Law Commission's View of Terrorism

Indians have increasingly put their faith in courts of law and judges as politicians and bureaucrats repeatedly disappointed them. But the Law Commission's recommendations on the proposed anti-terrorism bill give one pause. The commission has brought back some of the more objectionable provisions and added a couple of irrelevancies of its own.

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An anti-terrorist law will soon be back, whether we like it or not, and one might as well open up a public discussion that may help soften it a bit. One wishes one could say we might even persuade the government to give it up, but that is without doubt a pipe dream. A 'human face' is all the humanity that is promised us these days and we are not allowed to expect more. The promise accompanies threats of globalisation, and it accompanies the Law Commission's approval of the proposed anti-terrorist law. Ours, it appears, is a determinedly inhuman society that promises a human visage on all fronts. All hopes and aspirations are expected to be pegged on it.

To recall some history, the Terrorist and Disruptive Activities (Prevention) Act (TADA) came into being in 1985. It had a built-in provision of lapse at the end of two years unless extended by parliament. It was extended with amendments in 1987, and again once every two years (with some further amendments to take care of observations made by the Supreme Court on various occasions) until 1995 in which year parliament, in response to strong public criticism, let it lapse, even though a constitution bench of the Supreme Court, in Kartar Singh vs State (1994), had upheld the constitutionality of the act as it stood by the time it was extended last in 1993.

At that time a fresh anti-terrorist law (innocuously named Criminal Law Amendment Bill, 1995) was drafted by the central government, but never enacted. The reason could be that the country has had consistently unstable governments since that time, and even if they had had the time to think about re-enacting TADA, the ruling parties probably had no inclination to bring back the law that had got branded as anti-Muslim. Such police officers as have the inclination to take to the pen abused in newspaper columns the populism of unstable governments that permits such pusillanimity. If that be so, then long live populism, and long live instability.

It appears that in 1999 the central government suggested some more amendments to the proposed bill through OM No II, 13014/21/98, Legal Cell, Ministry of Home Affairs. The Criminal Law Amendment Bill, thus amended, was then sent to the Law Commission of India with a request to study the need for an anti-terrorist law and make suitable recommendations to the government. The Law Commission, evidently having no wish to merely make general recommendations which would mean, in its view, further waste of time in bringing an anti-terrorist law back onto the statute book, has worked its suggestions and recommendations into the draft and sent it back in a ready-to-enact form. Rumour has it that the central government sent it back once again to the Law Commission for further clarifications or changes, but the Law Commission has returned it unamended. It is likely to be placed before parliament for enactment any day. If one recalls recent history correctly, barring only the BJP and fellow-parivar parties, all others had voted in 1995 for discontinuing TADA, and that includes many of the present allies of the BJP, whether or not they went by their present name at that time. The name of George Fernandes, India's first war minister in 50 years, comes immediately to the mind as a vociferous opponent of the act. But that is no reason for hoping, let alone assuming, that those parties and individuals will take a stand against the bill now. The virtue of constancy is not highly prized in Indian politics.

Understanding Terrorism

The Law Commission has submitted a very elaborate working paper in defence of the bill and the amendments recommended by it. Some of the amendments recommended are meant to ease things a bit for the accused, and some actually make things worse, notwithstanding the Law Commission's avowed concern for giving the law a human face that will accommodate the human rights critique of the late lamented TADA. We shall go into the details below, but it must be said straightaway that when a bill vetted by the Law Commission reads no different than if a body of policemen had done the job, then there is some thing prima facie – an expression that the Law Commission should have no difficulty in comprehending in its precise sense – wrong with it. Policing is about order, but the law is not merely about order. If it were, there would be no reason for any one to respect it, and no justification for the moral authority its punitive power assumes. If you imagine with your mind's eye the same bill being submitted to a body of police officers, the less illiterate among the breed, that is, and if you conclude upon fair perusal that they would not have said any thing substantially different, then you are entitled to complain. Even the foreign parallels quoted by the Law Commission are from the anti-terrorist statutes of US and UK, which any police officer could, with diligence, have familiarised himself with, and not any jurisprudential discussion about terrorism and the law. It is a sad day when the Law Commission of India understands the 'law' in its title as just another word for policing.

There is not one iota of social analysis of this phenomenon called terrorism, but only an inventory of its crimes, in the elaborate working paper presented by the Law Commission explaining its comments on the bill. Such a lack cannot be brushed aside as being of no importance since the justification offered for the harsh measures of the proposed anti-terrorist law proceeds from the nature of one's understanding of the phenomenon called terror-

