TADA Judgement

A Critique

We are never completely contemporaneous
with our history.
For history advances in disguise,
it appears on stage wearing the mask
of the preceeding scene,
and we tend to lose the meaning of the play.

Regis Debray

People's Union for Democratic Rights
Delhi
May 1994

Social and political life in India today is marked by escalating violence. The scale, complexity and seeming irrationality of this violence has shocked the nation's consciousness. The violence experienced directly in everyday life is reinforced and magnified by the state, political parties and media. A medley of images of violence and bloodshed assault us day after day. A compelling sense of urgency -- that of a nation under siege -- holds us in its grip. It is with this growing sense desperation that people turn to the state, and to increasing state intervention to ward of this spectre that seems to threaten the very basis of the federal republic of India. The state then unleashes the full force of its violent repressive machinery on the people. Not just through the deployment of armed forces but also more imperceptibly through legislations like the Terrorist and Disruptive Activities (Prevention) Act [TADA]. And this with public consent. Paradoxically this popular sanction to greater state intervention in social tensions comes at a time when the state is abdicating its responsibility in development and welfare.

In the course of the cycles of violence, reprisals and repression that constitutes "the Punjab problem", 2733 persons were killed in November 1984 over a four day period, in an organised massacre of Sikhs in the capital of our country. Senior leaders of the ruling party along with the police were alleged to be involved in the killings. It took six months to constitute a commission of enquiry. Two years passed before even the process for registration of cases and ascertaining of death toll was initiated. Ten years later the victims' affidavits still await action. It was also six months after the 1984 massacre, (April 1985) that a series of bombs exploded in buses and public places in Delhi killing a large number of innocent people. Shortly after, in May 1985, TADA was introduced. It is a telling commentary on the intent of the legislation that it was the bomb explosions *alone* and not the bloodbath preceding it that was cited as the context for introducing an Act ostensibly meant to provide speedy trial in especially heinous offences where the perpetrators were powerful and could subvert the law and its process in their favour.

The Act was introduced as a temporary measure to deal with the extraordinary situation created by Khalistani secessionist violence. Nine years and four extensions later, the ambit of the Act reaches far beyond the original context to encompass all nature of social tensions and political opposition and to cover nearly the entire territory of India.

Ordinary criminal law was found to be inadequate to deal with the "growing menace of terrorism". TADA seeks to combat terrorism by conferring on the Centre the powers to take the necessary expedient steps. Special trial procedures through special designated courts have been created to deal with this extraordinary category of offences. So any accused arrested under ordinary law - IPC or other acts - would merit a different treatment if TADA is added to the charges. Those covered under the Act have been defined in terms vague enough to cover the entire gamut of penal offences, covered by ordinary law.

Once arrested under TADA, the accused can be produced before an executive and not a judicial magistrate and can be remanded for 180 days extendible to a year. Charge sheets need not be filed for upto a year. Confessions

made before a police officer can be admitted as evidence. In certain cases the accused has to shoulder the burden of proving innocence. Trial takes place in courts specially constituted for the purpose. Government can transfer cases from one court to another, even in another state. Judges can continue in office even after retirement age. The court can chose its own place of sitting, and also try non TADA offences. It can conduct summary trials sentencing the accused to upto two years imprisonment. (Under CrPC the maximum sentence in a summary trial is 3 months.) Trials can be conducted *in camera* and the identity of the witnesses kept secret. Bail is denied unless there is reasonable ground to believe in the innocence of the accused. Appeals have to be made before the Supreme Court and not the High Court, within thirty days.

This procedure defies every procedural safeguard, every principle of natural justice and every tenet of liberal jurisprudence inherent in our legal system. It discriminates against those charged under its sections, thus violating the fundamental right to equal protection before the law (Article 14). The sacrosanct right to life and liberty (Article 21) which cannot be infringed upon even in a national emergency, is effectively vitiated by the use of TADA. Its extraordinary provisions allow long periods of detention without the bare minimum of procedural checks. The Act came into our midst with breathtaking ease and permeated criminal and penal procedures, in the face of bland indifference. But scattered voices of protest have been opposing the Black Act, from the time of its introduction. Thus more than 400 writ petitions, special leave petitions and appeals challenging the constitutionality of TADA came to be pending before the Supreme Court.

