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RECENT TRENDS IN LAW MAKING & JUDICIAL DECISIONS

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INTRODUCTION

If one looks at the provisions of repressive laws such as the Terrorist Affected Areas (Special Courts) Act, one might ask whether the Indian State is at war with its own people. A person accused of having committed an offence under this Act is caught in a vicious circle, will be granted bail only if the public prosecutor certifies it - a very slim chance.

This Act is the last in a series of anti-people, anti-democratic enactments like the Disturbed Areas Act, the Armed Forces (Special Powers) Act, the National Security Act ... a long list, and a formidable array of lethal, legal weapons in the hands of the State. What has led to the passing of these Acts which seem so at variance with the values embodied in the Constitution?

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Parliamentary democracy is said to be based on consent, and a social contract. People will not masochistically authorise a government to annihiliate themselves. A contract has, therefore, two parties - the people and the State - if one violates it, the other is not under any obligation to perform its part of the contract. Locke, philosopher of the English Revolution in 1688, and, of the American Declaration of Independence, said that if a government transcended its authority, the people regained the whole of their natural liberty, a part of which they had surrendered conditionally, and could constitute a new government.

The Indian government accuses sections of the people of taking law into their own hands, and calls them terrorists. But when a government itself turns terrorist, it loses all moral authority to denounce anybody else as such. The execution of dissident black poet Benjamin Moloise in South Africa invited severe criticism from all over the world. The UN and the Non-Aligned nations, condemning the execution, claimed that the government of South Africa had

lost all moral authority to govern its people.

What does the Indian government do? It treats its people as if they constitute a hostile entity - eliminating inconvenient elements in fake encounters, or seeking to neutralise dissenting voices by threatening them with repressive laws.

Apart from legislative enactments, judicial pronouncements with ominous implications, are threatening the lives of millions of people in the country. The Supreme Court judgement on pavement and slum dwellers enables the government and Municipal Corporation to treat 4.7 million people in Bombay as unlawful occupants of the city, and virtually write them off becuase they do not legally possess a place of their own. The government can evict them from their homes and consequently deprive them of their livelihood, thereby affecting their very right to life. Can a government 'of, by and for the people' be democratic, when it treats the majority of people as law-breakers? The judgement on hawkers is of a piece with that on pavement dwellers, affecting the livelihood of hawkers, as well as the common man who depends on them.

The recent judgement on government servants enables employers to hire and fire employees at will - employees who were always subject to the vagaries of their superiors. Under this judgement, there is no need to comply with the principles of natural justice; hearings, enquiries, etc. are considered superfluous and have been done away with. All this, of course, in the interest of the 'security of the State' or in the 'national interest' - mystical entities at whose altar the people of India can be sacrificed. Can the interest of the State be different from that of the people?

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The judiciary is generally believed to be above the pressures of society, and to administer justice even-handedly - a myth that has been assiduously cultivated.

The American Declaration of Independence began with the assertion that all human beings are born equal. But in 1857, the Supreme Court said that the founding fathers of the country did not have blacks in mind when they talked of equality. In the Dred Scott vs Sanford case, the Court ruled that Scott was a slave and as such, not a citizen of the United States. It is significant, however, that at a later stage, the Court outstripped the Executive in its opposition to racial segregation.

One can see the same process at work in the Indian Supreme Court. Until 1962, the Indian ruling classes were united behind Nehru. Subsequently a crack started to develop in the monolith. In all major cases between 1950 and 1967, the Supreme Court had upheld the right of the Indian Parliament to pass any legislation, including amendments to the Constitution. In 1967, the Indian National Congress, for the first time lost power in several north Indian States. A powerful section of the ruling classes began to articulate their differences with the government. In the Golaknath case in 1967, the Supreme Court in a magnificent volte face, curtailed the power of the Parliament to legislate and make constitutional amendments. Significantly, Chief Justice Subba Rao resigned immediately after delivering the judgement and filed his nomination papers for Presidency of India, as a candidate of the United Opposition.

Then in 1969, came the vertical split in the Congress. Mrs. Gandhi took many populist measures to defeat her rivals. Her policies further alarmed dissident sections of the governing classes. Many of her policies like bank nationalisation were struck down by the Supreme Court. The judiciary was often divided; many decisions in the Supreme Court were taken by a majority of precisely one vote.

Article 21 and Article 31 are identically worded:

'No person shall be deprived of his life or liberty except according to the procedure established by law' (Article

XXI)
'No person shall be deprived of his property save by authority of law' (Article XXXI).

When A. K.Gopalan was preventively detained, the Court said that a person could be deprived of his life or liberty, provided that there is a law enacted by a legislature; Mr. Gopalan had no right to complain that he was deprived of his liberty guaranteed by Article 21, or his right to travel througout the country guaranteed by Article 19(1)(d). Article 22 (Preventive Detention) was a **complete** code - it had no reference to other articles.

But when R.C.Cooper and others were deprived of their property at the time of bank nationalisation, the Supreme Court declared that Article 31 was not a complete code; it was interlinked with Articles 14, 19 and 21. Property was more valuable than life or liberty.

As time passed, Mrs. Gandhi's government changed its policies. Socialist pretensions were jettisoned. (By this time, Mrs. Gandhi had a 'majority' in the Supreme Court.) In the well-known **habeas corpus case**, the Court said that in Emergency, the government could shoot a person to death, and there was no remedy.

Mrs. Gandhi has now passed from the scene; the rift in the ruling classes has closed. And, the Court is back to square one: Article 311 of the Constitution is a **complete** code; it has no reference to articles such as 14, 19 & 21. Freedom to life and liberty have been sacrificed in the 'interest of the State'. The Disturbed Areas Act which empowers a havaldar to shoot a person to death is constitutionally valid.

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The R.C.Cooper case was concerned with property, but one of its fall- outs was that it expanded the horizon of civil liberties and democratic rights. The rights asserted under the prevailing legal ideology, both with respect to

property and contract rights, as well as with respect to individual rights, are stated in universal terms; they may be claimed by all. But when dissident groups of people try to take advantage of these features of the prevailing legal system, the State moves to abandon and destroy them. Today we have reached a stage where the State seeks to curtail the system of individual rights, while dissident groups have a stake in maintaining and expanding them.

It is therefore imperative that civil liberties and democratic rights organisations take a stand against the erosion of basic human rights and in their defence.

This booklet focuses on three major judicial decisions and three black acts which are indicative of a dangerous authoritarian trend.

GOVERNMENT EMPLOYEES AND ARTICLE 311(2) OF THE CONSTITUTION

It is sad and, indeed, ironical that at the threshold of the 21st century, when we should be moving towards more freedom, the Supreme Court of India has left millions of government employees at the mercy of their superiors. A government employee in India can now be dismissed with no charge-sheet and no enquiry. The reason for dismissal need not be disclosed.

In old days, laws were arbitrary, unjust and cruel, the wielders of the laws were oppressive and capricious. The suffering humanity therefore articulated the necessity of certain laws and rules which would moderate and temper the might and will of the rulers. Such rules were known as principles of natural justice. But today in India, those cherished principles of humanity stand negated.

There are three articles in the Constitution of India which very vitally concern government employees. Article 309 lays down that, subject to the other Provisions of the Constitution, the Union or the State legislatures, as the case may be, will regulate the recruitment and the conditions of service of government employees. The President or the Governor can make rules to regulate both recruitment and the conditions of service. Such rules will be in force until replaced with rules made by the appropriate legislatures.

It is stipulated under Article 310 that except as otherwise provided, every government employee holds office at the pleasure of the President or the Governor, as the case may be. In England, all public officers and servants of the Crown hold their appointments at the pleasure of the Crown. Their services can be terminated at will without assigning any cause. The British Parliament can however control this pleasure of the Crown.

