In Defence of India

Supreme Court and Terrorism

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The Supreme Court's judgment on TADA in the Kartar Singh vs State of Punjab case has taken the law back to the pre-1978 days, though, to be fair, this is not the only occasion when the Supreme Court has set the calendar back

JUSTICE Ratnavel Pandian's judgment (on behalf of the majority) in Kartar Singh vs State of Punjab has set the Constitutional sealon TADA. It is a poorly written judgment, poor in language—because it is poor in judicial philosophy and not merely because of the judge's poor command of English—poor in logic and poor for its unwillingness to follow the path opened up by the Supreme Court in 1978 in Maneka Gandhi vs Union of India. Justice Sahai, in his dissenting judgment, says of the Additional Solicitor General's arguments in defence of TADA that "if they are accepted, that will result in taking the law back to A K Gopalan", i e, the Supreme Court's view in A *K* Gopalan vs State of Madras, 1950. The judge is too polite to say the same of the reasoning of 'brother Pandian' whose erudition *(of* which there is really little trace in the judgment) he praises copiously. But hiscomment applies equally to the majority judgment, with which he too is in significant measure in agreement. Without at any point saying so, it takes the law back to the pre-1978 days, though, to be fair, this is not the only occasion when the Supreme Court has set the calendar back.

Terrorism is a reality, and just such a reality as the union home ministry says it is, and none other; a special law for terrorism is therefore based on a reasonable classification. That takes care of Article 14, The procedure and substance of the new law is 'just and fair' as required by the Maneka Gandhi judgment, for no reason other than that a parliament competent to enact the special legislation for the special circumstances has enacted it, and once the reasonableness of the classification of the special situation is accepted, you cannot complain that the special procedure denies rights that you had under ordinary procedure. (That the special procedure can be questioned not for being special but for being arbitrary and unreasonable is a distinction emphasised by the Maneka Gandhi judgment, which Justice Pandian does not recognise.) And as nobody who argued the case has contended that TADA violates Article 19 or any other fundamental right, there is nothing left to be vindicated. This about sums up the Constitution Bench judgment on TADA.

Two judges out of the five have dissented, and have crafted evidently better argued—though excessively cautious—judgments. If the composition of the Bench had been slightly different then it is possible that at least some of the more obnoxious provisions of TADA, such as the admissibility of confessions made to policemen of rank SP or above (sec 15), the conferment of certain judicial powers on executive magistrates (sees 20(3) and 20(4)), and the oppressive prerequisites for the granting of bail (sec 20(8)), would have been struck down by the majority. Nevertheless, TADA is now a fact of life for the people of this country, for as long as the government of India wishes to extend its life, which could well be indefinitely. I say 'people of this country' rather than 'terrorists of this country' advisedly, not only because TADA is being extensively misused, but also because even if it is properly used, the 'terrorists' who are its victims are not some specially vicious subspecies of Indians, but the very citizens that justice has to specially protect: the people peripheral to the mainstream of social, political, ethnic and economic life of this country, no matter that ihey-may be misguided, misled or wilfully mischievous.

A court that does not possess a social understanding of the ugly thing called terrorism cannot possibly look critically at the provisions of TADA. A court that understands terrorism the same way as the union home ministry (as Justice Pandian and his brotherhood unabashedly do) cannot look at TADA in the spirit of the best values expressed by the Indian Supreme Court in the past. A court that does not begin to make sense of the striking fact that the terrorists and extremists of India—Sikhs in Punjab, Muslims in Kashmir, tribal people in the north-east, the wretched of rural Bharat in Bihar and Andhra Pradesh, expatriate Jaffna Tamils in Tamil Nadu, and in recent days disillusioned Muslim youth in various urban centres—are all from the political, social, ethnic and economic periphery of Indian society, cannot begin to see what it means if suspects in 'terrorist' crimes are denied rights that mainstream criminals possess. Democracy in the best sense hat always meant justice for the dissident, the abnormal, the peripheral, notwithstanding that 'their proclivities may be held morally unjustifiable and politically unsupportable by the mainstream, or even a majority of the periphery too. Only a court that values such a justice can look properly at TADA. A court that thinks justice is another name for the securing of public order cannot.

Heinous crimes have no doubt been committed by the armed groups espousing these causes, especially but not only in Punjab. Bus passengers .and train commuters have been killed, passers-by have been massacred in the streets in random firing, and in every part of the country armed groups have killed 'peoples enemies' and 'police informers' without any procedural justice or substantive norms. Whatever the pros and cons of the need to resort to armed struggle in certain situations, the armed groups operating in India certainly need to learn basic lessons in fairness and justice.

IMAGES OF TERRORISM

But the discussion of terrorism cannot begin and end there. Nor can it end up with foreign conspiracies to dismember the nation, a particularly unconvincing explanation of the phenomenon that the state propagates ceaselessly. Justice Pandian's recital of the "background and circumstances" attending the enactment of TADA is startling for more serious reasons than the judge's *very* indifferent prose. Terrorism and disruption are "a world-wide phenomenon and India is no exception". The country "in the recent past has fallen in the firm grip of spiralling terrorists violence and is caught between the deadly pangs of disruptive activities". Having begun in Punjab, "at present they have outstretched their activities by spreading their wings far and wide almost bringing the major part of the country under the extreme violence and terrorism by letting loose unprecedented and unprovoked repression and disruption unmindful of the security of the nation, personal liberty and rights inclusive of the right to live with human dignity of innocent citizens of this country and destroying the image of many glitzy cities like Chandigarh, Srinagar, Delhi and Bombay by strangulating the normal life of the citizens... there were countless serious and horrendous events engulfing many cities with bloodbath, firing, looting, mad-killing even without sparing women and children and reducing those area into a graveyard which brutal atrocities have rocked and shocked the nation". These "stark facts and naked truths" cannot be denied by adopting an "ostrich-like attitude completely ignoring the impending danger". This is the Supreme Court speaking, not K P S Gill.

