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Norm or exception? The operation of anti-terror legislations in India

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Abstract
To examine the role of law in perpetrating state violence, this paper analyses the legacy of certain anti-terror laws in India i.e., the Unlawful Activities (Prevention) Act, 1967 (UAPA) and its antecedents Prevention of Terrorism Act, 2002 (POTA) and the Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA). Central to the analysis will be the discourse on creation of 'exceptions' both within the legal procedures i.e., relaxation of rules of evidence or allowing preventive detention and in terms of relegation of certain communities as "suspect communities" (Ujjwal Singh, 2007) thereby treating certain religions/ideologies as an exception. Given India's territorial length and breadth along with a history of various separatist and peasant movements (based on *inter alia* identity, territory, and ideology), the politics of subjugation of movements through creation of legal 'exception' or 'extraordinary situation' has been played out time and again.
This paper begins by looking at the colonial legacies of the Indian legal system and then analyse the colonial continuations in the specified anti-terror legislations. Further, using a case study, I inquire if 'extraordinary' situations/communities are manufactured through the operation of law, while simultaneously rendering the non-extraordinary as the norm. This will be done through examining the theories of 'state of exception' and the 'annihilation of exception'.

Keywords: Anti-terror legislations, state violence, unlawful activities

Introduction
India achieved independence from the British Empire in August 1947 through what is known as the process of transfer of powers. The subcontinent was divided into two sovereign nations on religious lines, i.e., India and Pakistan (with East Pakistan (now Bangladesh) also forming a part of Pakistan). There were "565 princely states" which attained "full sovereignty" upon the withdrawal of the British rule (Chatterjee 1997: 2) [6]:

> There was furious diplomatic activity on the part of the new political authorities of India and Pakistan in the days immediately preceding independence to get the princes to sign the instruments of accession to their respective dominions…There is nothing natural or immemorial about the territorial boundaries of independent India. They existed as the result of a particular mode of transfer of power from British colonial rule and political negotiations between the leaders of independent India and the rulers of princely states. (Ibid)

To analyse the functioning of anti-terror laws in India, it is crucial to acknowledge the debates and analysis regarding the colonial legacies of the Indian state and its functioning. Within the Subaltern Studies group and the Indian left political parties, a lively debate has sustained over the nature of the Indian nation state and its colonial legacies. The Communist Party of India, which was founded before independence in 1920, termed the transfer of power in 1947, as "fake independence" (Banerjee 1984: 61-2) [3]. For Kaviraj (2010: 222) [16], the postcolonial Indian nation-state was a "successor to both the British colonial state and the movement of Indian nationalism" (Ibid.). Given the colonial legacy and an "ineluctable continuance" of the British Indian legal system, the phenomena of "juristic *dependencia*" manifested itself "in planning or initiating through legislative or judicial processes, evident in copycat drafting of laws" (Baxi, 1982: 42-43) [4]. Consequently, if the claim is that India's independence and transfer of powers did not serve as an interlude in governance of its people, then it is crucial to mention the moment of application of English law in colonial India as well. The introduction of the 'rule of law' in the colonies was itself an exercise in control and subjugation of dissent. It was central to the "civilising mission" of imperialism, particularly British imperialism, of

the nineteenth and early twentieth centuries" (Darby 1987 in Merry 1991: 890) [18]. Hussain (2003: 2) [13] explains how the "extension of English law and constitutionality to the colonies" is a story of "haphazard introduction of a rule of law, its colonial mutations, and its enduring consequences." "To the late 18th century English political imagination, the virtue of a rule of law was as settled a fact as its Englishness" (Hussain 2003: 2) [13] and "when the British turned India into a crown colony, the colonial state explicitly assumed the rights of sovereignty as understood in European discourses of the nineteenth century" (Kaviraj 2010: 217) [16].