ism. When the understanding does not proceed from a rational analysis, the gap is bound to be occupied by popular prejudices, that is to say the prejudices of such opinion as manages to achieve the status of public opinion. An instance is the Law Commission's chronology which dates the rise of religious terrorism in the country to the Mumbai blasts of 1993. Only a couple of months before the blasts, the Shiv Sena and the police had struck real terror in the hearts of the Muslims of that city, a fact substantiated by the report of the Sri Krishna Commission. And prior to that the Babri masjid was pulled down at Ayodhya by the organised force of Hindu fundamentalist outfits. In fact it is that destruction that initiated the cycle of communal violence that terrorised Mumbai. But for mainstream public opinion in this country, those killings and the destruction of the masjid, however reprehensible, do not amount to terrorism, but only the subsequent blasts do. And so too thinks the Law Commission of India. On par with this is the reference to the al-Umma as the principal fundamentalist militant outfit of southern India, and the depiction of the February 1998 blasts in the Coimbatore region attributed to it as signifying the rise of religious terror in south India, whereas, in fact, the al-Umma came into the picture as a response to the terror unleashed by way of murder, arson and pillage upon the Muslims of Coimbatore by the police-Hindu Munnani combine. This too is a widely reported fact. In popular perception, and so too in the Law Commission's uncritical adoption of the same, the violence of the Hindu Munnani maniacs in league with the police, however reprehensible at least to sensible minds, is not terrorism. The al-Umma alone symbolises terror in Coimbatore. And it is the principal fundamentalist militant outfit of south India because Hindu fundamentalist outfits, though objectionable to sane minds, are not in the same category.

It is not the case – lest the line of the argument above be mistaken – that the crime of terrorism as defined in the old TADA or the proposed bill would not comprehend Hindu fundamentalist terror. The law does not suffer from that kind of bias, nor could it within the scheme of the Indian Constitution. But it makes a lot of difference for the justification sought to be offered for the law, that the terror emanating from minorities alone is depicted as terror. It enables a harsh law to find easier support. Nor is the fact that such a viewpoint is expressed as the merest common sense not requiring substantiation, devoid of disturbing implications for the operational effect of the law. Other things being the same, a law is in fact as biased or unbiased as those who enforce it, and when a general mindset that views Hindu terror as somehow not of the same character as Muslim terror dominates the view of such a high body as the Law Commission of India and therefore, a fortiori, that of most of the enforcers of the law, the law cannot really operate as even-handedly as its text indicates. It is not unknown that Hindu militant outfits were never booked under TADA to the same extent as their Muslim rivals.

But perhaps, with due respect to B P Jeevan Reddy who heads the Law Commission of India, that august body's depiction of terrorism borrows, not from unreflecting public opinion, but from the reports of the union home ministry, which are quite conscious of what they tell and what they do not. The greater is the pity. Jeevan Reddy, as a judge, was known for his sensitive interpretation of questions of secularism, caste, ecology and workers' rights. That the working paper authored by the Commission under his stewardship does not exhibit one bit of sensitivity in understanding the complex question of terrorism, nor one bit of hesitation in allowing the home ministry's perception to set the tone of its discussion, is therefore all the more a pity.

Terrorism, the Law Commission says in its working paper, is but another name for organised crime. There can be no more mistaken opinion. The problems that what is called terrorism gives rise to are so difficult to handle precisely because it is something other than mere crime, even organised crime. Political and social militancy does contain an element – not necessarily slight – of terror, but that is neither the beginning nor the end of the matter. What really distinguishes it does not lie in crime. On the other hand, there is plenty of organised crime – such as printing fake currency notes or adulterating foodgrains – that does not terrorise any one, though it certainly injures many.

What is called terrorism for the purpose of the bill – as for the purpose of TADA – is but political militancy. One may or may not like that particular politics, and one may or may not like any militancy. But what is called terrorism is nevertheless political militancy. Plain terror of goonda gangs, mafias and gun-toting landlords, which long predates the Khalistan Commando Force, the Hizb-ul-Mujahideen, the ULFA and the Peoples War, was never called terrorism, nor were specially harsh laws ever contemplated for tackling it. If political militancy is treated differently, that is not so much because it is militancy as because it is politics, and that too politics of an inconvenient kind. It appeals to certain ideas unpalatable to an extreme degree to the rulers of the country as well as the country's social mainstream, but nevertheless creates a social base for itself from out of the citizenry of the country, and arms itself with their support. That is why it is difficult to deal with, and seems to require stringent statutory provisions. Paradoxically, political militancy calls for harsh laws not because it is terror, but precisely because it is not just terror, but is a politics. It is a politics, right or wrong, with a social base of people – well guided or misguided – supporting it and its armed activity, which makes it difficult in the extreme to deal with it, if dealing with it means policing it.

Terrorism in Kashmir and Nagaland is the politics of ethnic self-determination; terrorism in Tripura, Bodoland and Assam is the politics of ethnic self-assertion or self-preservation; and terrorism in Bihar and Telangana is the politics of socialism; even the extra-territorial terror of the Harkat-ul-Ansar (alias Mujahideen) is a politics: it is the politics of pan-Islamism. Its idea that Muslims everywhere must live under Islam and that this divine state of affairs will be achieved by force, used if necessary against dissenting Muslims too, would be regarded by most right thinking people as plain but harmful foolishness, but it is a politics nevertheless. As a politics it attracts the ideas of people, creates certain aspirations and moulds or remoulds others, and in the process creates a social base – a base of human beings, let us stress – for itself. That is why it is so difficult to 'root out', if rooting out is what is required. And it is precisely for this reason – more than the quantity or quality of the weapons it carries – that policing finds political militancy a difficult nut to crack. To transfer the difficulty from its political character to the weapons it carries and the allegedly demoniac mind behind the weapons, and to seek harsh laws to tackle it is a dubious mode of reasoning, to put it mildly. It is all the more dubious when it comes from a high body such as the Law Commission of India.