On 11 March 1994, nearly nine years after the introduction of the Act, the Supreme Court finally disposed this batch of petitions "without costs". A Constitutional Bench comprising of Justices S.R. Pandian, M.M. Punchhi, K. Ramaswamy, S.C. Aggarwal and R.M. Sahai, upheld the constitutional validity of TADA. Three judgements were delivered. A majority judgement by S.R. Pandian, and two minority judgements by R.M. Sahai and K. Ramaswamy.

The 81 page majority judgement starts with a note on the legislations in question -- The Terrorist Affected Areas (Special Courts) Act, 1984, Terrorist and Disruptive Activities (Prevention) Act, 1985, and 1987, and the Code of Criminal Procedure (U.P. Amendment) Act, 1976. It goes on to state the arguments of the counsels on both the sides. While the lawyers representing the petitioners "made the most virulent fuselage", the challenges presented "have been countervailed by the learned Additional Solicitor General".(sic) Before delving into the merits of the arguments, the judgement presents a brief historical sketch of the circumstances that forced the Parliament to enact this legislation. To do so, the court reproduces excerpts from the statements of objects and reasons, speeches by the Home minister in Parliament, and even media reports to recreate in the judgement images of bloodbaths and mad killings. The images haunt the entire judgement. All these are accepted as "matters of common knowledge" which "no one can deny". The judgement then goes on "unbiasedly and without any preconceived notion" to examine the contentions put forward in the "polemics" of the counsel for the petitioners.

Common knowledge, however, did not include the stark truth of torture and death in police custody or the blatant abuse of the power conferred by the Act. Large areas notified under this Act do not by any standards face terrorist threat. And even by the government's own admission not all those arrested under this Act are terrorists. Even while the court was deliberating on the matter of constitutionality, Kerala was notified under this Act in January this year. The first arrests under the Act, in the state, were of activists of CPM and RSS in Kunnor. Such are the 'terrorists' and the "problem" areas that compel the use of this extraordinary legislation! This reality is being obfuscated by fanning a paranoia about the assault of terrorism.

Legislative Competence

The first issue taken up is whether the Parliament had the constitutional power to enact this law. The petitioners argue that the Act falls within the purview of 'maintenance of public order' -- a state subject. The judgement raises the spectre of threats posed by anti-national and external forces to assert that the pith and substance of TADA concerns something of much graver consequence than mere threat to public order. It is the sovereignty and security of the country that is at stake. So the Act would lie in the domain of 'defence of India' a union subject, that the Parliament is competent to legislate on.

In some ways the issue of legislative competence is absurdly farcical. The Act which has made the expression of a different opinion about India's federal structure an offence, systematically, if subtly, encroaches on the domain of the state's jurisdiction. The "threat" to national sovereignty can come even from demonstrators at Nandial protesting against the signing of the Dunkel treaty who got charged under sections of TADA. The areas notified under TADA have expanded from the original four states and two Union Territories to cover twenty three of the twenty five states of the Indian Union. Its reach and range spans the entire spectrum of political opposition - mainstream political parties, trade unions, communal and fundamentalist groups, secessionist and regional movements, movements against social oppression like the Naxalite movement, and even the civil rights movement. So that even if 'defence of India' is the domain of TADA, one is left wondering uneasily about the "India" that is being defended.

Scope of Applicability

TADA applies to all areas notified as terrorist affected in the official gazette. There are no guidelines to determine whether an area is terrorist affected. The judges note that entire states have been notified, but "no notified area seems to have been denotified". The manner in which terrorist acts and disruptive activities are defined is nebulous. And the vagueness accentuated by including abetting even in assisting an act preparatory to a terrorist or disruptive act. With the 1993 amendment membership of terrorist gangs and organisations and the holding of any property derived or obtained through terrorist acts or terrorist funds, also comes within the definition. The Act however defines neither the

term 'terrorist' nor 'terrorist organisation'. The vagueness of the definition, provides ample space for arbitrary use of the Act.

The court has taken a step in the right direction by incorporating the element of intent in the reading of the notion of 'abet'. The definition now includes those who communicate or associate with persons assisting terrorists and disruptionists- but only if there is evidence proving that the accused did so "with actual knowledge or having reason to believe" that the persons are engaged in assisting terrorists or disruptionists, in any way.

The majority judgement has not dealt with the provision regarding possession of arms in a notified area. However the minority judgement by Justice Sahai holds that the section can be invoked only if it is proved that the arms and ammunition were either intended for or in fact used in terrorist and disruptive activities. This is the most widely used and misused section of TADA which has been invoked over a range of cases, from the film actor Sanjay Dutt to the butcher who was arrested for carrying his tool of trade in a notified area. If enforced this would be a welcome relief. The question of the legal status of this minority judgement has been referred to a Supreme Court bench.