The Indian ruling classes have inherited this pleasure doctrine from the British - a doctrine which is a relic of feudal absolutism. But there are certain fetters on the

pleasure doctrine incorporated in the Indian constitution. Article 311 restricts the exercise of pleasure by the President or the Governor. The restrictions are: (1) A government employee will not be dismissed or removed by an authority subordinate to that by which he was appointed; (2) No such person will be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. The last restriction has three exceptions under which the government is not bound to hold an inquiry:

1) Such an employee has been convicted of a criminal charge:

2) the authority concerned is satisfied that for some reason, to be recorded in writing, it is not reasonably practicable to hold such inquiry;

3) where the President or the Governor is satisfied that, in the interest of the security of the state, it is not expedient to hold such inquiry.

It was these constitutional provisions that came before the Supreme Court for interpretation and decision. The issues were raised in a bunch of appeals and petitions filed by several government servants. Among the petitioners were the members of the Central Industrial Security Force. The CISF was constituted under the CISF Act for the protection and security of industrial undertakings owned by the government. The members of the CISF unit, Bokaro Steel Ltd. Bokaro, had formed an All India Association, in March, 1979. They carried on a country-wide agitation for recognition of their association resorting to demonstrations, dharnas and other forms of protest. The army was called; and the agitation was crushed. The leading members of the agitation were dismissed without any charge-sheet and enquiry. The dismissed employees challenged the action before the Supreme Court.

Another group of petitions was filed by railway employees who were peremptorily dismissed for their participation in

the all India railway strike of 1974.

The third group of petitioners belonged to both the Madhya Pradesh Police Force or the Madhya Pradesh Special Armed Force. An incident took place on January 18, 1981 at the annual mela held at Gwalior in which one man was burnt alive. Some persons, including a constable from each of these two forces, were arrested. The government dismissed them with no charge and with no enquiry.

As said earlier, Article 309 authorises the appropriate legislature or the executive to make rules regulating the recruitment and conditions of service of government servants. There are three sets of rules which apply to the employees in this case. They are the Railway Servants Rules, the Civil Services Rules and the Central Industrial Security Forces Rules. As far as the crucial part is concerned, all the three sets of rules are similar to each other.

Rule 14 of the Railway Servants Rules reads as follows: "...(i) where any penalty is imposed on a railway servant on the ground of conduct which has led to his conviction on a criminal charge; or (ii) where the disciplinary authority is satisfied, for reasons to be recorded by it in writing, that it is not reasonably practicable to hold an enquiry in the manner provided in these rules; or (iii) where the President is satisfied that in the interest of the security of the state, it is not expedient to hold an enquiry in the manner provided in these rules.

The disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit."

Rule 19 of the Civil Services Rules is identical to Rule 14 of the Railway Servants Rules. Rule 37 of the CISF Rules is also in conformity with Rule 14 of the Railway Servants Rules with the exception that it does not have sub-rule (iii).

It can be seen that the principles of natural justice were

incorporated in Article 311 (2) of the Constitution by laying down that no person will be punished without being heard. This right of being heard is negated in the three instances mentioned in Rule 14 of the Railway Servants Rules.

Until the decision of the Supreme Court in the present case, the rules laid down by the Supreme Court in Chellappan's case held the field.

> *Chellappen was a railway employee. He was arrested at a railway station platform for disorderly behaviour. The magistrate after finding him guilty, instead of sentencing him, released him on probation. After he was released, the disciplinary authority of the railway removed him from service. He was not given any say on the quantum of punishment.*

The Supreme Court decided in Chellappen's case that the three exceptions to Article 311(2) enabled the government to dispense with a domestic inquiry prior to disciplinary action. But the effect was only directory. It was not mandatory for the government to do away with the application of the principles of natural justice even when the three exceptions prevailed. This being the case, Rule 14 of the Railway Servants Rules which provided for an enquiry was valid even though there was no constitutional compulsion to hold an enquiry.

In Chellappen's case the government had not complied with the last part of Rule 14 that the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit. The Supreme Court said that a consideration of the circumstances of the case could not be unilateral but must be done after hearing the delinquent government servant. The word 'consider' connoted that there should be active application of the mind by the disciplinary authority after taking note of the circumstances of the case, in order to decide the nature and extent of the penalty to be imposed. The matter can be objectively determinded, said the Court, only if the delinquent employee is heard and given a chance to satisfy

the authority regarding the final orders.

The Supreme Court however, refrained from passing an opinion on whether an enquiry was necessary before the final order is passed, in the absence of such a provision in the Service Rules and in spite of Article 311.

But now the whole position has been reversed. The Supreme Court has held in the latest case that the three exceptions to Article 311(2) are *mandatory*. If a case falls under any of the three, then the employee concerned has no legal right of being heard. The last part of the Rule 14 of the Railway Servants Rules will not be enforceable because it is against Article 311 of the Constitution. The Court now says that the second proviso to Article 311(2) (the three exceptions) is mandatory while Rule 14 of the Railway Servants Rules is only directory.

The authority concerned may decide that an enquiry before disciplinary action is taken is not practicable, or not expedient. The decision of the authority is subjective. The adequacy or inadequacy of the satisfaction of the authority regarding the offence of the employee cannot be judicially investigated.

The employees argued before the Supreme Court that at least a show cause notice be given to the employees before the disciplinary action is taken. But the Supreme Court felt that this would mean disclosure of facts and this would jeopardise the interests of the security of the State.

One of the main contentions before the Supreme Court by government employees was that once the protection provided by Article 311(2) is lifted, Article 14 of the Constitution will spring into action. Article 14 contains the priciples of natural justice. The Supreme Court said in Maneka Gandhi's case decided in 1978 : "The principle that no one shall be condemned unheard is part of the rules of natural justice. Natural justice is a great humanising principle intended to invest law with fairness and to secure justice, and over the years it has grown into a widely pervasive rule affecting large areas of administrative

action. The inquiry must always be: Does fairness in an action demand that an opportunity to be heard should be given to the person affected?".

The principles of natural justice have received international recognition. They are included in Article 10 of the Universal Decleration of Human Rights. These priciples are two:

1. No man shall be a judge in his own case, because he cannot act as a judge and, at the same time, be a party.

2. Hear the other side.

Article 14 does not set out in express terms either of the two rules of natural justice. It only says that 'the State shall not deny to any person equality before the law or the equal protection of the laws.' But the Supreme Court has repeatedly said that the basic principle which informs Article 14 is equality and inhibition against discrimination. The Supreme Court has eloquently declared that 'equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whims and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14.' When a person is punished without hearing his/her side of the story, the action is arbitrary and ultra vires of Article 14 of the Constitution.

Article 311(2) contains the principles of natural justice. But there are three exceptions to the Article in which the protection of these principles is removed. *But Article 311(2) does not specifically exclude the application of Article 14 to the three exceptions*. The general principles of natural justice, therefore, still prevail. But the Supreme Court today refuses to admit this position which it had taken in its earlier judgements.

In one of its earlier judgements, the Supreme Court had said that Article 14 is the genus while Articles like

311(2) are species. This meant that the specific protection given by Article 311(2) may have been lifted, but the general protection of Article 14 was still available. But now the Supreme Court says otherwise.

In the early stage of the interpretation of our constitutional law, the Supreme Court had taken a stand that the freedoms under Articles 19,21,22 and 31 are exclusive - each article enacting a code of its own relating to protection of distinct rights. This question first arose when A.K. Gopalan, the leader of the undivided Communist Party of India was detained under the law of Preventive Detention. The Supreme Court said in this case that Article 22 being a complete code relating to Preventive Detention, the validity of an order of detention must be determined strictly according to the terms, and within the four corners, of that Article.