it was in these circumstances, the judge says, that parliament "has been compelled to bring forth" special anti-terrorist laws to "sternly deal with many groups lurking beneath the murky surface aiding, abetting, nourishing and fomenting the terrorists". The rhetoric is truly torrential, and would do the home ministry proud. The "totality of the speeches made by the ministers and members of parliament during the debate in parliament, the Statement of Objects and Reasons,, and the submissions made by the learned Additional Solicitor General of India" (it is a quaint fact that the Additional Solicitor General is always referred to as learned' in the judgment, but the opposing counsel are frequently plain 6Mr', devoid of the traditional epithet) are accepted uncritically by Justice Pandian and his judicial brothers as "facts of common knowledge and authenticated report" which the courts can take into consideration "to sustain the presumption of constitutionality of a legislative measure", though in fact you soon discover that they do not just sustain the presumption but fully establish the constitutionality of TADA in Justice Pandian's eyes. He says that the 'Court can take into consideration matters of common knowledge, matters of common report, the history of the times" and also can (if you can make sense of this) "assume every state of facts which can be conceived existing at the time of the legislation" as (quotes he approvingly) the High Court of Punjab and Haryana said in a full Bench judgment in 1987. One does not have to be a post-structuralist to find this celebration of "matters of common knowledge", "history of the times" and "existing facts" alarming. Granting the epistemological legitimacy of the notion of a fact, its actually and knowability, and granting also that taking into account facts of common knowledge in arriving at judicial conclusions is neither a novel idea nor an unreasonable one, one may nevertheless object to the notion that 'facts' about terrorism are what the home ministry and the Additional Solicitor General (however learned) say they are.

The 81-page judgment therefore ends on page 8 where all the "facts" and the "matters of common knowledge and report" are set out, down to the last sharpened claw and spread out wing of terrorism. For these uncontroverted facts constitute a special situation, and a parliament competent to legislate specially for well-defined special situations has in its wisdom produced TADA, and that is that. But the edifice of the judgment has nevertheless to be fully built. That is a professional requirement, and so the rest of the judgment needs to be written. The blame cannot however be wholly put at the door of Justice Pandian and his judicial brothers. It appears (I would like to be corrected if I am wrong) that the lawyers who contested the vires of the statute did not challenge the "history of the times" and "the matters of common knowledge". They seem to have conceded the terrain of history and sociology to the Additional Solicitor General!, and fought their case with arguments about parliament's lack of legislative competence; the unreasonableness of the classification of terrorist and disruptive offences; and the unfairness of the procedure prescribed for charging and trying these offences This self-imposed restriction is partly reflected in the surprising fact that TADA has been challenged only for violating Articles 14 and 21, whereas in its very fundamentals it violates the political freedoms guaranteed in Article 19. Indeed, it violates the very crux of a democratic Constitution which is premised on freedom of political choice as a matter of right, a freedom that is certainly part of the basic structure of the Indian Constitution as much as parliamentary democracy or an independent judiciary'.

The voluntary imposition of this restriction—which should no doubt be put down to the caution that these difficult times appear to mandate even to the most courageous—does not make the effort altogether worthless, as witness the dissenting judgments of Justices Ramaswamy and Salhai. But Justice Pandian has a few more arguments up his sleeve. He first defends the legislative competence of parliament to enact TADA with the contrived argument that it concerns neither "law and order" nor "public order", but the defence of India, which is a subject within the legislative competence of parliament. But in that case it is difficult to see why everybody who commits a crime to overawe the government or to alienate any section of the population should be called a terrorist, as does section 3 of the act, for such a person may be entirely patriotic and full of zeal to defend the country's borders against all external intruders. The court cannot get away with the argument that what is relevant for deciding the legislative competence is the "pith and substance" of the act and not the whole of it, for sec 3 is very much central to the "pith and substance" of TADA. But in truth, the notion that TADA is concerned with .the Defence of India has nothing to do with the actual text of the statute, but is an ideological presentation of the act, in tune with the general ideological representation of 'terrorism' as a foreign-inspired disease. It is sad that the Supreme Court should voluntarily become part of this ideological campaign of the Indian state.

Next Justice Pandian defends the reasonableness of the classification of offences made by TADA on the ground of the "matters of common report" and the "history of the times" that have been conceded by both parties. As we shall see below, once we question TADA in the light of the freedom of political choice (implicit in Article 19) and in the course of that effort look critically at the "history of the times" as stated by the home ministry, the reasonableness starts looking shaky. And finally, Justice Pandian defends the new procedure laid down by TADA as just and fair on the ground that it meets the stated aims of the legislature. He quotes approvingly a 1952 judgment of the Supreme Court upholding the validity of an impugned section of the Bombay Police Act: "It is true that a procedure different from what is laid down under the ordinary law has been provided for a particular class of persons... but the discrimination if any is based upon a reasonable classification which is within the competence of the legislature to make. Having regard to the objective which the legislation has in view and the policy underlying it, a departure from the ordinary procedure can certainly be justified as the best means of giving effect to the object of the legislature". He also quotes a 1951 judgment of the Supreme Court which said that "the presumption is always in favour of the constitutionality of an enactment since it must be assumed that the legislature understands and correctly appreciates the needs of its own people and its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds". But granting the reasonableness of the classification of a new category of offences, and also the need to depart from normal procedure to that end, the test of "just and fair" procedure cannot be answered by the argument that the procedure is best suited to give effect to the object of the legislation, and parliament knows best how to make adequate laws. That would defeat the whale logic of the Maneka Gandhi judgment. Bhagwati said quite explicitly in that judgment that the equal protection of the laws guaranteed by Article 14 cannot be merely reduced to the requirement that any legal classification of persons or situations must be based on reasonable grounds. Legal equality, he said, is a guarantee against arbitrariness. In his oft-quoted words, "the principle of reasonableness... which is an essential element of equality or hon-arbitrariness pervades Article 14 like a brooding omni-presence". And any procedure by which a person is deprived of life or personal liberty must stand the test of this reasonableness or non-arbitrariness required by Article 14.