The judges concede that "the act tends to be very harsh and drastic", but then go on to moan the failure of ordinary law to tackle the problem. Hence the need for "drastic change" in the ordinary criminal procedure. The resulting discrimination was wished away "in view of the separate machinery provided for (TADA) cases" i.e. designated courts. Thus the grave nature of the offence is used to justify a different machinery. And the different machinery to dismiss the question of discrimination. And so the circle closes. Entrapped in its midst are the countless TADA detenues who are caught in the sweeping range of the Act.

The judges point out that a scientific and rational basis of classification of offences as terrorist or disruptive activities, could be questioned if "there is little or no difference between the persons and things which have been grouped together and those left out of the group." When charges were filed against Rashid Khan a *satta* don and the principal accused in the Bowbazaar bomb blast which had claimed 80 lives, in Calcutta last year, the use of TADA was sanctioned for the first time in the State. The High court has now ruled that the provisions of the Act are not applicable to this case -- which otherwise conforms to the image of terrorist acts that pushed the Act into being. So much for rational classification!

It is precisely this vagueness in definition that allows for arbitrary and uncontrolled use of the Act not only to suppress all forms of dissent but also as an instrument in day to day parliamentary politics or even simply to extort money. It is not that the judges are not conscious of the danger -- "Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen." This is precisely what TADA entails. This has been upheld.

Enhanced punishments can be meted out for these ambiguously defined offences. Punishment under TADA is a minimum of five years extending to the death penalty. In addition the property of the convicted under TADA is liable

TADA, Supreme Court and the Constitution

TADA Provision	Section	Constitutional Violation	The Verdict
Definition of 'abet'	2(1)(a)(i)	Art. 14, 21	Modified to include actual intent or knowledge
Notification of areas	2(1)(f)	Art 14, 21	Upheld
Punishment for terrorist and disruptive activities	3, 4	Art. 14, 19, 21	Upheld
Possession of arms	5	Art. 14, 21	Not discussed in majority judgement. Minority judgement modifies.
Enhanced Penalties	6	Art. 14	Not discussed
Forfeiture of property	8	Art. 14, 21	Upheld. Appeal made to designated court
Constitution of designated courts	9	Entry 65, List II, Seventh Schedule, Art. 233,234, 235	Upheld
Continuation of judges beyond retirement	9(7)	Art. 21	Upheld. Suggestions to government.
Place of sitting	10	Art. 21	Not discussed
Transfer of cases	11(2), (3)	Art. 14	Upheld. Concurrence order of CJ is statutory
Summary trial	14(2)	Art. 14, 21	Not discussed
Trial in absence of the accused	14(5)	Art. 14, 21	Not discussed
Admissibility of police confessions	15	Art. 14, 20(3), 21	Upheld. Suggestions for guidelines to Central government
In camera trials	16(1)	Art. 14, 21	Upheld.
Concealment of identity of witnesses	16(2), (3)	Art. 14, 21	Upheld
Denial of appeal to High Court	19	Art. 14, 21, 226	Upheld. High Court to exercise restraint
Role of executive magistrates	20(3)	Art. 14, 21, 50	Upheld
Enhanced remand	20(4)	Art. 14, 21	Upheld
Restrictions on bail	20(7), (8)	Art. 14, 21	Upheld
Reversal of burden of proof	21(1)	Art. 14, 21	Not discussed
Identification of accused by photograph	22	Art. 14, 21	Struck down.

to forfeiture. The judgement does add that the reasons for forfeiture orders should be provided even if the Act does not specifically require this. The enhanced penalties have been upheld on grounds of the special nature of the crime. What is lost sight of is the pathetic record of convictions under TADA. Of the 52,998 persons arrested under TADA upto March 1993, only 434 (0.8%) were finally convicted. And of these not a single conviction under the section relating to "terrorist activity". In the General Vaidya assassination case, Sukhdev Singh (Sukha) and Harjinder Singh (Jinda), the main accused, voluntarily made a statement admitting to having killed General Vaidya. The prosecution however failed to prove the charge of terrorism against them. So that in the end the self confessed "khalistanis", were convicted and hanged under the ordinary law for murder (S.302 IPC). And this in a case that actually conforms to the stated "Objects and Reasons" of the extraordinary legislation!