It is easy to get angry at this point and say: what shall we do, then? Kargil and

Kandahar have given rise to plenty of such rhetorical anger. Without denying that there is reason behind the anger – violence used systematically creates a feeling of helplessness among the victims as well as the onlookers that easily and understandably turns into rage – it is still necessary to meet the question head on: yes, what shall we do? Jail more and more people persuaded rightly or wrongly to think the way of the militants, under the proposed anti-terrorist law, deny them bail and a fair trial, and thereby create a whole prison world of recalcitrant citizens? Or perhaps shoot them dead in custody as happens day in and day out in militancy-influenced parts of the country from Kashmir to Telangana? Difficult problems do not have easy solutions. Especially when the 'problem' comprises human beings whom the humanity in us should cherish, and citizens whom the law should protect.

This is the reason why human rights activists have always objected to the use of the words terrorism, extremism, etc. They have the effect of denying the politics of the alleged terrorists and extremists, as well as their humanity. This does not mean that there is no terror at all in the acts described as terrorist. There is terror, and it can be quite substantial some times. If I were a Kashmiri villager living somewhere in Kupwara and a conscientious believer in Kashmir's accession to India, I would certainly lead a fear-stricken life. If I were a Telangana villager living somewhere in Karimnagar and an elected representative in the gram panchayat from the Telugu Desam Party I would certainly live in trepidation if not in a state of fear to the same degree as the Kupwara villager. The fact that I am a good person and intend no harm to anyone, whatever my political preferences, or that I belong to the very same social/economic class or community which the militants claim to represent, or that I am merely a minor cog of the state machinery and therefore cannot do the militants or their supporters much harm, need make little difference, and I would be well aware of that. Armed politics suffers from a common temptation of substituting terror for politics, and even otherwise exhibits a degree of arbitrariness and intolerance, and the effect is to strike terror in those who are – by their own doing or otherwise – objects of the intolerance. Even when the politics is not intolerant by its very nature, the wisdom that advises you to be as tolerant when you have an automatic rifle in your hand as when you have only a flag is not common among human beings.

But how do we tackle this element of terror in political militancy? As far as criminal investigation and adjudication are concerned, each such instance of terror falls within the definition of some crime or other in existing penal legislation. The terrorists are yet to invent a new crime not thought of by Macaulay. So what is the need for a new legislative exercise? The answer given is that the same old crimes committed in new ways (and, more importantly, for new purposes, though this is not made explicit in the discussion by the Law Commission) call for a new and harsh procedure. It is said that the existing criminal justice system was not fashioned keeping in mind the organised crime of our times, in particular the organised crime of terrorism. It is an important theme of the Law Commission's working paper that terrorism which is said to be just another name for organised crime is a new phenomenon that defeats the capabilities of the criminal justice system we have. Its capability to apprehend and punish the guilty, that is. From this complaint it certainly does not follow that it is enough if the criminal justice system is able to apprehend and punish somebody, whether guilty or not, and therefore the issue of procedural fairness and justice remains as relevant as ever. But it is a characteristic feature of the entire discussion supporting anti-terrorist legislation that this obvious consideration is pushed into a remote corner.

But as a matter of fact, the capability of our criminal justice system to apprehend and punish the guilty is uniformly slight, whether the crime falls within the category described as 'organised' or not. Rape, for instance, is hardly an 'organised' crime, but the rate of success in prosecuting that offence is acknowledged to be barely 4 per cent. There are a number of reasons for this, which this is not the occasion to go into. In general, offences by the socially and politically powerful are a category of crimes which are rarely prosecuted successfully. Prosecution of white-collar offences, which are perhaps more harmful than all terrorist offences put together, is even less efficacious. Offences of tax evasion are no more successfully prosecuted than that of rape or terrorist crimes. Yet it has never been argued by anyone, including policemen who are uniformly contemptuous of procedural fairness in criminal trials, that trial procedure can or ought therefore to be rendered unjust and unfair to enable 'successful' prosecution of tax evasion. It has always been assumed that procedural fairness and justice are non-negotiable elements of criminal trial procedure, not out of love of perpetrators of crime but out of the consideration that justice must actually be done and not merely declared to have been done, and that if efficacy of prosecution is lacking, then that should be addressed by measures such as improving the investigative capabilities of the police, and more generally the content of policing so that people are encouraged to trust them. Perhaps it has also been understood at some level that prosecution of crime is not the whole answer to crime, an understanding that much of the discussion supportive of anti-terrorist legislation implicitly rejects. Indeed, whenever penal provisions aimed at preventing and punishing socially oppressive practices such as dowry or untouchability come up for discussion, it is commonly said by all and sundry that such practices are best tackled by social reform and education and not by penal provisions that cannot go to the root of the matter. The same is rarely said about theft, though there is no reason at all why the same logic should not be applied to it, and yet at some level there is an understanding that the police station and the criminal court are not the whole answer to the crime of theft, and that reduction of unemployment and poverty should be at least part of the answer. The crime of terrorism is the first category of offence with respect to which this common sense understanding is forsaken by even very learned people, and the full – or let us say the preponderant – burden of tackling it is put upon the criminal justice system, which must therefore be made more harsh and illiberal to suit the task. Of course, at the end it is ritually added that the state must evolve political steps to tackle the problem in its totality, but that is only after ensuring that enough provisions are incorporated in the powers of policing and in criminal trial procedure – the various Disturbed Areas Acts, Armed Forces (Special Powers) Act, TADA, National Security Act, Unlawful Activities (Prevention) Act, etc, so that they are in themselves adequate in their harshness, or at least can be believed to be so, to tackle militancy. Whatever the rhetoric, the actual attitude is not merely that normal laws are inadequate for solving terrorist crime. It is that political militants do not deserve such niceties as fair trial or democratic handling of the issue in its political and social totality.