it is true that the Supreme Court has on occasion reverted to a traditional mode of interpretation of the right to life and liberty in post-Maneka Gandhi cases such as A K Roy vs Union of India, 1982. But if (as Justice Pandian thinks) that logic is sufficient to answer the requirement of Article 21, then the least the Supreme Court could do is to stop quoting the Maneka Gandhi judgment and overrule it once for all, for that at least would make it clear to the people where their rights stand in the eyes of the highest court of the land. That logic, however, goes entirely against the ratio of not only the Maneka Gandhi judgment but also that of a number

of judgments given by the same court in the 80s concerning many matters, such as for instance prisoners' rights. That a prisoner cannot enjoy the same rights as a free person, and that a sensibly distinguished high-security prisoner cannot enjoy the same rights as an ordinary prisoner are reasonable propositions, but yet the court refused to accept that therefore any procedure lawfully enacted to confine prisoners securely is a "just and fair" procedure merely because whichever legislative or administrative body has in its competence made the rules knows how best to achieve the purpose for which the rules are intended.

Suppose for the moment that terrorist and disruptive activities constitute a sensibly distinguished class of offences. Does it necessarily follow that there can be nothing arbitrary, oppressive and fanciful about prescribing a maximum of one year as against the normal 90 days as the period up to which the prisoner's remand can be continuously extended by the Designated Court? Why one year? What is it in the definition of TADA offences that makes it reasonable to multiply the required period of investigation by a factor of four? The Supreme Court may not permit itself to weigh each and every difference in procedure, however minute, to see whether the deviation is justified. But certainly the court is entitled to take note of departures from normal procedure that are beyond reasonable explanation, that are fanciful or exaggerated? Or the institution of a new procedure that violates natural justice, and is unjust or unfair? This much is surely implied in the dictum of the Maneka Gandhi judgment, supposedly accepted ever since by the Supreme Court, that the law referred to in Article 21 must be a reasonable law, and not 'any enacted piece", in V R Krishna Iyer's words? It can certainly be argued that reasonableness entails not merely reasonableness of the categorisation of the new class of offences, but also reasonableness in the deviation of the new procedure from the procedure applicable to the normal offenders, and also inherent reasonableness and fairness of the new procedure? It would have been good if the Supreme Court had considered this view explicitly and decided against it, instead of rejecting it implicitly.

What, similarly, is the rationale for allowing certain hitherto unknown judicial functions to executive magistrates? It cannot be in the interest of speed as claimed by the government, for (and this is truly a matter of common knowledge and report) in all states of India, every seat of a judicial magistrate is also the seat of an executive magistrate and vice versa. The one is not unavailable where the other is available. So there is no convenience of speed in allowing executive magistrates to do judicial jobs. On the other hand, the innovation can be suspected to hide the mala fide intention of in fact bypassing judicial scrutiny, for executive magistrates are notoriously (and this too is a matter of common knowledge) much more amenable to executive interference than judicial magistrates, and indeed increasingly there are many instances where police officers themselves possess powers of an executive magistrate. Special executive magistrates too can be appointed at will by the government without judicial consultation. Does not the procedural innovation then suffer from harmful and oppressive possibilities?

Justice Pandian's answer is that the separation of the judiciary and executive is not absolute in the Indian state, though Article SO of the Constitution (a Directive Principle of State Policy) says that the state should endeavour to separate the two. He quotes various provisions of the Cr PC under which executive magistrates have been performing judicial functions. But what does this mean? It only means that the Indian government has made no serious effort to give effect to Article 50. That being only a directive principle, the courts cannot force the government to implement it, but surely the courts can prevent the government from moving farther away from the directive principles? If it is not mandatory to legislate the directive principles, is it not nevertheless impermissible to legislate contrary to them? Especially when procedural fairness and justice in criminal investigation and trial which impinge upon the fundamental right to life and personal liberty are involved?

BAIL PROVISIONS

The argument in defence of the bail provisions of TADA is the most shoddy part of the Kartar Singh judgment. The notion that a person accused of a crime is to be treated as innocent until the guilt is proved is built into the Criminal Procedure Code. While a magistrate's power to release a prisoner on bail is curtailed in cases where the punishment is death or life imprisonment, there is no such curtailment of the authority of the sessions court or high court, to which the accused can always have recourse if the lower court rejects the bail application. Under TADA, the designated court is to release the accused on bail only if there is reasonable ground to believe that he is not guilty, and also that he will not again commit a similar crime if released on bail. And there is no higher court which has unfettered power to release the accused on bail. What Justice Pandian does is to justify the restriction placed upon the bail-granting power of the designated court by saying that it is similar to the restriction placed by the Cr PC in normal cases upon the bail-granting power of the courts lower than the sessions court, ignoring the crucial fact that such a restriction is compensated by the unfettered power of higher courts under the Cr PC, whereas under TADA there is no higher court whose power to grant bail is unrestricted. This is plain enough from the statute, and was made explicit-six years ago by the Supreme Court in Usmanbhai Dawoodbhai Mernon vs State of Gujarat, 1988, with which opinion Justice Pandian says "we are in full agreement".