As noted above, post-independence the Indian nation-state retained "in a virtually unaltered form the basic structure of the civil service, the police administration, the judicial system, including the code of civil and criminal law, and the armed forces as they existed in the colonial period" (Chatterjee 1993: 204). If so, in what way was the postcolonial nation-state different from its predecessor? On this Chatterjee notes:

> It was planning above all that the postcolonial state would claim its legitimacy as a single will and consciousness – the will of the nation – pursuing a task that was both universal and rational: the well being of the people as a whole. (Ibid: 205)

However, this meant that the postcolonial nation-state could create exceptions in the nature of strikes, insurgencies, etc. and extend the logics use of emergency powers from its predecessors (Hussain 2003: 137) [13]. In fact, while the Constitution building exercise of the "world's largest democracy" was underway, the nascent democratic nation was already sending its armed forces in the area known as Telengana (the biggest princely state at the time) to crush a peasant struggle which began as a struggle against feudal landlords and developed into an agrarian liberation struggle against landlordism Banerjee (1984: 19) [3].

In continuance of the methods of control implemented by the British in India, via the same legal institutions and law enforcement agencies, India's anti-terror legislations have been perpetually extended, (while claiming to be enacted for limited 'extraordinary situations') amended, repealed or re-enacted. While India's newly formed Constitution gave its citizens a range of fundamental rights and other protections, it also continued emergency provisions from the Government of India Act of 1935 [12] (Kalhan *et al* 2006: 132) [14]. In part V of the Government of India Act, 1935 [12] which governed *inter alia* the "distribution of legislative powers", section 102 states that: "where a grave emergency exists whereby the security of India is threatened, *whether by war or internal disturbance* [emphasis mine]; the Federal Legislature shall have power to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List" (*Government of India Act 1935*) [12]. Given the fact that legal practices and codes were wholesale carried forward in independent India, the security state apparatus of independent India was a continuation of its British colonial legacy. In fact, the Indian National Congress-led governments "initially made efforts to repeal the emergency powers enacted before 1935, by 1937 they increasingly began to rely upon the same kinds of measures used by the British to maintain order and exercise social control" (Kalhan *et al* 2006: 130-131) [14].

Given this, the anti-terror laws of independent India need to be seen as inheritors of the infrastructures of governance utilised by the British Empire (the police and the instrument of law) along with a colonial logic of governance of situations of emergency.

Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA)

Even prior to the enactment of the Terrorist and Disruptive Activities (Prevention) Act in 1985, the Preventive Detention Act, 1950, Maintenance of Internal Security Act, 1971 and the National Security Act, 1980 were carrying forward the legacy of the British Indian legal system by replicating the provisions of *inter alia* preventive detention under pre-independence legislations. However, the focus here is an analysis of acts promulgated post the 1980s, since post-1908s these anti-terror legislations were passed for the specific purpose of combating internal "terrorism" (i.e., in case of TADA, for combating separatist tendencies in the Punjab region). It is justifiable to make the generalisation that most repressive laws which tend to annul fundamental human rights are necessarily vague and have all-sweeping powers. In their application "court processes are inevitably subverted, and the much-trumpeted 'rule of law' is transformed into 'rule by discretion', which is a euphemism for 'rule by caprice' (Kannabiran 2003: 83) [15].

TADA came into force in 1985, ten years after the imposition of constitutional emergency by then Prime Minister Indira Gandhi. Its provisions had a built-in expiry date (sunset clause), i.e., it was meant to lapse eight years from the May 24, 1987. Section 3 of the act which specifies the offences, was a "rearrangement of the offences against the state enumerated in Macaulay's penal code" (Kannabiran 2003: 93) [15]. Under TADA, no procedure for conduct of the case was provided for, and every judge had the freedom to proceed with the trial based on procedure laid down by them, on a case-to-case basis. Also, there was no provision in the act to provide the accused with a copy of the complaint against them, and the accused was "kept in dark about the facts which led to the arrest" (Ibid: 95). Testimony given to a police officer was also made admissible as evidence in the court of law (under the criminal procedure code which is applicable to situations other than the ones mentioned under TADA, testimony given to a police officer is not admissible as evidence, since it has the tendency of being tainted given that there is a possibility of it being extracted by torture). It was found that The TADA Review Committees found that other than in 5,000 cases out of a total of 8,000, the application of TADA was wrong and the conviction rate was less than 1% (Verma 2004: 436) [25].