The possible answer that terrorism does so much damage to life and liberty that such niceties must be ignored in the interests of the very existence of organised society – something like the doctrine of necessity much beloved of the Supreme Court of Pakistan – is likely to impress lay persons who are accustomed to thinking that a crime is only as serious as the newspapers make it out to be. Without wishing to deny or minimise the methods of terror often adopted by militant political groups and their ill effects, it is nevertheless necessary to say that it is just not true that such terror is qualitatively much more damaging to civilised social existence than organised corruption or the hundred other white-collar crimes, or the crimes of physical and psychic violence emanating from systematic social and economic oppression based on caste, gender, community and property.

Why, then, is political militancy held to be undeserving of the niceties that are allowed to what is believed to be normal crime? This may be linked to a question we noticed earlier. Why does the common person's response to and the Law Commission's analysis of religious terrorism in Mumbai and Coimbatore regard only Muslim militancy as terrorism and not Hindu militancy? Why is the systematic violence of the Shiv Sena and the Hindu Munnani in league with the police not regarded as terrorism while the blasts engineered by Dawood Ibrahim or whoever it was that blew up buildings in Mumbai and the al-Umma are treated unhesitatingly as such? Not everybody among this country's common people approves of the hooliganism of the Hindu communal forces, and the Law Commission of India, at least under the stewardship of Jeevan Reddy, cannot be called a communal or anti-Muslim body. What then could be the reason?

Violence – systematic violence in league with the protectors of the law – by the Hindu fanatics terrorises the Muslims, but it does not destabilise what is usually called the 'system'. The same is true of the plentiful white-collar crime and the crime of social oppression that admittedly does a lot of unacceptable injury to civilised life in the eyes of even common people. Of course there are those who would argue in the interests of the 'system' itself that such crimes are in fact even more destructive than the violence of rebels, but that is an 'in the long run' argument and not something spontaneously felt. It must be added that this thing called the 'system' is difficult to define or clearly delineate, much less to discover the reason that governs it, but that is no reason for taking refuge in the sociological agnosticism that is currently rather fashionable. There is a complex of real relations of domination and subordination, primacy and marginality, power and powerlessness, the centre and the periphery, the inside and the outside, that together constitute a real system, whatever one's view of its structure and its rationale. Violence that does not upset this system, even if it creates terror among a sizeable section of the people, does not agitate public opinion – one is talking of the right thinking kind of public opinion and not the brutal kind – to the same degree that systematic violence that upsets the system does. It is such organised violence that upsets the complex entity called the system along one dimension or the other that is being called terrorism, and is being subjected to extraordinary – and extraordinarily illiberal – criminal law, as well as a refusal to give adequate importance to the otherwise easily accepted notion that the total answer to crime lies not in the criminal justice system alone, but in combining adequate political and social responses with it. The two attitudes evidently reinforce each other. To the extent that political and social responses are pushed into the background, the criminal justice system carries a greater burden. And to the extent that it carries a greater burden its perversion through the enactment of unfair laws and the legalisation of brutal practices is rendered more necessary and rational.

This is not to imply that all such anti-systemic violence is good because the system is bad. There is no such easy answer to the dilemmas posed by this thing called terrorism. For a given purpose, the system may or may not be all bad, and for any purpose, violent attacks on the system may or may not be all good. That is not the point at all. The point is threefold. One, there is no obvious sense in which what is categorised as terrorist crime or organised crime as distinct from all normal crimes that the existing criminal investigation and trial procedure has been designed to handle, is qualitatively so novel in the harm it does to civilised life as to justify its being put outside the pale of civilised procedure of criminal investigation and adjudication. Two, even if it is, persons accused of such crimes cannot be denied the protection of fair and just procedure, since the reason for such procedural fairness is not the protection of the criminal but the protection of the innocent, and the protection of the norms of civilised social organisation. And three, that such crimes, that is to say the category of crimes that are said to require an abnormal treatment from the criminal justice system, originate at the margin, the periphery, or with the powerless and the dominated, in other words from outside the social, political or economic mainstream of Indian society, means that the persons who are subjected to the abnormal law are precisely those whom society should in fact care more for and be concerned more about rather than less. This is what even the Indian Constitution says.