The judge further says that the provision in Cr PC which says that while granting bail the sessions court or high court may impose conditions on the prisoner with a view to ensure that he or she will not commit a similar offence .is a provision of the same nature as the restriction in TADA that bail should not be given unless there is reasonable certainty that the accused will not commit a similar offence again. The judge must be charged with extremely loose thinking. The provision in Cr PC is a restriction imposed upon the liberty of the accused (such as that the accused shall not visit the place of occurrence of the offence without the court's permission) after the prisoner's liberty from prison has been granted, whereas the provision in TADA is a pre-condition for the granting bf liberty. There is a whole world's difference between the two, which the Additional Solicitor General has described and the Supreme Court has accepted as being similar in nature. Way back in 1988, in Bimal Kaur vs Union of India the Punjab and Haryana High Court had described as obnoxious the condition that bail should not be granted without reasonable certainty that the prisoner will not repeat a similar offence, and .had declared that bit of TADA ultra vires. The Supreme Court has now restored it to constitutional status with this entirely specious analogy.

But apart from the spaciousness of the Supreme Court's logic there is another reason for regarding the bail provisions of TADA unconstitutional. To say that a person who is not yet convicted of an offence should be denied bail on the ground that he or she may commit a similar offence if released amounts to putting that person in preventive detention. The bail provisions of TADA therefore effectively make it a preventive detention law as well as a penal and procedural law. But under the Constitution a preventive detention law must necessarily follow the procedure mandated in Article 22, which TADA does not follow. There is no provision for an Advisory Board and a review by it of the detention in TADA. The bail provision of TADA thus is a violation of Article 22.

This is not just a technical argument. It goes to the heart of the oppressive character of TADA in one aspect. The police have been using TADA essentially as a preventive detention law, which is not what it is supposed to be, and which it cannot be, in view of Article 22. It is a common complaint of the Indian police that courts are too lenient in granting bail (which is not uniformly true) and therefore there is no adequate deterrence to crime (it is this deterrence rather than investigative convenience that they habitually link their complaints about bail with). 'We

catch hold of hardcore criminals with great difficulty, and the Courts release them on bail in much less time than it takes us to catch them', is a frequently heard grouse. They would like to see that suspects, once apprehended by them, stay in jail until the case is decided, which eventuality can be postponed indefinitely, by filing multiple cases against each such suspect, implicating large numbers of (preferably inaccessible and underground) associates in each case, and thereby dragging the trial (or rather, the complex of trials) endlessly. The police are perfectly adept at keeping people in endless preventive detention under purportedly punitive laws provided only bail is difficult to get. If the Supreme Court does not know this, it knows nothing of the task of the judiciary in India. It is not enough to know the "facts of common knowledge and report" about the terrorists. There are such equally authenticated facts about the police, which too the courts should be aware of and take into consideration while judging the vires of penal procedures.

Now that the police have a law after their hearts in TADA they are happily putting people behind bars to stay there for long periods without any offence being proved. And given the political nature of TADA offences (TADA is essentially a criminal law for the newly-defined category of political offences, a fact that should have been, but unfortunately has not been, the starting point for the arguments of the lawyers challenging the act), the political establishment too is more interested in shutting up the suspects and putting society out of their harm's reach, rather than trying them and punishing them for each individual crime. If one were not burdened by a philosophical suspicion of post-structuralist excesses, one would describe the whole structure of TADA and its designated courts as an elaborate political game coded in penal and judicial language. But that way of looking at it is of little help in salvaging the valuable principles of natural justice and substantive and procedural fairness that are not part of any cognitive code, but are real legacies of past struggles for democracy, equality and justice.

CONFESSIONS AS EVIDENCE

As far as procedure goes, the most obnoxious provision of TADA is sec 15(1) which says that confessions made by an accused to a police officer of rank SP or above are admissible in evidence in the designated court. Justice Pandian's reasoning for reagrding this provision as not violative of Articles 20(3) and 21 is typical of his entire mode of reasoning. He confesses that he too was at first tempted to "share the view *of* the learned counsel that it would be dangerous to make a statement given to a police officer admissible", but he has overcome the temptation in view of the "legal competence of the legislature to make a law prescribing a different mode of proof, the meaningful purpose and object of the legislation, the gravity of terrorism unleashed by the terrorists and the disruptionists endangering not only the sovereignty and integrity of the country but also the normal life of the citizens, and the reluctance of even the victims as well as the public in coming forward, at the risk of their lives, to give evidence", and therefore holds the relevant section of TADA perfectly constitutional. In other words there is a special situation prevalent in the country whose nature is undisputed and a matter of common knowledge, and a parliament competent to make the required law has made such a law to serve the required purpose, which is a meaningful purpose, and that is all there is to its constitutionality. It is a matter of minor redemption that both Justice Sahai and Justice Ramaswamy, in their dissenting judgments, have held this provision unconstitutional, and in doing so have made an elaborate discussion of the problem of police torture, which should in truth be central to any consideration of statutory provisions such as 15(1) of TADA. The view of the majority however is an expression of a barely concealed cynicism; 'because these terrorists will not allow witnesses to depose against them, the only way out is to beat them up and extract confessions and treat that as evidence'. Such a cynicism is unworthy of the highest judicial body of the land. As for armed groups not allowing anyone to depose against them, this is a general problem faced by criminal courts whenever powerful persons are involved, except that nobody sees it as a problem when the source of the power is a dominant position in society. It is only when the power stems from a rebel's gun that it is seen as a problem. But when society has reached a stage where social and political rebels of whichever variety take so easily to guns—a stage that Indian society has certainly reached—the problem of effective conduct of criminal trials cannot be divorced from basic problems of justice in the socio-economic order, and cannot be solved by a facile recourse to an implicit sanction of police torture.