Article 22 of the Constitution provides that a person can be preventively detained without charge-sheet and trial. Such a detention may deprive him/her of rights such as freedom to move freely throughout the territory of India guaranteed by Article 19(1)(d). This freedom can be restricted only on two counts: Either in the interest of the general public or for the protection of some scheduled tribe. A.K. Gopalan contended before the Supreme Court among other things, that his detention was not either in the interest of the general public or for the protection of any scheduled tribe as provided under Article 19(5). But the Supreme Court ruled that Article 22 and 19 were exclusive to each other. An act of preventive detention should be judged on the basis of the form and object of state action, not on the basis of its impact on the various fundamental rights of the detenue. The form and object of the state action were preventive detention which squarely came within the four corners of Article 22. The Supreme Court, therefore, concluded that A.K.Gopalan could not argue that his rights under Article 19 or Article 21 (right to life and liberty) were violated.

This decision of the Supreme Court held sway until 1970

when the spectre of Mrs. Gandhi's socialism haunted certain sections of the ruling classes in India. The Supreme Court reversed its decision in the case of R.C.Cooper which is popularly known as the Bank Nationalisation Case.

Mr.R.C.Cooper, a rich banker in India, complained before the Supreme Court that his rights, under Articles 19 and 31 among other rights, were being violated by the nationalisation of banks. The test applied in the Bank Nationalisation Case was : what were the direct and inevitable consequences or effects of the impugned state action on the fundamental right of the petitioner?

Article 19(1)(f) entitled all citizens to acquire, hold and dispose of property. This right could be restricted either in the interest of the general public or for the protection of the scheduled tribes. Article 31 assured that no person would be deprived of his /her property save by authority of law. In addition, Article 31(2) specified that no property would be acquired or requisitioned save for a public purpose and then not without compensation the adequacy or inadequacy of which could not be challenged in a court of law. The form and object of state action vis-a-vis bank nationalisation related only to Article 31. But one of the challenges of Cooper against bank nationalisation was that it did not fulfil the requirements of Article 19.

Accepting the argument of Cooper and rejecting the theory of 'pith and substance' adopted in A.K.Gopalan's case, the Supreme Court of India said that all the fundamental rights in the Constitution together weaved a pattern of guarantees on the texture of basic human rights. The pith and the substance of the state action may deal with a particular fundamental right but its direct and inevitable effect may be on another fundamental right. In that case, the state action would have to meet the challenge of the latter fundamental right. The state action of bank nationalisation had to satisfy not only the requirements of Article 31 i.e. public purpose and compensation, and also the requirements of Article 19, interest of the general public or for the protection of the scheduled tribes.

But in the instant case, the Supreme Court has made another somersault and gone back to square one. The Supreme Court in effect, holds that Article 311(2) is a complete code in itself. So Articles 14, 19 and 21 do not apply to a case which falls under Article 311.

The logic of the Supreme Court has gone awry in this respect. For instance, the Court says that neither Article 19 nor 21 excludes the operation of the other Articles which contain fundamental rights. The statement does not make much sense in the context in which it has been used. It can only be said that nor do they exclude the operation of Article 311.

Article 31(2) dealt with acquisition and requisition of property which are only two methods of deprivation of property. The Article said that property could be acquired or requisitioned on two conditions : Public purpose and Compensation. Article 31 did not say that the acquisition or requisition must also fulfil the conditions laid down in Article 19(5). But in R.C.Cooper's case, the Supreme Court was of the opinion that Articles 19 and 31 were parts of a single pattern.

Now take the case of Article 311. It lays down a specific procedure for dismissal, removal and reduction in rank of a government employee. Three categories of delinquent employees are excluded from this procedure. But they have not been excluded from the operation of Article 14 which guarantees to every person equality before the law and equal protection of the laws. *But the Supreme Court says that Article 14 does not apply to government employees.* Can there be two standards - one for Cooper and another for government employees?

Two Articles of the Constitution are co-ordinate. If both of them lay down the same principles, one of them can be deleted. This will not make the other Article infructuous (ineffective). The specific procedure in Article 311 does not apply to certain categories of government employees because of the exclusionary effect of the proviso to the Article. But Article 14 does apply, which contains the

principles of natural justice.

> *The law is what the Courts interpret it to be. Nowhere is it mentioned in the Constitution that the Constitution has a fundamental structure which is unamendable. But the Supreme Court laid down in the Keshavananda Bharati case that the Indian Constitution had a core, a fundamental structure. The Court said that Parliament had no power to amend and alter this basic structure. This is the law of the land today.*

In Mrs.Gandhi's election case decided in 1975, Justice Khanna elaborated what the basic structure was. He said that the basic structure included a democratic republican form of government, secular and federal character of the Constitution, separation of powers among the legislature, executive and judiciary, rule of law, equality of status and of opportunity, justice, economic and political, unity and integrity of the nation and the dignity of the individual secured by the various provisions of the Constitution and by democracy.

Now it may be noticed that one of the basic features of the Constitution is rule of law. The rule of law has two characteristics: 1) All persons will be equal before the law, irrespective of the status which they occupy in society; 2. No person shall be punished unheard. Article 14 is the epitome of the rule of law. It, therefore, stands to reason that Article 14 must prevail in any circumstance. But the Supreme Court does not take this stand in the present case. Then what happens to the theory of basic structure?

The Supreme Court says that, where an article in the Constitution expressly excludes the application of certain fundamental rights, the view taken in the Cooper case and the other cases which followed it, namely, that the Articles in the chapter on fundamental rights do not operate in isolation, cannot apply. Then the Court cites the example of Article 31-B. Under this Article, none of the acts and regulations specified in the Ninth Schedule to the Constitution are to be deemed to be void on the ground that such act or regulation is inconsistent with or takes away or

abridges any of the fundamental rights. Can it then be contended in the face of this express provision in the Constitution that nonetheless Article 14 will apply to the provisions of a law specified in Article 31-B? - the Supreme Court asks. If the contention of the petitioners that in all cases there must be a right of hearing before an order is made to a person's prejudice were correct, the result would make a mockery of the provisions of the Constitution, the Court says. Now it may be recalled that the Supreme Court had a different view in 1981 regarding this particular aspect of constitutional law. In Waman Rao's case, the Supreme Court held that Acts included in Schedule Nine would not automatically be protected by Article 31-B. If they violated the basic structure of the Constitution, the Supreme Court said that they would be struck down.

The Supreme Court for the first time admitted in the slum-dwellers' case that the right to life included the right to livelihood. A person can be deprived of his right to life or livelihood only according to the procedure established by law. This procedure established by law must comply with the requirements of the fundamental rights. Therefore it goes without saying that a government employees cannot be dismissed, removed or reduced in rank in violation of the provisions of Article 14.

It is said in one of the judgements of the Supreme Court that the withdrawal of protection of Articles 14 and 19 from a large number of laws destroys the basic structure of the Constitution. Exposing millions of government employees to the arbitrary will of their superior officers undermines the basic structure of the Constitution. How can the Supreme Court uphold an action which destroys the basic structure of the Constitution?

The law, as it stands today after the Supreme Court decision, denies basic democratic rights to millions of government employees. Either the Supreme Court should review its judgement and restore the *status-quo ante* or Parliament must so alter the Constitution as to restore the *status-quo ante*.

THE SUPREME COURT JUDGEMENT ON SLUM AND PAVEMENT DWELLERS

The Supreme Court of India delivered a judgement on July 10, 1985. It vitally concerns about 4.7 million people who live either on the pavements or in the slums of Bombay.

In July 1981, the government of Maharashtra had prepared a plan to demolish huts on Bombay's pavements and in some of its slums, and deport the inhabitants to different places in India, from where they allegedly came. The word 'deportation' has a particular connotation. A country does not deport its own citizens. It deports only unwanted or undesirable foreigners.