It is reported that about 76,000 persons were arrested under TADA while that law was in force. A taxonomy of the accused would show that the overwhelming majority of these 'terrorists' belong to the social, political or economic periphery: Muslims suspected to be involved in bombings in Mumbai or Tamil Nadu, Sikh militants or sympathisers supportive of the Khalistan demand, persons – whether militants or their supporters – belonging to the tribal communities of the north-east desiring secession from India, Kashmiris of like nature, the rural poor in Andhra Pradesh, Bihar and other regions affected by naxalite activity, the poor and socially backward masses of Veerappan country at the border of Karnataka and Tamil Nadu, etc. Religious minorities, the ethnic periphery and the socially and economically oppressed, would between them exhaust the list of the accused in TADA cases barring in all likelihood no more than 2 to 5 per cent. At the risk of repetition it must be added that it is not my case that such militant activity is necessarily for the benefit of the periphery or that the periphery as a whole is supportive of it. Whether that is so in a given case would require detailed and concrete analysis. But it must nevertheless be said that such being the social nature of the thing called terrorism, it calls if anything for a more sympathetic rather than a more harsh treatment at the hands of policy-makers. One does not expect policemen to see this point, but one certainly expects the Law Commission of India to be able to see it, and assess the proposed replacement for TADA accordingly. One legitimately expects that eminent institution to be able to see that the arguments it offers in support of special and harsh anti-terrorist legislation amount

to treating crime – including very harmful and highly organised crime – that originates within the mainstream in accordance with natural justice and fairness, while denying that treatment to organised crime or even merely seditious opinion that originates outside the mainstream. There is no way that a 'human face' can be put upon this unacceptable discrimination. If any such discriminatory treatment is at all permissible in such matters, it should be in the reverse direction. Failing that, there should at least be equal treatment of all criminal offences.

This is not an argument – lest the argument be misunderstood – for extending TADA or TADA-like legislation to mainstream crime too. Policemen for one would be only too happy to read it that way. Procedural fairness and justice in action are non-negotiable elements of criminal investigation and trial procedure. There is no other way that the law can ensure that the innocent will never bear the cross. If this reduces the efficacy of the criminal justice system, then so be it. It only means that criminal justice can reach thus far and no farther. The rest of the distance in crime prevention is to be traversed by social, political and moral efforts. If they too cannot do the full job, then the residue is to be borne by all of us as the disorder inherent in human social existence, human nature as expressed in organised social existence.

Provisions of New Law

Let us now get down to the bill itself as modified and handed back to the government by the Law Commission of India. There are in the main two offences in this bill as in TADA. They are: terrorist acts and disruptive activities. A terrorist act is any offence of violence committed with arms or explosives, but with a particular type of intent. What truly distinguishes it is the intent and not the act of violence as such. As said above, TADA was pre-eminently a statute that penalised militancy on the basis of political and social intent, though the rhetoric of official explanation served to give the impression that it was penalising militancy for its inhuman crimes. Anti-terrorist legislation thrives on the horrible images of mangled bodies strewn around a blown up railway track or a land-mined road. The definition of terrorist activity is however very widely worded to catch very much more than perpetrators of such horrors. It takes in all political and social militancy.

There were two categories of intent that made an act of violence using arms or explosives a terrorist act in the former TADA. One is the intent to strike terror in the people or a section of the people or to alienate a section of the people or create disharmony between different sections of the people (all of which can either be very heinous offences, or may merely reflect social struggles of the marginalised or alienated communities; as a matter of fact, militant struggles undertaken in the name of minority or marginalised communities were subsumed lock stock and barrel, and not just to the extent of heinous crimes committed by them, under this head). The other is the intent of overawing by force the government as by law established. What is immediately striking about the present bill is that the last mentioned intent which was advisedly deleted by the union government from the definition of terrorist offence in the bill as drafted by it has been brought back by the Law Commission. The deletion suggested by the government was no doubt motivated by the strong criticism TADA faced, namely, that the intent of overawing the government as by law established is too vague an expression that permits much oppositional politics to be dragged into the ambit of TADA if even the mildest country-made bomb is used. It was condemned strongly by most political parties, which criticism among others was instrumental in parliament allowing the act to lapse. It was replaced in the proposed bill with the 'intent to threaten the unity, integrity, security or sovereignty of India'. This is at least a less vague expression and in any case it does not bring anything new into the act because the other offence of disruptive activity independently penalises acts undertaken with such intent. However, the Law Commission, with no more comment or argument than that 'there is no good reason for deleting it' (though in fact there was plenty of good reason in the form of reasoned criticism of the provision by various political forces as well as human rights groups), has insisted on bringing back the expression: 'overawing the lawfully established government', into the definition of terrorist offence. The new bill now carries all the three and not just two categories of intent as definitive of terrorism. The next time that people are harassed by being charged with terrorist offences merely because their agitation against government policies has turned momentarily violent, they will have the Law Commission of India to thank and not the union home ministry.

The Law Commission will probably say that protection against such harassment is provided for by the provision it has introduced, namely that an FIR registered under the proposed act survives only if it is approved within ten days by the director general of police (DGP), or within 30 days by the review committee (consisting of the DGP, the home secretary, the law secretary, etc). This is not an altogether novel safeguard. In TADA as it stood by 1995, the local station house officer could not register an FIR under TADA without the prior permission of the inspector general of police or the commissioner of police as the case may be. Now one more level of approval is introduced by making it obligatory to have the approval further approved by the DGP or the review committee. Two layers of consideration may not mean much in a force as notoriously single-minded as the police. Moreover, whether it is the earlier safeguard or the addition now suggested, they might conceivably be of use against individual cases of harassment that originate with the local station house officer. They will not be of avail against a decision by the rulers of a state to treat a certain category of opposition as being worthy of anti-terrorist legislation, for no police officer will take an independent decision contrary to the policy of the ruling party.

