*No Vakeel, No Daleel, No Appeal*

# Resist POTO

**Peoples Union for Democratic Rights**
**Delhi**
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## Introduction

Ever since TADA lapsed in 1995, there has been a singleminded attempt on the part of the government to enact an anti terrorist law along the lines of TADA. With utter disregard to the fact that over 76,000 people had been held under TADA, that even today a significant number of people are being tried under TADA, that TADA was legislated violence and that protests had and have continued against the enactment of a similar law — serving police officers, retired cops bureaucrats and parties in power have vociferously argued in its favour. In these six years the government tried to bring in Criminal Law Amendment Bill, (CLA) in 1995 itself and again later in 1999 and POT Bill in 2000. In the absence of a central legislation, state governments were asked to enact similar state laws. And in the recent past when the record of human rights violation by security forces was getting inconvenient, the Home Minister was busy promising amnesty to police and security forces. September 11 was the most opportunistic alibi the government needed to push POTO through.

The heady power that the police got through TADA was never talked about. How the executive was systematically allowed to interfere with the judiciary was also never talked about. And how TADA was deliberately used against protests in the name of terrorism was also never talked about.

The new law, promulgated in October as an Ordinance, (Prevention of Terrorism Ordinance 2001- POTO) has already been given Presidential assent. In the present winter session of the Parliament, the government is committed to getting it passed. Like its predecessor, TADA, POTO brings with it new judicial procedure. Remand is extended, confessions are admissible before the police, release on bail is near impossible, punishments are enhanced and the trial procedure is prejudiced against the accused. POTO has supposedly better safeguards than TADA which will prevent its misuse.

Why should we oppose POTO or TADA or CLA and POT Bill attempted to be brought in earlier or any other anti terrorist law? Even before we get into the specific details of the provisions or procedures or definition, the basic and fundamental nature of the opposition to such laws must be made and reiterated.

1. Anti terrorist laws deny the basic principle that a person is presumed innocent till found guilty. The premise of these laws is that the accused is guilty unless proven innocent. Thus, all provisions in these laws are aimed at denying the existing rights under normal law - the rights of association, freedom of speech and right to life besides denying equal treatment before law by bringing in a more draconian procedure. Any law that is premised on the denial of fundamental rights is a draconian one and must be opposed.
2. Such laws usher in worse parallel system of criminal justice based on arbitrary criteria and summary procedures. Ironically, those who argue in favour of such laws begin by stating that the executive and the judiciary over the years have become inefficient, apathetic, corrupt and biased. However, instead of reforming these institutions or providing checks, such laws give enhanced powers to their officials, and take away existing checks.

3. Anti terrorist laws are political weapons for quelling opposition and dissent. The vagueness of definition coupled with enhanced punishment based on harsher procedures enable the political parties in power along with the local executive authorities deal with political opposition as "terrorist crimes".
4. Concrete acts of violence can be dealt with under the ordinary law as the Rajiv Gandhi case demonstrated where TADA was held to be inapplicable and the accused were finally convicted for murder under the IPC. Broad and vague definitions in laws like TADA only give more unchecked powers to the police to harass citizens.

In short, the intent is anti democratic, the content is damaging and the consequence is a degeneration of our polity.

It is often argued that by opposing such laws, civil rights and democratic rights organisations are supportive of anti national activities. To use the present government's official vocabulary: those who are not with them are with the terrorists. Crimes committed against innocents are reprehensible. Ideologies supportive of such actions are undemocratic and need to be condemned. However, can extraordinary laws deal with such crimes? Can law and order address the roots of terrorism? The roots are socio-political and have to be addressed as political questions not as a 'law and order problem'. The experience of TADA is worth remembering. The sectarian nature, the selective and arbitrary use as a preventive detention law against all inconvenient people, groups, parties and protests, the enormous harassment of ordinary people who had to suffer under an extraordinary law is well documented. In fact, the protests against TADA led to its non-renewal in 1995. TADA did not even attempt to root out "terrorist" crimes. Instead, it legitimized state terrorism.

And now POTO has come into our midst quietly. Stealth and super secrecy has characterised the entire process of bringing in this Ordinance. So much so, the government's own institutions like the National Human Rights Commission did not have a copy of the draft Ordinance until the President gave his assent to it. Perhaps because the government had anticipated the fact that people would remember the experience of TADA

and that they would not allow themselves to be subjected to the regime of terror by another terrorist law.