At the other end of the spectrum is this seemingly miserable little right for the accused defended by some of the lawyers challenging TADA: that when a case is transferred from one designated court to another, whether within the same state or outside, the objections if any of the accused must be mandatorily taken into account before the transfer is effected. It seems a harmless enough right to ask for, but the Supreme Court is not moved. Section 11(2) of TADA as it stands says that the transfer is to be effected with the concurrence of the Chief Justice of India, and Justice Pandian leaves it to the Chief Justice to decide from case to case whether he wants to hear the accused. It is interesting to hear the weighty arguments employed by the Additional Solicitor General and silently allowed to pass by the court to obstruct the simple plea. The Additional Solicitor General says that under certain circumstances "the parliament is fully empowered to exclude the invocation of the rule of natural justice... having regard to the fact that the entertainment of any objection would only frustrate the proceedings and paralyse the meaningful purpose of the provision". This weighty argument (whatever its intrinsic worth) is evidently uncalled for in this simple situation where all that is being asked for is that when the Attorney General applies to the Chief Justice of India for permission to transfer a case, the accused concerned should also have a right to express their views, which views should be taken into account by the Chief Justice in arriving at a decision. Nothing need be 'paralysed' by this. But Justice Pandian does not confront the proposition that rules of natural justice can be set aside so cavalierly as this. Instead he argues that the very fact that the concurrence for the transfer is to be given by none other than the highest judicial officer in the land who gives his opinion by "drawing the requisite subjective satisfaction on the reasons given in the application or any material placed before him explaining the exigencies of the situation" is sufficient to prove the bona fides of the lawmakers and to protect the rights of the accused. But what would be lost if the materials from which the Chief Justice is to draw subjective satisfaction include whatever reasoned objections the accused may have? As for the power to set aside natural justice, Justice Pandian says nothing about its applicability to this—or any—situation, but adds magnanimously that notwithstanding such a power that parliament may have, the Chief Justice may, from case to case, allow the accused to express objections, a discretion that is in any case not excluded by the act itself. Such a miserly attitude towards civil liberties is unusual, to say the least. It has been customary for Indian courts that whenever they deny major rights or substantial relief, they add the spiritual balm of subsidiary minor relief, but the majority in Kartar Singh vs State of Punjab is implacable in its resolve not to allow the sharpened claws and outstretched wings of the terrorists any quarter whatsoever It is a pity that Justice Pandian and his brothers have never seen, and do not possess the imagination to visualise, who these terrorists are whom they have so ruthlessly put outside the protection of the Indian Constitution.

In arguing the case for the constitutionality of TADA, the state has frequently resorted to—and the court has at more than one point approved—a mode of argument that proves one apprehension that has often been raised and discussed in the civil liberties movement There are many special statutes dealing with socially oppressive and morally obnoxious

offences. These are statutes dealing with smugglers, bootleggers, with crimes against women, crimes against scheduled castes and tribes, and crimes against public morality. Most such statutes include provisions that contravene some principle or other of natural justice. And the courts as well as democratic public opinion has allowed them to pass keeping In view the exceptional nature of such crimes. The apprehension of the civil rights movement has been that once an undesirable principle is laid down in the name of a desirable object, there i s no stopping its extension to more ambiguous or plainly undesirable ends, especially since the discretion lies with the increasingly lumpenised legislatures and insensitive bureaucracies. The TADA case has proved the apprehensions true, and with a vengeance. TADA cripples the right of the accused to cross-examine witnesses by allowing the Designated Court to keep the identity of the witnesses secret, if it so wishes. This is certainly a violation of natural justice. But the Supreme Court in a 1973 case had said that rules of natural justice cannot remain the same in all conditions, and had justified the examination of witnesses outside the presence of the accused, and the denial of the right of cross-examination to the accused. But what was that case? It was a case where some men had entered and misbehaved in a women's hostel.and in the ensuing enquiry the institution's authorities had understandably decided not to allow the accused to be present when the women inmates were examined by the enquiry committee. The Supreme Court, with perfect good sense, had justified the procedure, and in the process laid down the principle that has now come in use to Justice Pandian to uphold the vires of the provision of TADA that takes the accused blindfolded through the trial.