The naxalite movement may be taken as an instance. Not all its acts would fall within the meaning of terrorising the people, or a section of the people, etc, though some might. Nor, certainly, can they be said to be questioning the unity or territorial integrity of India. They want to rule India, not to dismember it or hand it over to Pakistan. Thus, almost all of naxalite activity would have fallen outside the scope of terrorism as defined by the union government in the draft bill it proposed. But the Law Commission's re-introduction of 'overawing the government' as a criterion that would make an act of violence a terrorist act brings back the whole of naxalite activity within the meaning of terrorism in the proposed act. And the proposed safeguard of approval by the DGP within ten days or the review committee within 30 days will be of no avail since the naxalites will be targeted as a matter of government policy.

Coming to the procedure of investigation and trial of offences, all the unfair and unjust provisions of TADA are intact in the proposed bill. Confessions in police custody (to an officer of rank of superin-

tendent of police or higher) will be admissible in evidence against the one who has confessed as well as his or her co-accused. The trial of the offence need not take place in a court of law but can be held anywhere (including a high security prison). The identity and address of the witnesses can be kept secret from the accused. Bail is almost impossible to get since the judge has to be convinced of the innocence of the accused before bail can be granted. Remand, whether to jail or to police custody, can be for a period of 30 days at a stretch; and the remand can be extended up to a period of six months. The burden of proving innocence shifts on to the accused in certain situations. There is no appeal to the high court but only the Supreme Court and that too not on any interlocutory matter.

The secrecy of the identity of witnesses has been taken one step farther by the Law Commission in the amendments suggested by it. In TADA as well as in the new bill as drafted by the government, the secrecy stopped at the witness box. In the witness box the accused would know the identity and other particulars of the witness, so that some – if not very effective – cross examination may yet be possible. Giving of evidence in the presence of the accused, and the witness being confronted in cross examination is a central element of the adversarial legal system that we have. It is indeed the hub around which adversarial trial procedure turns, and is an absolutely essential ingredient of fair procedure within the adversarial system. Its efficacy is reduced drastically by keeping the identity of witnesses secret until the last moment and thereby forcing an impromptu cross examination. But nevertheless at least this much of fair procedure survived in TADA and in the new bill as proposed by the union government. The Law Commission now proposes that even in the witness stand the identity of the witness need not be revealed. A screen can be placed and the witness can sit behind it and give evidence, heard without being seen, and cross examined without being identified. The right of cross examination remains, of course, but what purpose would such cross examination serve? If an unknown and unseen witness speaks from behind the screen and says that he saw the accused throwing a bomb, how is the accused to challenge the veracity of the statement? The amendment effectively means that the right of cross examination is taken away. Indeed, the burden of proving anything at all is taken away from the prosecution. If there is a charge sheet, and if there are some persons (for instance, plain clothes policemen or political opponents of the militants facing the charge) who are willing to depose incognito in support of the charge sheet (and who would not, when telling falsehood would entail no risk), and if for good measure police remand of the accused is obtained for 30 days and he is made to confess before a superintendent of police at gun point (the Supreme Court through Justice K T Thomas has recently said that even a confession given in chains is valid, presumably because confession being the product of a spiritual state of repentance cannot be sullied by such material dross as mere chains), then the job of prosecution is done. The question is not whether terrorists have not been guilty of heinous killings. The question is whether such trial procedure is not equally heinous as an instrument of deprivation of life and liberty.

The Law Commission, however, has one 'safeguard' against forcible confessions which it has written into the bill. This is that after the accused has confessed to the police officer and the confession has been reduced to writing, the accused as well as the confession recorded should be immediately taken before the local chief judicial (or metropolitan, as the case may be) magistrate, who will record every thing the accused has to say. This is evidently meant as an opportunity to the accused to take back the confession recorded, in case it has been extracted from him by threats or force. But what happens thereafter? There is no provision in the 'safeguard' that the chief judicial magistrate must then remand the accused to jail, and he should never again be given to police custody during the pendency of that trial. In the absence of that, the safeguard is empty since the police always get the confession recorded while there is still a day or two of police remand left. This is a precautionary measure they adopt, just in case the accused develops his own notions of what to say and what not to say at the last moment. Indeed, the safeguard inserted by the Law Commission may well turn out to be to the disadvantage of the accused. If, because he knows that there is more of police custody left in store, he does not retract his confession before the chief judicial magistrate immediately, and does not tell the judicial officer that he has been forced to confess, then any such retraction he may later make in court when taken there from the safety of the prison may be rejected as an undependable afterthought on the ground that he did not complain at the first opportunity specifically provided for that purpose by the law.