## Who is a Terrorist?

The decade-long history of POTO's predecessor was marked by a serious paucity of debate in Parliament on the impact of the law. This shortcoming is made more serious by POTO in which the law remains in force for 5 years at a stretch as compared to 2 years earlier for TADA. Another criticism of TADA arose from the fact that entire states were notified at one go and large numbers of people were arrested in states that had no movements that could even remotely be called 'terrorist'. POTO makes the situation worse by removing the clause requiring notification altogether. The law affects the entire country and thus forces every citizen to live under POTO and even the people from elected Assemblies cannot save them from its spate.

Making the law more anti-people is not restricted to the above only. It extends into the defining of "new" crimes. The "new" crimes listed in this law overlap with what is already defined in existing laws. The newness is that crimes are not based on the actions carried out by people, but on the interpretation of the law enforcers of the intent behind the actions. To fall within the definition of terrorist activity, the accused needs to have carried out an act,

1. with the intention: of threatening the unity, integrity, security or sovereignty of India, or strike terror in the people or any section of the people
2. while using: explosive, inflammable substances, firearms, other lethal weapons, chemicals, or by any other means
3. which result in: death or injuries to any person, or damage or destruction of property, or disruption of essential supplies or services, or damage or destruction of property of central or state government or their agencies. [S.3(1)(a)]

Or

Being a member, or aiding or abetting an organisation banned under the Unlawful Activities (Prevention) Act and being in the possession of firearms or other instrument that result in loss of life, or grievous injuries, or significant damage to property. [S.3(1)(b)].

Terrorist act defined in this manner is far removed even from the gory pictures of violence. One, because such violence becomes terrorism only when the government feels that unity, integrity of the country is threatened or feels that people are terrorised; and secondly since virtually all crimes against body and property are included under the ordinary law, exigencies of governance decide which among them are called 'terrorism'. Thus a demonstration breaking a cordon or a union strike preventing movement of people or goods could be brought under the purview of POTO. At the same time gruesome killings in communal riots or torching of dalit settlements may not become terrorism. These decisions rest purely on the whim of the police officer, the district administration, the state government or for that matter anyone powerful enough to pressurise the former. It is also well known that banning organisations is a political decision of the government. Basing terrorist acts on this premise makes the definition equally biased.

The punishment is a minimum of five years and extends to death [S.3(2)]. Under normal law punishments for many of such actions are much lower. In effect therefore, this law provides different treatment for similar crimes – a violation of the right to equality before law.

A glimpse of the variety of provisions under which people can be charged under POTO brings out the enormity of the potential damage. People do not need to do terrorist acts to be charged. Conspiring, attempting to commit, advocating, abetting, advising or inciting such acts or acts preparatory to such acts is also punishable. The terms 'advocate', 'abet', 'advice' being vague allow the inclusion of people even remotely connected to person charged for a terrorist act and punished with a term ranging from 5 years to life[S.3(3)] Families and friends are targeted with punishments from 3 years to life through making harbouring or attempt to harbour a terrorist a crime [S.3(4)]. Holding property derived or obtained through terrorist funds and terrorist actions

targets the masses that may support the organisations [S.3(6)]. Thus a landless dalit who obtains a patch of land through the redistribution programme of a peasant organisation, or people facing drought getting grain distributed to them by an organisation that looted the same from the granary become liable for punishment. Mere membership of a terrorist organisation is punishable upto a life term [S.3(5)]. This is contrary to all norms of criminal jurisprudence.

More reprehensible is the provision to target any person on the mere suspicion that the person is withholding information that could result in the apprehension of a person accused of a terrorist act [S.3(8)]. Besides journalists, filmmakers, researchers, human rights investigation teams, this provision forces NGOs engaged in providing essential and needed services such as health, land improvement, education, disaster relief, and who need to interact with the local people, to become police informers.

Violating, attempting or abetting violation of provisions of the Arms Act, Explosive Substances Act, or Inflammable Substances Act invites the invocation of POTO with life imprisonment if the intent is of aiding a terrorist [S.5]. In regions specifically notified, the mere possession of arms is punishable with life imprisonment [S.4].

POTO provides for the declaration of an organisation as terrorist by a mere publication of a name in the official gazette. The arbitrariness inherent in banning is made worse by denying all legal redress. [S.18, 19]. The number of potential offenders under POTO increases substantially with this. Support to terrorist organisations is defined to include inviting support for such organisation, assistance in arranging a meeting to further the activities of such organisations or one which would be addressed by a person belonging to such organisation. All speakers at such meetings are also deemed to have committed an offence. To top it all, a meeting refers to a meeting of 3 or more persons whether or not public is admitted! [S.21] In this fashion, academic research, sharing of views and ideas are all deemed crimes punishable with 10 years imprisonment.