Similarly, *in camera* trial as provided for in 16(1) of TADA is justified by Justice Pandian with the argument that such a provision is already there in the CrPC in the case of the offertce of rape. About anticipatory bail too, the judge could have said that the SC and ST (Prevention of Atrocities) Act also excludes the right of anticipatory bail to upper caste persons accused of crimes against scheduled castes or tribes. But Justice Pandian finds an easier substitute in a strange argument: anticipatory bail is a new right introduced into the CrPC only in 1973, and therefore removing this right cannot be called a violation of personal liberty. He also relies, it is true, on an argument proffered by the Punjab and Haryana High Court in Bimal Kaur vs Stale of Punjab, that "persons accused of terrorist offences are members of a well-organised secret movement whom the enforcing Agencies find it difficult to lay their hands on", and therefore it is all right to exclude the right of anticipatory bail for TADA offences. But this is an arbitrary reading of "facts of common report and knowledge" into the statute, whereas TADA itself says nowhere that to be guilty of a terrorist offence, one has to be a member of a "well organised secret movement". The assumption that all TADA *detenus* are such persons is one of the common images of terrorism that haunt judicial minds and mask the fact that the definition of a terrorist offence in the statute does not conform to what is imagined, and further also the fact that the majority of TADA *detenus* are not members of any secret movement at all, whether well or ill organised. After all, while granting anticipatory bail, the court is supposed to principally consider whether the applicant needs to go through the rigmarole of arrest and remand, or can be allowed at liberty without affecting the interests of justice while the investigation is going on. This discretion is essential to the provision of anticipatory bail, and is by its very nature a consideration that is applied from case to. case. There is no logic in assuming beforehand that all persons accused of TADA offences are necessarily going to be underground activists—or slippery gangsters—whereas "no such explicit presumption is present in the statute as a prerequisite for an offence to be a TADA offence.

Aside of that, the generalisation of principles of procedure that are violative of natural justice, from offences that are anti-social and immoral in character to a statute such as TADA that is pre-eminently aimed at dissenting politics, is an eventuality—as said above—apprehended by the civil liberties movement, and yet an eventuality that is difficult to avoid or evade and can only be lived with. It is evidently a consequence of the nature of law as an institution of the bourgeois state: its notion of fairness and equitability can only be formal and notional, and therefore insensitive to social hierarchies and unequal social and economic relations. To say this is not to pretend that there is an easy solution to the problem here posed: to conceptualise and institutionalise law in such a way that it will possess the bourgeois virtue of avoiding arbitrariness and unreasonable selectivity, and will at the same time be supple and flexible enough to be sensitive to the iniquities in social and economic relations; in other words to create a legal system that will be attuned to the requirements of social change but at the same time somehow be free from the possibility of unfair discrimination and partisan misuse. 'The post-revolutionary societies ruled by communist parties uniformly failed to solve this problem, and instead created monstrous legal systems in which the problem is by-passed and the law is made a handmaid of the party in power. Leave alone law and legal systems, any substantive—as distinct from formal or procedural—perfection in the arrangement of human affairs will perhaps long be an elusive ideal (whatever the Utopian dreams of Marx) because the perfectibility of the human subject has inherent limitations. As a value and as a vision, one should of course go on dreaming with Marx in his more extreme moods that not only law, but philosophy, morality and alt such objectified norms of human conduct will be abolished because they will coalesce with life and become part of the lived reality of human life, for it is such visions that make possible whatever degree of perfection is given to us.

ANTI-DEMOCRATIC ESSENCE

We finally come to what is undoubtedly the anti-democratic essence of TADA: the fact that its classification of the new category of terrorist and disruptive offences includes politics as a defining element. In discussing this, we will perforce have to go beyond even the best of the Supreme Court's past pronouncements, for unlike the matter of procedural and punitive justice, in which the Supreme Court has made substantial contributions towards the protection of people's rights in the last two decades, it has behaved uniformly, conservatively and cautiously in the matter of freedom of political choice and political liberty as fundamental rights stemming from Article 19. The TADA case was a good occasion for charting out a new path in this matter, but neither the lawyers who challenged the statute nor the judges who sat in judgment over its vires saw it that way. TADA was challenged only for its procedural unfairness and was upheld—however dubiously—as procedurally fair. It was not challenged for being violative of the right to political freedom which is the essence of the political democracy that India proudly proclaims itself to be, and of course the Supreme Court's frame of mind leaves little doubt that if it had been, the challenge would have been received very inhospitably by the Bench.

But that need not deter a rational examination of the statute. When political activists take to violence in a systematic manner, the dividing line between politics and crime becomes quite thin, but that only means that a democratic legal and judicial system must be extra careful to ensure that it does not transgress its limits and encroach upon political liberty in the name of punishing and preventing crime. TADA, on the contrary, leaves no dividing line at all between politics and crime. A crime of violence committed with political intent is what a terrorist offence is, by definition, and to be an offence of disruption, no crime of violence is at all necessary. Mere political intent is a crime. Can that be a reasonable basis for classification of offences? Article 19 allows reasonable restrictions to be placed upon civil and political freedoms, but would it not be anathema to its spirit to classify crimes as political and non-political and to devise a new and oppressive procedure for the former? It is now supposedly accepted that

fundamental rights cannot be seen in isolation of each other, but must be seen together. A classification under Article 14 cannot therefore be repugnant to the right of political liberty, the freedom of political choice, that is implied by Article 19(1) (a), (b) and (c). If it is, it would not be a reasonable classification.