It is an interesting fact that in the list of crimes of violence that constitute ingredients of a terrorist act (if committed with arms or explosives, and with the above mentioned categories of intent) the Law Commission has added the act of disrupting 'interstate or foreign commerce'. This was neither there in TADA nor in the bill drafted by the union government. What could be the purpose of this innovation? None of the militant political groups in our country has used violence to disrupt foreign commerce. Is the Law Commission, aware that globalisation has given rise to much dissatisfaction, making advance preparation to protect it from militant movements? Is not the totally political character of this whole business of anti-terrorist legislation fully evident here, notwithstanding that the Law Commission seeks sanction for the bill on the ground of the inadequacy of existing law to handle organised crime, and on the mental pictures of the inhuman violence that militant groups have indulged in? As of today, the only movement that has been physically obstructing 'foreign commerce' is the Karnataka Rajya Rytha Sangha of Nanjundaswamy. It is true that they have not used explosives or arms, but one countrymade bomb or two are not at all difficult to plant upon them, nor can even Nanjundaswamy guarantee that some one or other of his followers from the more violence-prone among the districts of his state will not procure and use one or two explosives against the buildings of this multinational company or that, and then the entire movement will become 'terrorist activity'.

But then, while it is in general politics that is targeted by anti-terrorist legislation under the cover of fighting inhuman violence, this innovation pertaining to foreign commerce introduced by the Law Commission is not the first instance where that is made explicit. The crime of 'disruptive activity', which is the other major offence defined by TADA, is a political crime pure and unvarnished. That is not only retained in the proposed bill, but a slight face-saving modification suggested by the union government has been overruled by the Law Commission. In the definition of terrorist act there is first of all an act of violence, and therefore it is legitimately a

subject of penal law, though the nature of the law may be open to objection. But 'disruptive activity' as defined in TADA as well as the proposed bill is not a penal act by any yardstick. The mere expression of a political opinion that questions the boundaries of India is 'disruptive activity'. The late TADA had defined this offence as an activity that 'questions, disrupts, or attempts to disrupt, whether directly or indirectly, the sovereignty or territorial integrity of India', or 'is intended to bring about or support any claim', again directly or indirectly, the cession or secession of any part of India, 'by any action taken, whether by act or by speech or through any other media or in any manner whatsoever'. The last part in quotes was evidently included more for effect than anything else, since it is implicitly contained in the earlier part whereby 'questioning the sovereignty and territorial integrity of India' and 'supporting any claim of cession or secession' is included in the substantive offence. And moreover, being too explicit, it invited harsh criticism. The present bill, as drafted in 1995, contained the same provision, but in the amendment made in 1999 before sending it to the Law Commission, the government had deleted the phrase 'by any action taken, whether by act or speech or through any other media or in any manner whatsoever'. The deletion probably makes no substantive difference to the provision, but it certainly gives it a markedly less offensive look. The Law Commission, however, is more cautious than the union home ministry. It has put the whole of the deleted phrase back saying that the omission 'will create unnecessary controversy in the courts', meaning perhaps that an idiosyncratic interpretation of the provision by some liberal minded judge may very well help some Kashmiri cartoonist or Naga poet to escape the net of the provision on the supposition that the law-makers could not have intended it to cover such innocuous acts as the drawing of a caricature or the penning of a ditty.

There is another very questionable provision that was not there in the old TADA nor in the bill as drafted by the union government, but has been introduced into it by the Law Commission. This is the provision that all people in militancy-affected areas must become police informers on pain of a one-year prison sentence. It is of course part of ordinary law that if one has knowledge that an offence has taken place one is bound to inform the police. But the provision included in the bill by the Law Commission goes much farther. It makes it obligatory to inform the police about the whereabouts of an offender, or even one who is 'preparing' to commit or instigate the commission an offence under the act, or indeed any information one may have that may help prevent an offence under the act. Given the essentially political nature of the activity sought to be countered by this law, this provision is unacceptable for two reasons. As regards the supporters of militancy, it puts upon them the obligation of handing over to the police and giving information about the activities of the militants whom they regard as their saviours, comrades, liberators, etc. Every such militant is in any case always preparing for or instigating offences under this law, and every activity of the militants is an offence, given the way offences are defined under this law. This amounts to an assault on the political faith of those people, which contradicts the very preamble of the Indian Constitution. As regards the other residents of such areas, this provision forces them to face the wrath of the militants, which is no small matter since it is a universal characteristic of militant movements that they are absolutely ruthless in dealing with suspected police informers. It is doubtful that even a judge who finds a militant hiding in his bathroom will forthwith inform the police.

Exceptions often tell us a lot about the rule, including a lot that is not intended to be revealed by the rule-makers. A safeguard provided by the bill is a good instance of this general principle. It says that 'trade union activity and mass movements' that do not indulge in violence and do not support claims of cession or secession or question India's sovereignty and territorial integrity are protected from the charge of disruptive activity. Why trade union activity should be specifically named along with mass movements in general is not very clear. They are certainly not particularly vulnerable in this regard: they rarely concern themselves with India's territorial integrity or secession therefrom. It is probably a ruse to win for the bill the support of the CPI and CPI(M), based perhaps on the assumption that they will be satisfied with even such an irrelevant guarantee. If so, it reflects poorly on the impression the two communist parties carry with the union home ministry. But perhaps the impression is not undeserved, since they have rarely taken a stand very different from the parties they castigate as 'bourgeois' in the matter of India's territorial unity and integrity, or the question of terrorism in general.