POTO gives enhanced powers to the police and bureaucrats. Unlike normal laws where the Cr.PC governs the conduct of the law enforcing agency, POTO gives power to the executive to frame a new set of rules to enter and search premises, to arrest and extern persons, and to determine and mete punishments for contravention of these rules [S.61]. It even has the powers of a civil court [S.13]. In a departure from TADA these rules and orders do not even have to be placed before the legislature so that there is no accountability in framing such rules and orders. The legislature is sidelined by this Ordinance, which empowers the executive to make rules that may violate the normal law. Paradoxically, therefore, it makes 'legal' the violation of law itself!

So POTO once again inaugurates a regime of harsher punishment and sentencing for the same crime meted out via a procedure that denies the accused any safeguard. In many respects, it is this utterly dangerous parallel judicial procedure linked to POTO that amounts to a total denial of people's rights.

## The Procedure

### A. INVESTIGATION

***Forfeiture of property*** Leaving aside those charged under the Ordinance, the property held by people is liable for forfeiture and attachment even without them being charged under this law [6(2)]. Under the general law forfeiture of property is a punishment that can be imposed by a court after a person is convicted. The Ordinance provides that proceeds of terrorism (including property of all kinds) can be forfeited whether or not the accused is convicted or even prosecuted [S.6 and 8]. This provision will prove to be extremely handy for extraction of money by the police.

Under ordinary law, property can only be 'attached' if a person is absconding to ensure presence for trial. The Ordinance provides for attachment of all property, movable and immovable, of the accused while the proceedings are on and forfeiture of the same on conviction. These properties need have no relation with proceeds of terrorism. Thus

even the house in which the family may have been living for years can be attached and forfeited.

***Confessions*:** Confessions made before police officers are admissible as evidence [S 32(1)], as opposed to ordinary procedure in which only 'confessions' in court, or before a judicial magistrate are acceptable. This provision is an invitation to custodial abuse and confessions resulting from torture. As past experience has shown, the 'safeguard' of admissibility of confession, only if made to a higher police official has not proved to be of any protection against the use of third-degree methods.

***Interception of wire, electronic or oral communication*:** The Ordinance provides for interception of wire, electronic or oral communication by the police with approval from a Joint Secretary level officer [S.37], and its use as evidence in court against the accused. There is no method of verification of the authenticity of intercepted communications produced by the police as evidence of guilt. Tapping of phones, emails and private conversations is legitimized under POTO clearly violative of the right to privacy upheld by the courts.

***Remand and Bail*:** An accused held under this law can be kept in police remand for upto 30 days and in judicial custody for upto six months without being charged [S 48(2)]. The right to bail is severely restricted. [S 48 (7)] The court can grant bail only if its satisfied that there are reasonable grounds for believing that the accused is not guilty! Seeking anticipatory bail is not allowed [S 48(5)]. The provision is even more stringent where the accused is a foreign citizen [S 48(9)]. Once held under this law, the accused is kept in jail without charges against him. Preventive detention is the obvious logic of the law.

## B. TRIAL

***Designated Courts:*** Like its predecessor, POTO allows for the setting up of special courts which can be constituted by the state or central government [S.23]. Presided by retired Sessions Judges, the location of these courts is left to the discretion of the central government. Aimed for speedy and impartial trials, these courts present the real face of POTO.

Within the premises of these special courts, the accused is tried on the basis of confessions before the police and is denied bail, presumed to be guilty, and not allowed effective cross-examination. The very fact that retired judges can preside over these special courts mean that the appointing authority can pick and choose those judges who toe their line. The location of these courts is left to the discretion of the executive authorities. They can either be located within the premises of the jail such as in the Rajiv Gandhi case or as in countless other TADA cases, be at a great distance from where the accused is lodged, causing hardship to the family members, bailees and even advocates representing the accused.

In order to facilitate more speedy trials summary trials are allowed [S 29(2)], and permits sentences of upto two years. In normal law, summary trials are held for minor offences leading to punishment for not more than three months. Under POTO, trials can take place even "in the absence of the accused or his/her pleader" [S 29(5)].

***Witness Protection and in camera proceedings:*** In order to protect witnesses from intimidation and threats, the identity of the witnesses need not be disclosed [S 30(2)]. This means that the police can produce its stock witnesses during trial. This seriously undermines the possibility of cross-examination and gives the prosecution unfair advantage. Trials can proceed in camera at the discretion of the special courts [S 30(1)]. The potential for manipulation of evidence by the prosecution increases if trials are not open.

***'Adverse Inferences':*** Under POTO 'adverse inferences' can be drawn by the court against the accused, i.e., it will be taken as a sign of guilt, if he/she refuses to give a blood sample, handwriting or fingerprint [S.27]. The court is also directed to draw an 'adverse inference' about the guilt of the accused if arms or explosives believed to have been used to commit offences under this law, are found in the possession of a person, or if the person's fingerprints are found anywhere at the site of such an offence [S. 52]. A series of such 'adverse inferences' inexorably leads to the establishment of the guilt of the accused. In effect, by this clause, the burden of proof that a person is innocent until

proved guilty is reversed.