So TADA in effect does not seek to punish the perpetrators of a grave and special class of offences. What it does is to enable preventive detention without the mandatory safeguards, in another more acceptable guise. It is to this end that ordinary law is found inadequate. And hence the extraordinary procedures laid out under TADA.

Procedure

Given the enhanced penalties and the gravity of the offence any faulty application involves gross miscarriage of justice. Hence the need for greater checks and safeguards in procedure. TADA does precisely the opposite. And this towards the pursuit of expeditiously dealing with growing terrorism. The right to speedy trial is an integral part of the right to life and liberty. But by what sleight of hand, the judges of the constitutional bench assert that the imperative of speedy trial is inherent in the provisions of TADA, defies logic. And flies in the face of facts. In the first week of January, 160 Sikh TADA detenues in Ajmer Central Prison went on a hunger strike to urge speedy disposal of their cases. Their cases had been pending for the past 5 to 7 years. The strike was called off following an assurance by the Rajasthan Chief Minister. The final court order is still awaited. The Supreme Court has not taken note of this. Far from ensuring speedy trial TADA actually allows perfunctory investigations and listless prosecutions -- so that cases do not even reach the trial stage. In 1990 only 12% of those arrested were charge sheeted and trials completed in only 4% of the cases.

The most odious provision of the Act is that which makes confessions before superior police officers admissible as evidence. Devoting 74 paragraphs to this contentious provision the judges admit that this provision "vitiates not only law but procedure alike". Reflecting in some measure the judicial unease, they acknowledge having "frequently dealt with cases of atrocity and brutality practised by some over zealous police officers resorting to inhuman barbaric archaic and drastic methods of treating suspects" and express concern about this "oppressive behaviour". But the section is upheld. The legislative competence of the state to change procedure, the object and purpose of the Act, the gravity of the offence and the reluctance of witnesses to give evidence were cited as the

reason for riding slipshod over norms of fair and just procedure. Certain guidelines are however laid down - among others that the accused be presented along with the confession before a metropolitan or judicial magistrate. The government was asked to incorporate these guidelines into the Act. The judgement also recommends the setting up of an executive screening committee of the Central government to review TADA cases. The buck has been passed!

The two independent judgements strongly attack this provision. Justice Ramaswamy affirmed that only those confessions that are shown to have been made voluntarily, can be regarded as admissible. And confessions drawn out in custodial interrogation definitely "excite suspicion". He dismisses the assumption that limiting the provision to superior officers is adequate safeguard against abuse. Turning to the hierarchy of office and not the source of suspicion, he held, was obnoxious. "Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law". For this reason "ends cannot justify the means in the administration of criminal law". Justice Sahai asserted "There is a basic difference between the approach of a police officer and a judicial officer...A police officer is trained to achieve the result irrespective of the means and method...An SI may be uncouth in his approach and harsh in his behaviour as compared to the SP... But the basic philosophy of the two remains the same." With this provision, " What is inadmissible for a murder under Section 302 is admissible even against a person who abets or is possessed of arms".

The other drastic provisions relate to the extended remand period and the limitations on bail. One effect of the long remand permissible under TADA is seen in the fact that in 88% of cases chargesheets, were never filed. Trials were inevitably and unnecessarily delayed. The 1993 amendment reduced the remand to 180 days from one year. This the learned judges felt was sufficient to dispel any anxiety about infringement to individual liberty. The restrictions on bail were also upheld. The judges did record that "on many occasions...the prosecution unjustifiably invokes this provision with an oblique motive of depriving the accused persons from getting bail." Yet the only remedy that the apex court has to offer is an appeal to public prosecutors to discharge their responsibility to the public! The denial of anticipatory bail was not held violative of Article 21, since this provision was introduced for the first time in 1973, after more than two decades of the Indian Constitution. This argument belittles the significance of fundamental rights. And of the struggles that have continuously enriched their interpretation. The court used the same argument to uphold the deletion of Section 438 in the Criminal Procedure Code (U.P. Amendment) Act. And this in the teeth of the obviously discriminatory nature of this deletion that denies residents of U.P. a right that is available in all other states.