But the safeguard is in any case superfluous on the face of it, since any activity – whether it is trade union activity or not, and whether it can be called a mass movement or not – that does not employ violence and does not support secession would not in any case fall within the definition of disruptive activity. The fact that such a superfluous safeguard is nevertheless included is testimony to the extensive misuse of TADA against movements that do not strictly fall within the four corners of the offences defined in the act. But interestingly, trade union or mass activity is provided with this protection only in the matter of disruptive activity and not terrorist activity, the other major offence defined by the bill. That is sufficient in itself to describe the safeguard as ornamental, since the intention of overawing the government as by law established – unlike the intention of supporting secession – is very easily attributable to much of trade union activity, as well as most mass movements. And when the law specifically provides a safeguard against such activity being construed as the offence of disruptive activity but equally intentionally does not provide such a safeguard against imputation of the offence of terrorist activity, then the usual interpretation lawyers and courts are accustomed to would at the least make it prima facie lawful to book trade union or mass activity with a political character under the offence of terrorism the moment they indulge in militancy, even sporadic or momentary militancy, leaving it to the movement in question to rebut the charge.

That apart, the provision in effect amounts to delineating 'legitimate politics', and therefore, by implication, relegating all other politics to the realm of the illegitimate. After all, if provision of a safeguard against harassment and misuse is all that was intended, it could well have been said that any activity that does not indulge in violence and does not encourage secession shall not be construed as an offence under the act. Why bracket 'trade union activity and mass activity'? Clearly, there is a political statement there. Namely, that trade union activity and mass activity (whatever that expression means – it is neither defined in the bill, nor is an expression found in the General Clauses Act, nor does it carry a meaning customarily accepted in law) are alone of tolerable legitimacy and worthy of safeguards, and

others, by implication, are not. This is yet one more instance where a close look reveals the essentially political character of this legislation which is sought to be smuggled in under the cover of the inadequacy of ordinary criminal law to handle organised crime. Such a safeguard must undoubtedly be galling to people whose equally legitimate feelings are penalised as 'disruptive activity'. If one can look beyond weapons for a minute, one should be able to see that at least in Kashmir and Nagaland a very large number of people, in all probability a majority, honestly believe that they are not Indians, and should not be forced to think of themselves as Indians. It is certainly unbecoming of the law that it penalises this widely held popular feeling in whatever form it may express itself, but claims respect for itself by incorporating protection for a selectively defined category of political activity.

We may end with the moral of the story. There are many in this country who believe that politicians and bureaucrats cannot be trusted to protect democracy, but judges can. There are no doubt instances in recent history that go to support this view. But the history of TADA and its proposed successor indicates something to the contrary. TADA was upheld as constitutionally valid by a constitution bench of the Supreme Court in 1994. Each and every argument aimed at showing that it is draconian and unconstitutional was considered in detail and rejected by the undoubtedly learned judges of the Supreme Court. But hardly a year later, parliament consisting of politicians whom we routinely condemn – and with considerable justification – as corrupt, self-serving and illiterate in the fundamentals of democracy decided almost unanimously that the act was exactly what the Supreme Court said it was not: oppressive, draconian and unbecoming of a democratic polity. They let it lapse. The union home ministry – guided by bureaucrats whom we routinely, and again with considerable justification, condemn as insensitive file-pushers who have no understanding of the people and their varied aspirations, drafted a replacement for TADA in which they sought to dilute the act's harshness a bit. Four years later the same bureaucrats amended it a little bit to dilute its harshness a little more, hoping that thereby they may win the approval of the Law Commission of India, which would – surely? – take a dim view of oppressive legislation. It was left to the Law Commission, headed not – as yet – by a Sangh parivar fellow-traveller, but by a former judge of the Supreme Court of India with a – no doubt deserved – reputation as a progressive jurist, to pull up the home ministry for being needlessly squeamish about the matter, and put back into the law the little that was deleted, and add a little more besides to give the act 'teeth', a canine attribute that the law is for some reason generally expected to possess. It appears, therefore, that if we love democracy, we must be on our guard not only against corrupt politicians and heartless bureaucrats but learned judges too.

Indeed, while the home ministry proposed that the life of the new act would be five years at a time subject to extension by parliament, unlike TADA which had a two-year span, the Law Commission of India would, left to itself, prefer a permanent law against terrorism. The argument is that it is an illusion to believe that terrorism is a temporary phenomenon. What should follow from that realisation is not that we need a permanent law against terrorism, but rather that the country – and perhaps the world at large – is faced with a set of political-social problems which appear to find democracy as currently practised the world over inadequate. It is not the case that militancy is always very reasonable in the grievances it espouses and the rationale it offers for itself. Yet, the search should be for a deeper democracy that can handle real dissatisfaction within its terms, and reduce wilfully intractable dissent to such a numerically small scale – assuming that most of the people are willing to be reasonable most of the time, without which assumption democracy itself would be a fool's ideal – that the real difficulties that beset the handling of 'terrorism' are substantially reduced. Nor is it the case that there is available readymade an ideal form of democracy that will answer this need. But that is what we should be searching for, and not the incorporation of more and more harsh provisions in the law, which will only add some 'lawful' violence to the lawless, if not always mindless, violence of militancy. EPW