Yet, this is what TADA does. Section 3 of TADA defines a terrorist act as an offence of violence against person or property committed with a certain category of weapons, provided it is committed "with the intent to overawe the government as by law established, or to strike terror in the hearts of the people, or any section of the people, or to alienate any section of the people, or to adversely affect the harmony amongst different sections of the people". To overawe the government is certainly a political aim, and so is the aim of terrorising a certain section of the people or adversely affecting the harmony amongst different sections of the people, or alienating a section of the people. 'A section of the people', as used here, can only mean a social group, such as a class, caste, ethnic, linguistic or religious community. To strike terror in such a group or to alienate such a group may well be an obnoxious act, but it is a political act nevertheless. Even if, in principle, there can be non-political crimes that fall within the description of section 3 of TADA, the police have correctly understood the unstated major premise of TADA and arc are using it only against political activists. Subsection 5 of section 3 makes things even more explicit. It says that it is a crime to be a member of a terrorist gang or a terrorist organisation, that is, a gang or organisation that indulges in terrorist actions. Taking this together with the meaning given to 'terrorist act' in the preceding subsection, what this provision says is that if you are a member of (i) a revolutionary communist organisation that believes in the forcible overthrow of the existing political order; or (ii)an organisation of dalits, muslims, christians, etc, that employs force to resist upper caste/Hindu domination; or (iii) an organisation of a linguistic orethnic such as Nagas, Kashmiris or Tamils that employs force to resist or overthrow alien hegemony; then even if the organisation of which you are a member is not legally banned, you are guilty of a crime punishable by a minimum of five years' imprisonment and maximum of a life sentence

The political nature of TADA—the fact that politics is a central clement of the classification of crimes effected by this statute—is fully evident here. For, to be a member of a dacoit gang has always been a crime under the Indian Penal Code. What distinguishes a terrorist gang from a dacoit gang is not any qualitative difference in the nature of the offences committed (in both cases, the offence is a crime of armed violence against person and property, the difference being only in minor details), but the difference in the intention. The intention of the terrorist gang is political, whereas the intention of the dacoit gang is only pecuniary. And it is this political nature of the intention that forms the basis of the classification of a terrorist gang as a category different from a dacoit gang, with membership of the gang entailing a much heavier punishment and a much more illiberal procedure of investigation and trial Can this be called a reasonable classification in a country whose Constitution guarantees the freedom of political choice implicitly as a fundamental right?

More generally, if you commit a crime of murder, arson, assault or abduction with lethal weapons, with a pecuniary or retaliatory or any such apolitical motive, then your crime falls in one category. If you commit the same crime of murder, arson, assault or abduction with the same weapons with a view to ultimately overthrow Vie capitalist state, or with a view to put an end to the oppression of dalits by the upper castes, or to protect the security and rights of Muslims or Christians, or with a view to enable the Mizos or Punjabis to separate themselves from the country, then the same crime (committed with the weapons) is in a different category. You arc now liable for a heavier punishment and are tried by a distinctly more illiberal procedure. Is this classification of identical offences into separate categories according to the politics underlying the act, a reasonable classification in a political democracy, in a country whose Constitution guarantees freedom of political choice as a fundamental right, as the Indian Constitution implicitly does in Article 19(1) (a), (b) and (c)?

It is obviously not, and this is where TADA begins to be undemocratic and unconstitutional. Its procedural unfairness comes later. Since those who challenged the vires of the act did not approach the matter from this angle, the Supreme Court's answer to this mode of argument cannot be found in so many words in the Kartar Singh judgment. But it can easily be inferred from the outlook that informs the judgment. Like a magic puzzle that is simultaneously this.as well as that, TADA keeps getting transmuted every second from its literal text to the images conveyed by the word 'terrorism'. Terrorism conveys images of blown up DTC buses, bits of flesh strewn in a bombed market place, Bihari workers mowed down in a Punjabi village, a khakhi-clad leg stuck high up a tree in the landmined Telengana countryside, a blood-splattered refugee camp in Mizoram, etc. The text of TADA contains none of this but is a straightforward piece of illiberal legislation targeted at militant political dissent (or even mere dissenting political opinion, in the case of ethnic groups or linguistic communities desiring freedom from India). But the legitimacy of the illiberal statute rests upon the images of blood and gore. That lay persons are easily carried away by this imagery is perhaps understandable but it is neither understandable nor pardonable that judges of the highest court of the land are unable to see that 'the "blood-bath, firing, looting, mad killing" that Justice Pandian is so eloquent about has nothing to do with the actual classification of offences effected by TADA, whose vires the Supreme Court is called upon to adjudicate. Justice Pandian imputes to TADA the aim of tackling "a grave emergency situation created either by external forces particularly at the frontiers of the country or by anti-nationals throwing a challenge to the very existence and sovereignty of the country in its democratic polity". The provisions of the act cast a much wider net than is implied by this imputed aim, which can itself be criticised both for being gratuitous and tendentious.

If terrorism had been defined as, let us say, mass and random killing as distinct from an ordinary murder in which a targeted X or Y is killed; or as setting off explosives or opening gun-fire in a public place; or derailing a passenger train wantonly; then at least the definition would be in accordance with the image of 'bIood-bath and mad killing' used to justify the classification, even if one would still object to the unfair trial procedure. But what we have, on the contrary, is first of all rhetoric that brings to mind the sickening picture of bits of human flesh strewn in a Delhi market place, and then a definition of terrorism which says that if you kill X because you think he is an obstacle to your business then you are one category of criminal and are entitled to a civilised procedure of trial and norm of punishment, but if you kill the same X because you think he is an obstacle to the communist revolution, or to make an example of him to the brahmins, the rajputs, the marwaris, the bengalis or whoever you think needs to be given a scare to help liberate your caste/community/nationality, then you are a criminal of a different category, and you are entitled to only arather uncivilised procedure of trial and norm of punishment. There can be nothing more scandalous than the inability of the highest judiciary of the land to see through this fraud of language and images played upon citizens and courts by TADA.