The designated courts lie outside the constitutionally erected judicial hierarchy. They do not come under the judicial or administrative control of the High Court. Appeals under TADA have to be made directly to the Supreme Court. Eclipsing the role of the High court is defended in the name of speedy trials. The judges felt the procedure created "practical difficulties" for the accused, and also found it to be unfair in the case where a person has been

acquitted of TADA charges. But it left it to the legislature "to devise suitable modes of redress". However the High Court does have the constitutional power (Article 226, 227) to entertain petitions on matters from the territories in its jurisdiction and even transfer any case to itself (A. 228). This constitutional power has evoked the judges concern -- "It cannot be said that the High Court has no jurisdiction." But they felt this would "defeat and frustrate" the scheme and object of the Act and the intendment of the legislation. So the judges took a tenuous position urging the High Court to practise utmost restraint in the exercise of this power in the interest of judicial discipline and comity. The High Courts have in fact been instrumental in providing relief and some measure of procedural check to at least some of those detained under TADA.

The court upheld liberal procedure for transferring cases from one designated court to another on the motion of the government. It has been held that the concurrence granted by the Chief Justice of India on any such transfer, is a statutory and not a judicial order. It cannot, consequently, be challenged. Acknowledging that the accused is entitled to an opportunity to be heard, the judgement leaves the matter to the Chief Justice's discretion.

The remaining provisions, relating to the recording of the statements and remand even by an executive magistrate, holding in camera trials, concealment of identity of witnesses, continuance of judges in office even after superannuation, have all been upheld. The only section that was found to be invalid was that allowing the identification of the accused by a photograph. This was struck down.

The basic premise of the political context of violence remains unquestioned. Departures from procedure and the contravention of rights and safeguards are justified in the light of this context. But even with nine years of actual experience of the practical working of the Act, when the apex court of the land did take up the issue of the constitutionality of the Act, the actual abysmal record of implementation of TADA remained shrouded in dire proclamations of terrorist assaults. In fact the truth is that all offences coming within the ambit of TADA can be tried under the ordinary law, and more efficiently. And this precisely because the extraordinary provisions of TADA have made the police and prosecution less and not more serious about the offences that are described as terrorism.

So the Assam police could prepare a case under TADA against J.N. Bora, who had been president of the Assam Sahitya Sabha in 1968. An article by him arguing for a separate Assam had been published in Boodhbar an Assamese weekly. The editor Parag Das was booked under TADA. So too was J.N Bora. The only hitch was that the zealous law enforcers had failed to note that the article had been written half a century ago, much before the law or even the Constitution were in force. More important the author has been dead for several years!

The perfunctoriness that the Act engenders is evident too in the case of Vajrani arrested by the Bombay police in January 1993, on the charge of giving shelter to the gang of the notorious Naru (believed to be associated with Dawood Ibrahim). He was finally remanded to judicial custody a year later. Only the investigators had neglected to obtain the sanction of the Commissioner of

has endorsed.

By doing so the Court has lent its sanction to a subversion of the very meaning of democracy. The institutions of democracy have been steadily eroded over the years. And in terms of legislative violence too, Acts of much more brutal impact are in force. One such being the Special Armed Forces Act, which has also been challenged on grounds of unconstitutionality, and still awaits deliberation. TADA is not an emergency provision that actually suspends constitutionally guaranteed rights. It does something more insidious. Its real danger lies in the manner in which images of violence are being used to propagate an all encompassing notion of 'terrorism' that is uprooted from its specific historical and regional context. In this process democracy gets redefined. The notion of rights acquires new and distorted meanings. And laws like TADA slip imperceptibly into our lives -- creating a separate criminal procedure, a separate judicial hierarchy, a separate republic. And all this without more than a whimper of protest.

Opposition must begin from the hasty scribblings on FIRs and chargesheets, the listlessly considered judgements in far-flung courts and police stations, that tell the real story of TADA, of how it transforms ordinary men and women into hard-core terrorists, threats to state -- and prisoners without trial. Documentation would bring some semblance of sobriety to the attempt to come to grips with the violence that society inflicts on its people, and the power that TADA represents. It is also integral to protest. It is only through the painful chronicling of the life and living of the men and women condemned to its boundless realm that we can hope to and pierce through the hysteria about "terrorism". And so recapture the spirit of democracy that people in different parts of the country have been struggling to defend and realise. It is through these uncelebrated struggles that "India" can be defended. The India that is facing a threat -- a sovereign, socialist, secular, democratic republic.

Published by: Secretary, People's Union for Democratic Rights
For Copies: Dr. Sudesh Vaid, D-2, Staff Quarters, I.P. College, Shamnath Marg, Delhi 110054
Suggested Contribution: Rs. 3 (Please add mailing charges)