'Operation Eviction' started on the midnight of July 21, 1981. The government had requisitioned lorries, trucks, and buses to deport unfortunate human beings from the city of the rich. It was an inhuman operation carried out in pouring rain. Husbands and wives, mothers and children were separated. They were carted away to different destinations. A woman gave birth to a child in a running bus. The child was reportedly thrown on the wayside.

At 2.45pm on the same day, the People's Union for Civil Liberties moved the High Court of Bombay against this eviction. Mr. Justice Lentin stayed the operation with immediate effect.

The case was later taken to the Supreme Court. The Supreme Court took about 4 years to pronouce its judgement.

The petitioners argued before the Supreme Court that the right to life guaranteed by Article 21 of the Constitution included the right to livelihood. They further contended that the pavement and slum-dwellers would be deprived of their livelihood if they were evicted and sent away to distant places where there was no work.

The petitioners contended that according to the

Constitution, no person could be deprived of his /her life or personal liberty except according to procedure established by law. The procedure must be fair, just and reasonable. Section 314 of the Bombay Municipal Corporation Act empowered the Municipal Commissioner to evict the pavement dwellers without notice. This was in violation of the principles of natural justice and thereby unfair, unjust and unreasonable.

The petitioners further submitted before the Court that the State might not, by affirmative action, be compelled to provide the citizens with adequate means of livelihood or work. But a person who is deprived of his livelihood except according to just and fair procedure established by law, could challenge the action as a violation of right to life.

The Supreme Court admitted that most of those who lived in the slums or on pavements pursued occupations which were humble but honourable. The Court was also convinced that people lived in slums or on pavements becuase the city provided them with jobs not available elewhere.

The Supreme Court drew two conclusions from the facts and arguments presented before it: 1. The right to life under Article 21 includes the right to livelihood; 2. If the pavement and slum-dwellers are evicted they will be deprived of their livelihood.

The Supreme Court asserted in its judgement that what alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. So unimpeachable is the evidence of the nexus between life and the means of livelihood, it brooks nc doubt.

But after this, the Supreme Court reasoned that the Constitution did not put an absolute embargo on the deprivation of life. This is true. Article 21 does not protect a murderer. He can be hanged to death. So runs the logic of the Court: The pavement dwellers are trespassers; they can be deprived of their life. But the maximum punishment for criminal trespass prescribed by the Indian Penal Code

is only imprisonment for 3 months, while the Supreme Court judgement allows the executive to deprive a person of his life.

Besides, the offence 'criminal trespass' may not apply to the pavement and slum dwellers. In the words of the Court, the intention of these people in trespassing on others' property is not to "commit an offence, or intimidate, insult or annoy any person", which is the gist of the offence of 'criminal trespass' under Section 441 of the IPC.

What crime have the pavement and slum dwellers committed to warrant capital punishment? They do not legally either own or possess a place of dwelling. Does it behove the norms of civilization to equate the non- possession of property to a heinous crime like murder?

Even the Law of Torts distinguishes between life and property. Property can be destroyed or trespassed upon to save human life. It is no offence, either in civil or criminal law. The doctrine of necessity applies here. As the Supreme Court rightly says, "The encroachments committed by these persons are involuntary acts in the sense that these acts are compelled by inevitable circumstances and are not guided by choice."

The judgement itself states that "No person in his senses would opt to live on a pavement or in a slum if any other choice were available." Most of the people who live on the pavements or in slums do not have a place to live in, to which they are legally entitled. If they can be evicted from Bombay, they can be evicted from anywhere else in India. Then where do they live? Unless they live somewhere, how do they realise their right to life? Even animals have a place to live on this earth. But millions of humans are denied this in Bombay and thereby subjected to legal death, by the Supreme Court.

Not only the procedure but also the substantive law must be just, fair and reasonable. A law which condemns a person to capital punishment for a petty offence like trespass cannot be a civilized law. If a competent

legislature can pass a valid law which prescribes capital punishment for any trivial offence, then Article 21 is robbed of its substance and meaning.

The Supreme Court says that pavements are not laid for private use. "No one has the right to make use of a public property for a private purpose..." What is a public purpose? Walking on a road is a public purpose not because it is intrinsically for the purpose of the public, but because thousands of people walk on a road. A purpose which serves a great number of people becomes a public purpose. There are 4.7 million people on the pavements and in the slums of Bombay.

Is not the use to which they put pavements for their survival, a public purpose? Does not the right to live have precedence over the right to walk?

In the course of the judgement, the Supreme Court declared that "the proposition that the notice need not be given of a proposed action, because there can possibly be no answer to it, is contrary to the well- recognised understanding of the real import of the rule of hearing." The right to be heard has two facets, intrinsic and instrumental. The intrinsic value is the opportunity which it gives to individuals or groups, against whom decisions taken by public authorities operate, to participate in the processes by which those decisions are made, an opportunity that expresses their dignity as persons. The instrumental facet of the right insures that authorities comply with public rules of conduct. The pavement dwellers were not given an opportuinty of being heard before their dwellings were demolished. Still the Supreme Court did not direct the Municipal Commissioner to hear them before their houses are demolished because "the opportunity denied by the Commissioner was granted by us in an ample measure..." The Supreme Court unwittingly substitutes the Municipal Corporation here. This is against the accepted principles of judicial process. What the Court had to decide was whether the authorities concerned had complied with the principles of natural justice before they took any adverse action against an individual. If the

answer was negative, the action was bad in law. In every instance of this sort, the Court hears the case. If the Court hearing is a substitute for the hearing which the authority concerned must give, then no executive action can be struck down on the count that the principles of natural justice were denied.

The Supreme Court first accepted that the notice should be given whether there is an answer to it or not. But it later contradictorily said that where only one conclusion was possible and one penalty permissible, the Court would not compel the observance of natural justice.

There cannot be a collective punitive action. Each person must be individually heard. Even according to the Supreme Court, there are various possible answers which can be given by the pavements dwellers: 1) There was, in fact, no encroachment on any footpath; 2) The encroachment was so slight and negligible as to cause no nuisance or inconvenience to other members of the public; 3) Time may be granted for removal of the encroachment. But the Supreme Court subsequently dropped its directives on the need for a hearing.

There are several such conclusions in the judgement which fly at one another's face. The judgement requires a review at the earliest.

HAWKERS AND THE LAW

There are many ills which afflict the city of Bombay. There is no place to stay; there is no proper place where people can sit and sell goods which the people in the city need in their life.

One should not see the problems of Bombay in isolation. Both the prosperity and poverty of Bombay are manifestations of a deep malady from which the Union of India suffers. The malady is most visible in the city.

Bombay is not the orphanage of India, Bal Thackeray says rhetorically. True, Bombay is not and should not be the orphanage of India. But one may retort that nor should Bombay be the treasury of India where all the wealth of India is kept. Bombay is a piece of barren land. From where does all the wealth of Bombay come? The capitalists who own and occupy Bombay suck the wealth of India from her hinterlands and accumulate it in the city - the flesh-pot of India. Bal Thackerays are only scavengers of the city.

These are only some stray thoughts before one deals with the problem of the hawkers and the law.

One hears very often the middle class say that the hawkers cause nuisance in the street. True, they cause nuisance. But the same middle class forgets one thing: Most of them are dependent on the hawkers for their daily necessities. How many of us buy vegetables from a shop - for instance, has any one of us ever bought sugarcane juice from a shop? A shirt which costs Rs. 20 on a pavement may cost Rs. 120 in an established shop. The builders, the black marketeers and the politicians who rule this country have made the city of Bombay unlivable for the common man.

The Supreme Court rationalises the action of the Municipal Corporation by saying that "no one has any right to do his or her trade or business so as to cause nuisance, annoyance or inconvenience to the other members of the public. Public streets, by their very nomenclature and definition, are meant for the use of the general public."