## C. SAFEGUARDS

The Ordinance provides for the setting up of review committees constituted by bureaucrats, at both the state and central level to for the limited purpose of reviewing orders with regard to banning of an organisation and for interception of communication. There is no provision for review of the cases registered under the Ordinance. Even this limited power of scrutiny and review remains with the executive and the ruling political party.

Other safeguards included are that courts will take cognizance of offences only with the sanction of the state or central government [S 49]. (Under TADA approval of DSP and sanction of IGP was needed for cognizance of cases). There is in addition an unproven presumption that by allowing only high level police officials to investigate such offences [S 50] some measure of protection against abuse is provided for. Certain rights of the accused such as right to legal assistance, right that relatives are immediately informed of arrest, the duty of the police to draw up a custody memo are spelled out [S 51].

A welcome feature of the proposal unlike TADA is the restitution of the right to move the High Courts for appeal. However all such appeals have to be made within 30 days and not the normal 90 days. This restriction considerably dilutes the right of appeal and revision and implies that the access to judicial remedy is also curtailed.

While welcome these safeguards only enact what have been ruled as essential rights of every accused, by the Supreme Court, and are yet violated with impunity, day after day. There is no effective mechanism or penalty to deal with such violations. In its absence these provisions are cosmetic. The safeguard of production before CJM within 48 hours after confession to a police officer [S.32 (4)] has been rendered futile by the possibility of being back in police custody after judicial custody.

## Conclusion

The fact that is most well known about the 10 year experience of TADA is that it was blatantly misused. It is also clear that it failed miserably in controlling the menace referred to as terrorism. But haunted by the reality and images of mindless violence, we continue to accept the white lies that brought that black law into existence. We still refuse to see that POTO is condemned, by its very logic and structure, to both misuse and failure. And that such is inevitable for any law that bases itself on the premise that violence can be curbed through curtailment of democracy.

Misuse is a misnomer when referring to laws such as POTO where a crime is defined first and foremost on intent. Therefore the actions designated as crimes are all encompassing. And since intent is to be judged and prosecution launched by a corrupt and malleable law-enforcement machinery, the use and misuse coalesce. Use by one becomes misuse for the other.

Matters become worse when the procedure of POTO is added to the above situation. Special courts sitting in far away lands and long periods of police remand provide ample space for torture. Since police does not need to file charge sheets for six months, they are not filed. The admissibility of police confessions far from enabling their purported purpose of more convictions, lead to more torture and shoddier investigations. The shoddy investigations can continue since the trial is not open. The clause for protection of the identity of witnesses makes the police dispense with the effort of searching for witnesses since professional witnesses can suffice. The stage is thus set for full rein to launching of cases. Curtailment on bail ensures that the accused remain in jail. Thus POTO obliterates the distinction between innocent and guilty. Social visionaries and anti-socials, civil libertarians and crooks, poets and conmen, secessionists and scoundrels, peasant revolutionaries and thieves – all coalesce into one category: *terrorists*. All social values, political principles, and ethical consideration lose their way in the world of such laws.

The outcome of such laws however is not restricted to the innumerable tales, sometimes absurd and sometimes even funny, but always those of human misery witnessed during the reign of TADA. The systematic violence unleashed by such laws does not only attack people, it attacks the principles on which is based a democratic society and polity. Principles, for whose establishment many generations of our people have struggled and sacrificed their lives. Yet while the fundamental rights and freedoms are restricted, consent for such laws is again demanded in the context of a heightened fear. When TADA came into existence militancy in Punjab was cited as the reason. A decade later 23 of the 25 states and two of the seven union territories were notified under it. POTO is promulgated to encompass the entire country. This has been the "success" of such laws.

That such has been the outcome is not strange. Escalating violence has its roots in society, in the policies and development process set into motion by the institutions of state. Combating this violence through circumscribing the available democratic space for political protest and dissent, pushes protest outside the realm of the Constitution. The threat to the state is heightened. High pitched hysteria about grave threats to unity and integrity gain currency while the state negates its own foundation in a democratic, secular socialist republic. And in doing so the state becomes a mirror image of what it started out to combat. The tragic consequences of this are borne by the hundreds killed on the streets for no fault and the thousands languishing in jails.

We appeal to all people to break this circle of violence and protest the promulgation of the Prevention of Terrorism Ordinance 2001. We appeal to elected representatives to prevent its ratification by Parliament.

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