But as we go ahead from section 3 of TADA, which at least requires some explanation to enable one to see through its fraudulent nature, the intention of the legislature becomes even more plain in the subsequent sections. Section 4, for instance, says that if you merely propagate the opinion or even just encourage the opinion that, say, the Tamils or the Kashmiris are a people apart and should live apart from India, then you have committed the crime of disruption, for which the minimum punishment is five vears and the maximum a life sentence. No

blood-bath, no mad killing, but mere holding or propagation of an opinion. It is also a crime of disruption to advocate, advise, suggest, incite or to predict, prophesise or pronounce (by act, speech or any medium) in such a way as to advocate, advise, suggest or incite the killing or destruction of any person bound under the Constitution to uphold the sovereignty and integrity of India; or any public servant whatsoever—and for the mere act of verbal, literal or pictorial expression you are liable for a minimum of five years and a maximum of life imprisonment. It is interesting that in this provision, "a person bound under the Constitution to uphold the sovereignty and integrity of India" is treated on par with "any public servant', for Justice Pandian makes an elaborate discussion of the distinction between law and order, public order and the Defence of India, and justifies parliaments legislative competence to enact a statute such as TADA on the ground that it is concerned neither with mere law and order nor public order, but nothing less than the Defence of India. Evidently, the act itself cares nothing for such niceties of distinction, for not every public servant is concerned with the sovereignty and integrity of India, and yet the act treats all of them on par.

But that apart, what this provision means is that whether a retrenched industrial worker aggrieved by the freedom to rationalise industrial workforce conceded by P V Narasimha Rao's structural-adjusting government wishes instant death to that old man, or the progeny of a poor labourer killed in police custody wail that a similar death may visit the policemen concerned, the mere expression of such a wish (with which many right-thinking people would sympathise) may result in penal charges under TADA entailing the uniform punishment for all TADA offences: five years to life imprisonment. The Defence of India, evidently, is a very demanding cause, but quite thoroughly out of tunc with what is best about the Constitution of India. But Justice Pandian and his brother judges think otherwise. One should be pardoned for expecting the judges of the highest court of the land to understand that the Defence of India includes the Defence of the Constitution of India; and that the Defence of India is the Defence of India as a democracy. But unfortunately they have set these concepts one against the other and have ended up looking at the Defence of India the way a K P S Gill would. Natural justice and political freedom are therefore not part of the values and institutions that make up this India that is to be defended jealously. They are a luxury or perhaps a vanity of democracy that are to be ruthlessly superseded when the Defence of an India defined exclusively in terms of territory, security and order is endangered.

Financing Higher Education
Justice Punnayya Committee Report

M Shatrugna

The report of the Justice Punnayya Committee on financing of higher education highlights the need to review and restructure the norms for financing the education sector.

SINCE the 1950s higher education has been financed mainly by the central and state governments.

Table 1 shows that resource mobilisation from the private bodies and fees has dwindled over the years. Table 2 shows that the state governments' share in the plan expenditure is two-thirds that of the central government and that the share of the state governments in non-plan expenditure had touched 94 per cent by the Seventh Five-Year Plan.

Especially, after the inauguration of the New Economic Policy in 1991, there is a major change in the financial commitment of the governments to wards higher education. While it is true that the expenditure on higher education has gone up over the years, the major expenditure has mostly been on the non-plan side covering the wage bill of the teaching and non-teaching staff. The so-called capita! (development) expenditure has not been commensurate with the non-plan expenditure.

TERMS

The demand for higher education has been on the rise over the years from all sections of the society. With 'limited' resources at the command of the governments/UGC, the UGC in 1992 had appointed the Justice Punnayya Committee to go into the question of resources for higher education in the central universities, deemed universities and Delhi colleges and suggest measures to improve the financial position. The terms of the committee were among others, (i) to examine the present policy, norms and the pattern of providing development and maintenance grants to central universities, deemed universities, Delhi colleges and suggest measures and norms for determining grants in future (ii) to examine the inter-university variations in development and maintenance grants (per student, per department, and any other relevant criterion) with a view to developing objective parameters governing such grants (iii) to examine the pattern of utilisation of the grants (iv) to examine the pattern of allocation of grants between teaching, research and non-teaching functions and to suggest norms relating to expenditure on the above functions (v) to explore and recommend ways of improving overall cost efficiency of the institutions (vi) to study the extent to which the institutions are raising their own resources, and to suggest specific measures for augmenting the proportion of resource raising by the institutions (vii) to recommend incentives to institutions to raise a higher proportion of internal resources and to develop norms for utilisation of internally generated resources and (viii) to review the existing scheme of financial assistance for needy students such as free studentships, student loans and evolve a better scheme to assist students from disadvantaged sections of the community and promote equity in higher education.

The committee in its year's operation met and elicited the opinion of the vice-chancellors of the concerned universities, students, faculty, administrative and supporting staff and a number of educationists.

RECOMMENDATIONS

The UGC funds the universities in the form of block grants. This system, according to the committee, had robbed the universities of raising internal resources apart from the students fees which is insignificant compared *to* the expenditure. Further, 70 to 75 per cent of the expenditure is incurred on meeting the wage bill of the teaching and non-teaching staff. In practice, the income generated through fees, etc, is subtracted from the block grant before the grant is finalised. This method, the committee felt, acts as disincentive in mobilising additional resources at the university level. The committee, therefore, proposed that "the additional income generated should not be adjusted while determining the annual maintenance grant. Any additional resources generated by a university may be kept in a separate fund to be utilised for furtherance of the objectives of the University institutions" (p 6). For instance, the fees collected for 'entrance tests' may be kept in the university account after meeting the expenditure.

The committee further recommended that "the UGC may find a mechanism of providing an appropriate incentive grant, perhaps in the nature of a matching grant, as an incentive to universities generating their own resources". This suggestion is refreshing considering the weak financial position of the universities where no effort worth the name has been made to mobilise internal