One important thing which the Supreme Court forgets is that it is today in the interest of the general public that the hawkers carry on their trade and do their business in the streets. Who created such a situation? 'The interest of the general public' cannot be decided in a vaccuum. It has to be decided in a specific context.

The scheme adopted by the Court says that there will be one hawking zone in an area consisting of two wards. Which means that one may have to walk 3 kilometres or 4 kilometres to buy a packet of cigarettes or a bar of soap.

The scheme, if it is implemented, will hit the common man where it will hurt him most.

The danger which we see in all these laws and judgements is that the concept 'public interest' has been divested of its content and the 'public interest' has shrunk to the interest the haves. Now we have only the empty shell of 'public interest' into which anti-people things have been stuffed.

THE NATIONAL SECURITY ACT

In India, preventive detention has become as common as arrest. A person is arrested when he/she is suspected of having committed a crime. But a person is preventively detained when the executive thinks that he/she might do something which is not to its liking and convenience.

Whenever and wherever the people struggle for justice, two things are immediately done: Detaining activists under the National Security Act and opening fire on the people. Do not people have a right to agitate in a democracy?

During the textile strike in Bombay, all the activists of the strike were preventively detained. In Assam, in the Punjab, in Gujarat and everywhere, the people who led the popular agitations were incapacitated under the National Security Act. Before and during the Emergency, the people who fought Mrs. Gandhi were kept under preventive detention.

Article 22 of the Constitution guarantees two rights to a person arrested: a) He/she will be informed of the grounds of arrest, as soon as may be, and will be allowed to consult and be defended by a legal practitioner of his/her choice. b) He/she will be produced before a magistrate within 24 hours of arrest. *But both these guarantees will not apply to a person who is an enemy alien or to a person who is detained under any law for preventive detention.*

The only effective right which a detenue has is to make a representation against his/her detention to the Advisory Board constituted for the purpose and the Central and State governments. The detenue can present his/her case before the Advisory Board in person if he/she so desires. But no legal practitioner will be allowed to appear on his/her behalf before the Advisory Board. It must be specifically mentioned in the order of detention that the detenue has a right to make a representation to the Advisory Board.

The proceedings of the Advisory Board are not open to the

general public. Examination and cross-examination of witnesses are not allowed.

If the Advisory Board reports that there is no sufficient reason for detention, the government must revoke the order of detention. Otherwise, the detention may or may not be confirmed. It is left to the discretion of the government.

However, the Constitution of India does not make the institution of an Advisory Board compulsory. Thus Parliament is competent to make a law of preventive detention without providing for such a Board.

The detenue has a constitutional right to be informed of the grounds of detention but no details will be furnished. The grounds are conclusions drawn by the detaining authority from the various charges against the detenue. However, the Supreme Court has, in its various judgements, laid down that the detenue be provided with sufficient details to enable him/her to make a representation to the government and the Advisory Board against his/her detention.

Preventive Detention has been in existence in India for a very long time. During the First and Second World Wars, the British had enacted preventive detention laws, and it was also included in the Government of India Act, 1935. The Constituent Assembly decided to continue preventive detention and incorporated it into the Indian Constitution.

Sardar Patel and others who were the main proponents of preventive detention used the peasants' struggle in Telangana to convince those who had so far dithered on the issue.

Ever since the enactment of the Constitution, there has been preventive detention in India almost continuously in one form or another. But Western democracies do not have preventive detention during peace time. The Constitutions of the U.S.A., Australia, and Japan also have no provision for it.

In 1971, Parliament passed the Maintenance of Internal Security Act (MISA) under cover of the war with Pakistan, continued it after the war and used it largely to stifle the voice of dissent. In the Emergency, the Act was used against the leaders of the Parliamentary Opposition. Even Jayaprakash Narayan was detained under MISA. The Janata government which came to power in 1977 repealed MISA, but later made an abortive attempt to revive preventive detention. Opposition from within the party scuttled the move. But states like Madhya Pradesh ruled by the Janata passed their own law of preventive detention.

The Janata government carried out certain amendments to Article 22 of the Constitution, to make it less rigorous and more equitable. They reduced the time limit of three months to two months for a reference to the Advisory Board. The amendment stipulated that only those who are, or have been judges of a High court, can be appointed to the Advisory Board, and omitted those 'qualified to be appointed as High court judges' from the Board. The amendment also stated that only a serving judge of a High court will be appointed as chairman of the Advisory Board. *But, for some reason which cannot be complimentary to the Janata government, this amendment was not brought into effect by a Presidential proclamation.*

Then Mrs. Gandhi came back to power in 1980 and promptly brought back the law of preventive detention on the statute book, newly christened as the National Security Act. This Act did not contain the provisions of the Janata amendment.

A writ petition was filed in the Supreme Court that the Central government be ordered to issue a Presidential proclamation and bring the Janata amendment into effect. But the Supreme Court said that it was left to the government whether to do so or not, and the Court had no power to issue a dictate to the government in this matter.

At present a person can be preventively detained under the following heads provided in the NSA:

1. For committing any act prejudicial to the defence of India, 2. The relations of India with foreign powers, 3. The security of India, 4. The security of the state government, 5. The maintenance of public order, 6. The maintenance of supplies and services essential to the public.

Both the Central government and the state government can preventively detain a person under the law. The state government may delegate its power of detention to a district magistrate or to a commissioner of police. In Bombay and Thane, the commissioner of police has power to order preventive detention under the NSA.

When the magistrate or the commissioner of police orders detention, he must within 10 days, report the matter of detention to the state government along with grounds and particulars of detention. Such an order of detention will not remain in force for more than 12 days unless the state government approves of the order. If the detaining authority has reported the matter to the state government after 5 days and not later than 10 days, then the period for approval by the state government will be extended from 12 days to 15 days. The state government must in turn report to the Central government within 7 days of such an order being made or approved of. *Unless these formalities are complied with, the order of detention will be invalid.*

Within three weeks from the date of detention of a person, the government must place before the Advisory Board, the grounds of detention and the representation, if any. The Advisory Board submits its report to the government within seven weeks after the date of detention, on whether there is sufficient cause for the detention. The Advisory Board will hear the detenue, if he/she so desires, before it submits its report.

The detenue has a right to make a representation against his/her detention not only to the Advisory Board but also to the state government and the Central government. Either of the governments can revoke the order of

detention at any time irrespective of the opinion of the Advisory Board. The government must take a decision on the representation at the earliest. A delay of 10 days can be fatal to the detention order. It is also necessary for the detaining authority to tell the detenue that he/she has a statutory right to make a representation against his/her detention to the Advisory Board, the state government and the central government.

Section 8 of the NSA specifically states that the detenue be informed of the grounds of detention, as soon as may be, but ordinarily not later than 5 days and in exceptional circumstances and for reasons to be recorded in writing, not later than ten days from the date of detention. If this is not done within the statutory limit, the court will strike down the order of detention and release the detenue. It is not very important whether a law of preventive detention contains such a provision or not because the Supreme Court has even otherwise laid down that a delay of 10 days can be fatal to a detention order.

The NSA was more than once amended in 1984. Under the original Act, the detaining authority detains a person on its subjective satisfaction. The courts do not investigate the question of adequacy or inadequacy of this subjective satisfaction. There is normally more than one ground for the detention of a person, all the grounds cumulatively leading to the subjective satisfaction of the detaining authority. If any of the grounds is non-existent, stale, irrelevant or vague, the courts can strike down the order of detention. But the amendments have changed his. Now even if one of the grounds is relevant, the order of detention will be valid. This has made it almost impossible for a court to strike down an order of preventive detention.

