards their own groups) that is strongly associated with the intensity of terrorism in the vicinity of the court in the year

preceding the ruling.⁴⁶ However, the disproportionate numbers of Muslims charged with terrorism and imprisoned (while awaiting trial), the growing scope of anti-terror laws and the propensity on the part of the court to ally with the other arms of the state after a terrorist strike do not bode well for civil liberties. While the political ideology of the party in power seemed to be less of a factor in influencing the court's judgments - the tenor of judgments became more pro-state after 2001, and not after 1998 when the BJP led a coalition government at the centre - we do not have adequate data (cases) to test whether the ideology of the party in power will indeed matter, particularly for the Muslim minority, in a situation when that party runs a majority government and there is an ongoing perception of a national security crisis. The creation of a new National Judicial Appointments Commission in 2015, with representation from the executive, which will be able to play a greater role in appointing the two other non-judicial members, may reduce the ability of the judiciary to withstand political pressure.⁴⁷ In the past, the judiciary as an institution was able to stymie such pressure (at least at the entry point) by seizing the power to appoint judges. But it is unlikely to be able to do so anymore. Other factors such as the urge on the part of some judges to garner post-retirement appointments to tribunals and other bodies will continue to complicate the judiciary's capacity to create a zone of autonomy and impartiality from the political arm of the state. These developments do not bode well for civil liberties in general, and for vulnerable minorities in particular.

46 Shayo and Zussman, *Bias in the Shadow of Terrorism*, THE QUARTERLY JOURNAL OF ECONOMICS (2011), doi: 10.1093/qje/qjr022.

47 The Commission will comprise the CJI and two senior judges in the Supreme Court, the Union Law Minister, and two eminent personalities appointed by a selection committee with the CJI, the Prime Minister and the Leader of the Opposition. The veto power rests with any two members who disagree with the appointment or transfer of a High Court or Supreme Court judge.

Appendix

Issue	Preventive Detention Act, 1950	Armed Forces Special Powers Act, 1958	Terrorist and Disruptive Activities (Prevention) Act, 1987	Prevention of Terrorism Act, 2002	Unlawful Activities Prevention (Amendment) Act, 2004	Unlawful Activities Prevention (Amendment) Act, 2008
Definition of acts that pertain to this law	With a view to prevent him from acting in any manner prejudicial to (a) the defence of India, relations of India with foreign powers or the security of India; or (b) the security of a state or the maintenance of public order.	Can fire upon (after due warning), search premises and arrest without a warrant for the maintenance of public order, to prevent cognizable offence in areas that it declares “disturbed areas”.	Intent to overawe the Government as by law established or to strike terror or alienate any section of the people or to adversely affect the harmony amongst different sections of the people.	Intent to threaten integrity, security or sovereignty of India or to strike terror in the people.	Same as POTA.	Intent that is “likely to threaten”. Widens the scope and includes offences related to radioactive or nuclear substances and attempts overawe state or public functionaries (similar to TADA).

Issue	Preventive Detention Act, 1950	Armed Forces Special Powers Act, 1958	Terrorist and Disruptive Activities (Prevention) Act, 1987	Prevention of Terrorism Act, 2002	Unlawful Activities Prevention (Amendment) Act, 2004	Unlawful Activities Prevention (Amendment) Act, 2008
Bail	30 days to 1 year (on hearing prosecution)	Any person arrested and taken into custody and given to officer in charge of the nearest police station with the least possible delay, together with a report of the circumstance occasioning the arrest.	180 days extendable to a year on public prosecutor's information.	180 days; police custody upto 30 days; charge sheet to be filed in 180 days; no bail for non-Indians who have entered the country illegally.	Detention without bail for upto 90 days; police custody upto 15 days. No blanket denial of bail.	Detention upto 90 days; upto 30 day police custody; chargesheet within 180 days; blanket denial of bail to non-Indians.
Burden of proof	On prosecution.	N/A	On the accused. Adverse inference drawn if arms, ammuni-	Court to draw adverse inference if arms recovered from the	On the prosecution.	On the accused.

Judicial Restraint in An Era of Terrorism: Prevention of Terrorism Cases and Minorities in India

Issue	Preventive Detention Act, 1950	Armed Forces Special Powers Act, 1958	Terrorist and Disruptive Activities (Prevention) Act, 1987	Prevention of Terrorism Act, 2002	Unlawful Activities Prevention (Amendment) Act, 2004	Unlawful Activities Prevention (Amendment) Act, 2008
			tion found on person or property and fingerprints of accused on them or at site of crime or if financial assistance granted.	accused or his fingerprints are found at the site of the incident		
Confessions in police custody	Not admissible	Not admissible	Admissible	Admissible as evidence	No special provision	Not admissible
Special courts	Separate advisory board	Not under this Act but the Disturbed Areas (Special Courts) Act, 1976.	Yes	May be constituted	No.	No.