Originally if an order of detention expired, or was revoked, the detaining authority could not make another order on the same grounds. But the amendments enable the detaining authority to detain a person again and again on the same grounds. The Akali leaders Longowal and Tohra were detained under the NSA before the amendments were

passed. After the amendments, the government released them and re-detained them on the spot. This was to make sure that they were not released by a court ruling which found that any of the grounds was stale, irrelevant, nonexistent or vague.

As far as the Punjab and the Union Territory of Chandigarh are concerned, the amendment is much more drastic. A detenue can be detained for six months without a reference to the Advisory Board. The maximum period of detention has been raised from one year to two years.

* * *

Orders of detention are often struck down by courts, not because of the laxity of the law, but because of technical flaws in the orders and in the procedures of detention.

For instance, many of the detenues do not know English or Marathi. Therefore, the documents have to be translated into the language which the detenue knows. The translation is often defective, and the detenue may not be in a position to know the precise nature of grounds on which his/her detention is based. Unless the detenue knows the grounds for detention and the basis for the grounds, he/she cannot make an effective representation to the authorities against his/her detention, the right to which is constitutionally guaranteed. The courts strike down an order of detention when a detenue has been denied of his/her right of representation because of defects in translation. *It is said that when smugglers and black marketeers are preventively detained, the detaining authorities deliberately make mistakes in translation so that the order of detention is struck down by the courts. There must obviously be a remuneration for this.*

Another common reason which goes against an order of detention is *the non-application of mind or malafides on the part of the detaining authority.* He may have mechanically signed the order of detention placed before him by his subordinates. Or he may have acted under the dictates of

the superior officer. In either eventuality, the detaining authority has not applied his mind to achieve subjective satisfaction, which is legally essential.

Most of the detentions are made for the 'maintenance of public order'. 'Public order' has been interpreted by the courts as 'even tempo of life in a locality'. A single incident or an incident which takes place in a secluded place may not spread panic or terror in a locality. It may be a problem which concerns only law and order which can be dealt with under the ordinary law of the land. Some Naxalites thus preventively detained were let off by the Supreme Court because it felt that isolated incidents of violence did not pose a threat to the maintenance of public order. The forcible overthrow of the government is an integral part of Marxist ideology. The ideology can be propagated in India because it has not been proscribed. Preventive detention can be legally used only when there is repeated or large scale violence or the imminent danger of such violence.

Another ground on which an order of detention is quashed is *the absence of any connection between the detention and the object sought to be achieved by such a detention.* Preventive detention is widely used against trade union activists who do not belong to the ruling party. During the textile strike, many active union workers were detained under NSA. This was done to prop up the RMMS (Rashtriya Mill Mazdoor Sangh), which was acting in collusion with the management, and to prevent the entry of MGKU (Maharashtra Girni Kamgar Union) into the textile industry. But the Bombay High Court released all these detenues because it felt that such detentions did not have anything to do with the maintenance of public order for which they were apparently detained.

Sometimes, the grounds of detention are fabricated. If the detenue establishes that the grounds of detention are non-existent and concocted, he/she will be released.

Recently many trade union workers owing allegiance to Dr. Datta Samant were detained under the NSA. Most of them were released by the Advisory Board. The rest were

released by the High Court of Bombay.

But if a reasonable threat is seen to the maintenance of public order, and the detention order is correctly written, the courts will not interfere with that order. The Akali leaders' detention under NSA was challenged in the Supreme Court, but they were not released.

Preventive detention is a serious encroachment on human liberty. People who do not fall in line with the establishment are kept in jail with no trial at the sweet will of a detaining authority. Voltaire felt free in England not because the laws in England were less harsh, but because no one was kept in jail without a judicial trial. Voltaire knew the difference between the two because he had rotted in the Bastille for defending a book the author of which he did not know and with the sentiments of which he did not agree. Preventive detention is a negation of personal liberty as propounded by Voltaire, Rousseau and other liberal bourgeois thinkers.

It may be recalled that the Indian Constitution under Article 22 authorises Parliament to enact a law of preventive detention under which a person can be kept in jail for any number of years and with no reference even to an Advisory Board. Sheikh Abdullah was imprisoned under preventive detention for 17 years with no crime having been proved against him.

The first case in which the validity of Preventive Detention was challenged was A.K. Gopalan's case. Mr. Gopalan argued that Articles 19, 21 and 22 be read together. A detention under Article 22 deprives the detenue of his right to life and liberty guaranteed by Article 21 and of his right to move through the territory of India guaranteed by Article 19(1)(d). A person can be deprived of his life or liberty only according to the procedure established by law. Both the law and the procedure must be fair and just. And they cannot be fair and just unless they comply with the requirements of fundamental rights. For instance 'the right to travel through the territory of India' can be restricted only on two counts: a) In the interest of the general

public, b) For the protection of interests of any scheduled tribe. The principles of natural justice require that a person be heard before he is deprived of his liberty guaranteed by Article 21. None of these requirements are fulfilled in any law of Preventive Detention. But the Supreme Court said in A.K. Gopalan's case that each of the fundamental rights constituted a separate and complete code and the fundamental rights were not interconnected.

But later on the Supreme Court changed its stand in the Bank Nationalisation Case and said that all fundamental rights together constituted a single texture of human rights. The theme of the Bank Nationalisation case was further expanded in Maneka Gandhi's case. (See chapter on Government Employees Judgement.)

In the light of such decisions, it is possible to challenge the various provisions of the National Security Act, especially the amendments to it.

A detaining authority reaches his subjective satisfaction on the basis of a brief survey of all the grounds. The satisfaction is indivisible, not fragmented. To sever the grounds and to say that the detention is valid even if one of the grounds is valid undermines the very concept of subjective satisfaction. The same thing can be said about a second order of detention passed on the same grounds as the first order.

But the challenge will be successful only if the Supreme Court does not change its stand as it did in the case of government employees.

It is universally accepted that an accused is innocent until proved guilty. This principle is included in the Universal Declaration of Human Rights. But this cherished principle of humanity is negated in a law of Preventive Detention.

The same principle is one of the characteristics of rule of law on which Parliamentary democracy is based. The law of Preventive Detention and Parliamentary democracy do not

go together.

A law of Preventive Detention is against the accepted principles of democracy and civilization. Such a law must be resisted and opposed whether it is in India, in the Phillippines or in Pinochet's Chile.

THE TERRORIST AFFECTED AREAS (SPECIAL COURTS) ACT, 1984

The Terrorist Affected Areas (Special Courts) Act was passed by Parliament last year. Very little has been said about this law. But it is one piece of legislation which fits in with the scenario of authoritarian rule and which must ring an alarm bell.

This law extends to the whole of India except Jammu and Kashmir and for the first time defines who a terrorist is: "... a person who indulges in wanton killing of persons or in violence or in the disruption of services or means of communications essential to the community or in damaging property with a view to:

i) Putting the public or any section of the public in fear; or
ii) Affecting adversely the harmony between different religious, racial, language or regional groups or castes or communities; or
iii) Coercing or overawing the government established by law; or
iv) Endangering the sovereignity and integrity of India."

This law is fraught with danger because it can treat as terrorists all those who disrupt services or means of communications with a view to causing fear to any section of the public or overawing the government established by law. The definition is indeed wide. It could apply to several forms of manifestation of the people's dissent.

There is hardly any demonstration or morcha which does not disrupt public transport. A street play which is a common mode of public expression can disrupt various services. Students who demonstrate, workers on strike, women who organise morchas against atrocities on them, and the middle-class who protest price-rise and bus-fare hikes may all be subsumed terrorists. This does violence to the term "terrorist" and makes a mockery of democratic dissent.

The word "overawe" too is of very wide import. A massive demonstration of the people can overawe the government. Those who participate in the demonstration will be "terrorists". The definition subverts the natural meaning of the word.

The Act gives a schedule of offences which includes offences like sedition (bringing the government into contempt or hatred, etc.) creating enmity between two groups of people and causing damage to public property.

If the Central Government thinks that the offences specified in the schedule are being committed by terrorists in an area, it can declare such area to be a terrorist-affected area. The Government may divide such an area into one or more judicial zones. Such a declaration can retrospectively take effect from a date six months earlier than the date of declaration. The first declaration will be prospectively for a period not longer than six months. Cumulatively therefore the first declaration will have effect over a period of one year. The Government may extend this term of six months from time to time, indefinitely.

The Act empowers the Government to establish a Special Court in respect of the judicial zone. This court can be within the judicial zone concerned or outside the judicial zone. The Government can also establish such a court outside the State in anticipation of a breach of peace or threat to the safety of the judge, public prosecutor, the accused or witnesses. The Special Court may sit at any place other than its normal place of sitting if the public prosecutor certifies that it is necessary for the protection of the accused or any witness or in the interests of justice. This can be a "protected place" which means that the trial may take place inside a prison.

The entire trial will be conducted in camera. The identity and the address of the witness may be kept a secret: the name of the witness will not be mentioned in the order, judgement or any records of the case. The court may issue directions that the identity and address of the witness will

not be disclosed. One who violates this direction may be imprisoned for one year or fined Rs. 1000 as well.

Will this mean that the name of witness will be withheld even from the accused and his advocate?

The court may try the offences under the Act in a summary way: the charge may not be formally framed against the accused; the evidence may not be recorded in detail; the judgement may be laconic.

There is no appeal to a High Court. The appeal lies only to the Supreme Court. But even this appeal may be of little value because there will not be a well reasoned judgement or a full record of evidence.

The summary trial envisaged in the Criminal Procedure Code has been further cut down in the Terrorist Affected Areas (Special Courts) Act. The Cr. P.C. provides for summary trials only in respect of petty offences like theft, the punishment for which does not exceed two years. The Act has raised two years to three years. The offences under the Act triable in a summary way are of a much more serious nature. In a summary trial under the Code, the maximum punishment prescribed is three months' imprisonment while under the new law maximum punishment can be three years with fine.

All offences under the Act are cognisable, which means that the police can arrest a suspect without a warrant from a Magistrate.

Section 15 of the Act very drastically changes Section 167 of the Cr.P.C. The police have to produce an accused before a judicial magistrate within 24 hours after his arrest. But the Terrorist Act says that the police can produce the accused within 24 hours before either a judicial or an executive magistrate. This negates the separation of the judiciary from the executive. The judicial magistrate under the Cr.P.C. can detain an accused in police custody for 15 days at a time, but not exceeding 90 days, as a whole. But an executive magistrate under the Terrorist Act

can detain an accused person in police custody for 30 days at a time up to one year.

This change will effectively mean that a police commissioner or a collector will be able to detain in police custody a person charged with an offence under the Terrorist Act up to one year. We all know how fair and impartial an executive officer is. We also know what sort of treatment the accused get in a police lock-up, especially when the judiciary does not have any power to intervene.

Bail has been made practically impossible under the Terrorist Act. A magistrate can release on bail an accused under the Act only if he is convinced that the accused has not committed the crime alleged; and the accused is not likely to commit any offence while on bail. How can the magistrate convince himself at the preliminary stage of a case that the accused has not committed the crime alleged when no trial has taken place? How can the magistrate guarantee the good conduct of an accused? Besides, provision of anticipatory bail has been denied to the people who are wanted under this Act.

The most vicious change which the Terrorist Act has brought about in criminal law is the amendment of the Evidence Act. The cardinal principle of criminal law that an accused is innocent unless proved guilty is done away with. The onus of proof is shifted on the accused provided two conditions are fulfilled: a) He is accused of having committed the offence in an area declared to be disturbed under any law; or in an area where there has been, over a period of more than one month, disturbance of the public peace; and b) The accused has been in such area when explosives or firearms were used against the members of the armed forces or the forces charged with the maintenance of public order. The crime concerned is waging or attempting or conspiring to wage war against the Government of India. The punishment is death or imprisonment for life.

The result of this change is that citizens in a vast area of the country are potentially vulnerable to being

arbitrarily arrested and sentenced to death. The entire North-East, Assam, Punjab and certain parts of Andhra are considered as disturbed areas. If any violent act takes place in any such area anybody in the vicinity can be charged. Once charged the law shall presume that he has committed the crime and is liable even to death unless he proves the contrary. How does one do that? It is extremely difficult.

The Act exposes the opponents of the government to capital punishment. Is this rule of law? Dicey, the celebrated constitutional expert, says that one of the postulates of the rule of law is that an accused is innocent until it is proved that he is guilty. Voltaire languished in the Bastille accused of writing a book the author of which he did not know and the sentiments of which he did not agree with.

The law has retrospective effect in the sense that it brings within its purview incidents that took place six months earlier than the declaration. Chase J., considered a criminal law as ex post facto (with retrospective effect) when it "creates or aggravates the crime or increases the punishment or changes the rule of evidence." The Terrorist Act has changed the rule of evidence with retrospective effect. This may be violative of Article 20 of the Constitution.

Article 21 says that no person shall be deprived of his life or liberty except according to procedure established by law. The Supreme Court has laid down that this procedure must be just and fair. Is it fair and just to punish or even sentence a person to death in a summary trial held in camera, where even the name of the accused may not be disclosed? Or to keep a person in prison for one year on mere suspicion at the discretion of an executive magistrate? Or to ask an accused to prove that he is not guilty? Or to try a person outside his State where effective legal help may not be available?

Article 14 guarantees that no person shall be denied of equality before the law and the equal protection of the law except on reasonable classification. Is it reasonable to

classify the people of Punjab or Assam or the North-East as different from the people in the rest of India?

The Terrorist Act also violates the principles of natural justice which assert that no person shall be punished without being heard. The amendment to the Evidence Act presumes that an accused is guilty before he is heard. Can a procedure which violates the principles of natural justice be fair and just as required by Article 21?

There are already many repressive and anti-democratic laws such as the Disturbed Areas Act, Armed Forces (Special Powers) Act, and the NSA. This is one more deadly weapon in the arsenal of the Government. Where do all these laws lead?

MAJOR ANTI-DEMOCRATIC LAWS

Preventive Detention Act - now not in force.
Criminal Procedure Code 1973 - arrest and search without warrant.
Certain State laws - provision for preventive detention.
Maintenance of Internal Security Act 1971.
Defence of India Rules.
Essential Services Maintenance Act 1981.
National Security Act 1980.

SPECIAL POWERS LAWS

Disturbed Areas Act - in force in Assam, Andhra Pradesh, Punjab and Chandigarh.
Indian Police Act 1861 - an area can be declared disturbed.
Armed Forces (Special Powers) Act - North-East and Punjab.
Disturbed Areas (Special Courts) Act 1976 - under State governments.
Arms (Amendment) Act 1983 - area can be declared disturbed.
Courtesy: 'Are You A Terrorist?', a PUDR publication.

The Terrorist and Disruptive Activities (Prevention) Act, 1985

The Terrorist and Disruptive Activities (Prevention) Act, 1985 was hurried through Parliament in the wake of bomb blasts in Delhi and other places in North India. The atmosphere was so charged with emotion that the Bill was passed without much of a debate and with near unanimity. The provisions of the law are really ominous. This law can act as a devastating weapon in the hands of a megalomaniac who may use it to subvert the very essence of rule of law.

The law extends to the whole of India. This law can be read with the Terrorist Affected Areas (Special Courts) Act passed in 1984. They complement each other in certain respects. The Terrorist and Disruptive Activities Act is a substantive law (ie, one which defines offences) while the Terrorist Affected Areas Act is procedural (ie, one which only describes how offences are to be tried). The former creates new offences and provides for extremely harsh punishments.

The definition of a "terrorist act" given in section 3 of the Act is all-comprehensive. It may include political activists, trade unionists and other public activists, who mobilise various sections of the people to demand justice. For instance, section 3 of the Act says "whoever with intention to overawe the Government....or to alienate any section of people or to adversely affect the harmony amongst different sections of the people, does any act or thing by using....lethal weapons....or any other substances of a hazardous nature, in such a manner as to cause or as is likely to cause....damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, commits a terrorist act". The word 'overawe' means to overwhelm a person with emotion in which dread, veneration and wonder are variously mingled. A massive morcha of workers or peasants can overawe the Government. A statement like: "there is an irreconciliable clash of interests between employers and employees" may be construed as alienating workers and causing disharmony amongst different sections of people. A

flagstaff is capable of being used as a lethal weapon. If some members of a morcha break a few bus windows or the window panes of a building, that can be interpreted as destruction to property. A procession moving on a road invariably disrupts traffic which is an essential service to the people.

What can be the consequences of such a morcha in such circumstances?

The participants in the morcha may be termed as terrorists and may be punished with imprisonment which may extend to a term of life. Whoever advocates or facilitates such an act can also be sent to prison for life.

Does this conform to the principles of Parliamentary democracy?

This is not the end. Hold your breath and see the sweep of the term "disruptive activity": Disruptive activity is any action taken, whether by act or by speech or through any other media or in any manner whatsoever i) which questions, disrupts or is intended to disrupt, whether directly or indirectly, the sovereignty and territorial integrity of India, or ii) which is intended to bring about or support any claim, whether directly or indirectly, for the cession of any part of India or the secession of any part of India from the Union". Then there is an explanation: (a) "Cession" includes the admission of any claim of any foreign country to any part of India, and b) "Secession" includes the assertion of any claim to determine whether a part of India will remain with the Union.

If one says that Nagas constitute a distinct ethnic minority, with a distinct culture, that may be described as indulging in disruptive activity, which disrupts the sovereignty and territorial integrity of India. Or take a statement like: Aksai Chin falls on the Northern side of the watershed on the Himalayas. This can be seen as an admission of Chinese claims to a part of India and thereby a disruptive activity. Or you state that nationalities have the right of

self-determination. The Government may say that the very idea of self-determination undermines the integrity of India.

Do you know the punishment prescribed for such activities? Imprisonment which may extend to a term of life. Can we call such a law civil? This leaves a powerful weapon in the hands of the Government to extinguish the voice of dissent.

The Act empowers the Government to make rules to cope with terrorist and disruptive activities. Such rules may provide for any authority of the Government to make orders to implement a number of things. The authority who makes the rules can be the Superintendent of Police or Collector. The subjects which such officers can deal with are numerous and of a very serious nature. They can make rules, to re-group and re-settle people, as it is done in places like Nagaland and Mizoram. Other things which such officers can do include: a) demolition or destruction of any building, premises or property, b) Controlling the use of vehicles, c) Prohibiting, or regulating the use of postal, telegraphic or telephonic services.

An officer authorised under this law can requisition anybody's service if he thinks it necessary to maintain supplies and services essential to the life of the community.

The rule-making power under this law suffers from the vice of excessive delegation of power. Law-making is the exclusive jurisdiction of the legislature. *But this Act enables the executive to usurp this power from the legislature under the garb of making rules. The arbitrary power which the executive assumes under this Act is prone to great misuse.* For instance, this law makes the S.P. of Warangal district powerful enough to requisition the services of Dr. K.Balagopal, the general secretary of the Andhra Pradesh Civil Liberties Committee or Dr. Varavara Rao, the general secretary of the Revolutionary Writers' Association, and ask them to do manual work for the maintenance of the supply of foodgrains in Andhra Pradesh. This law may empower the Home Secretary of

Madhya Pradesh to order Dr. Anil Sadgopal to leave Madhya Pradesh and to live outside the State. Such a law destroys the separation of power between the executive and the legislature.

The procedural provisions in the Act are similar to the procedures under the Terrorist Affected Areas (Special Courts) Act. 'Designated Courts' can be set up just like Special Courts. These courts may conduct trials in protected places such as Tihar Jail. The trial may be summary. The name of the witnesses may not be disclosed. The evidence may not be recorded in full. *The Act does not provide for a trial which is the hallmark of an independent judicial system. The trial may be conducted in camera.* The judgments may be brief and may not disclose all the reasons for the final order. This makes the appeal to the Supreme Court (no appeal to the High Court) almost an exercise in futility.

The provisions of bail have been effectively emasculated. An accused under this Act can be released on bail only if the magistrate is totally convinced that the accused will not commit any crime of the sort with which he/she has been charged. The second circumstance under which an accused can be enlarged on bail is when the magistrate believes that the accused has not committed any crime. Pray, how can a magistrate know that a particular person will not commit a particular crime in future? Is he an astrologer? How can a magistrate reach the conclusion that an accused is innocent unless a proper trial has been conducted? It, therefore, effectively means that no person charged under this Act will be released on bail.

A person arrested under this Act may not be produced before a judicial magistrate as has been stipulated under the Cr.P.C. He/she may be, instead, produced before an Executive Magistrate who will be an officer of the Government. This also does away with the salutory separation between the executive and the judiciary.

The Act makes it possible for the Executive Magistrate to detain a person in police custody for one year. An innocent

person may rot in jail for one year with no charge and no trial. The police may subject a person to third degree methods in the name of interrogation for as long as one year.

The justification given by the Government for such a draconian measure was the abnormal situation in the Punjab. But the accord between the Prime Minister and Longowal has removed the rationale for such a piece of anti-democratic legislation. However, the AP government is now trying to introduce it in an amended, and harsher form in the state, to deal with "Naxalites" and "civil liberty organisations".

A law which can be misused to destroy the very system of Parliamentary democracy should not be allowed to remain on the statute book. No ruler is an angel. In 1975 the Constitutional provisions were misused to declare an Emergency. Then where is the guarantee that this law will not be used to immobilise the Opposition? The Opposition parties who supported the Act must ponder over this.

Oh you unfortunate ones!

Violence is done to your brother
and you shut your eyes!

The man that's been hit screams out
and you remain silent

The violent go around and choose their victims

And you say: Us they will spare,
for we show up dissatisfaction

What kind of city is this,
what kind of men are you!

When an injustice happens in the city,
there must be a commotion,

And where there is no commotion,
it is better the city perishes,

In a fire, before night envelopes it.

Bertolt
Brecht

The Committee for the Protection of Democratic Rights (CPDR) came into existence in April 1977, as part of the outburst against emergency rule. It is a Bombay based organisation, not affiliated to any political party. Its chief aims have been to create in citizens an awareness of their rights, investigate cases of infringement of rights and support the ongoing struggles of the people for justice and a better life. CPDR has investigated and taken up various cases, whether of ordinary people killed in police custody, students and teachers fighting authoritarian measures, workers, peasants and tribals struggling against exploitation, slum dwellers facing eviction or casteist tyranny.

CPDR has also tried to enhance the democratic consciousness of the citizens of Bombay through talks, slide shows, films, plays, public meetings, demonstrations and its bulletin - Adhikar Raksha.

Throughout, the Committee for the Protection of Democratic Rights has tried to protest against the arbitrary and undemocratic actions of those in power and safeguard the rights of our people. But faced with the enormity of task, its efforts have been a small contribution to the movement. It is with the support and help of more, that such efforts can become more meaningful.

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Police Terror in Telengana
Know your Rights (Marathi) (English)
Peddi Shankar : Death by Encounter
The Gujarat Agitation and Reservations
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