While the act was drafted to combat terrorism in Punjab, it is telling that 19,263 individuals detained under the act were in Gujarat – "in a state without any significant terrorism problem" (Kalhan *et al* 2006: 147) [14]. Additionally, the selective application of TADA was apparent from the fact that "TADA was not brought into force when large-scale violence against Muslims took place in Bombay riots" in 1993 (Singh 2007: 53) [22]. The law became an instrument of abuse of power, torture, and application of preventive detention laws indiscriminately. TADA was finally allowed to lapse in May 1995. "Despite TADA's lapse, the law cast a long shadow for years to come" (Ibid).

Prevention of Terrorism Act, 2002 (POTA)

The next instalment of anti-terror legislations came (conveniently) in the backdrop of the September 11 attacks in the United States – although previous governments had

unsuccessfully tried to "replicate TADA through the Criminal Law Amendment Bill, however no action was ultimately taken" (Kalhan *et al* 2006: 151) [14]. The 9/11 attacks, Security Council resolution number 1373, and the attack on Indian Parliament building on December 13, 2001, gave an impetus to the promulgation of Prevention of Terrorism Ordinance. The ruling party reminded the opposition that those opposing the law "would be wittingly or unwittingly pleasing the terrorists by blocking it in Parliament" (Kalhan *et al* 2006: 152) [14].

Much like the Global War on Terror, here the appeal to act against "terrorists" was unsupported by any on-ground reports of presence of terrorists, only a general suspect against an entire religious community. Even under vehement opposition, ignoring the human rights abuses under TADA, "the perception of a national security threat created by the 9/11 attacks, the Parliament attack, and the deteriorating conditions with Pakistan all served to blunt the opposition to the ordinance" and it finally became law on March 26, 2002 (Verma 2004: 437) [25]:

> In Jharkhand, where the highest number of POTA cases and detenues have been registered, the protesting tribal community has been targeted. In Gujarat all except one of the POTA detainees [were] from Muslim community, in Tamil Nadu political opponents were booked and in UP [Uttar Pradesh] the so-called anti-terror law has been used against poor communities. (Ibid: 438-439)

The law was so convoluted in its application of criminal law jurisprudence that it put the burden of proof on the accused. This "political law with strong ideological content" was finally repealed in 2004 (Singh 2007: 1) [22]. In a detailed study conducted by Shankar (2009) [21], it has been demonstrated that Supreme Court judges in India "ruled in favour of the state in 54 per cent of all the cases and invariably upheld the rights of the Parliament to make draconian laws, conforming that the judiciary privileged security over the [constitutional] rights of the detainees" (2009: 96). This should be read alongside the fact that only "42 per cent of the cases tried under any of the anti-terror laws could (using court's definition[1]) be classified as a threat to the 'security of the state'" (Ibid: 97-98).

The Unlawful Activities (Prevention) Act, 1967

Simultaneously with the repeal of POTA, an existing law i.e., the UAPA was amended to pass on the provisions of POTA into this legislation in September 2004. While TADA had been allowed to lapse and POTA had been repealed, all cases that were ongoing at the time of their respective demise *continued*, even after there was express recognition of the fact of their misuse. Mere formality of removing the laws from the statute books has meant that there has been a perpetual continuance of legal regimes – both in terms of continued adjudication of "terrorists" under the acts (even when it is known that the likelihood of abuse of legal procedures by authorities is high, along with the likelihood of targeting of minorities) and passing on of the provisions through the amendment of the UAPA. Additionally, the extraordinary situations that demanded or necessitated the passing of TADA and POTA were made ordinary through UAPA:

> The promulgation of UAPO [the Unlawful Activities Prevention Ordinance] while easing the repeal of POTA, almost imperceptibly siphoned off some of its extraordinary provisions into an existing law, making them permanent. At the same time, it also smothered periodic legislative review, which was a substantive safeguard in temporary laws dealing with terrorism. (Singh 2007: 306) [22].

In fact, it is as if the creativity of the legislators in adding new provisions of the law, almost made boring legal provisions come alive. In 2008, "UAPA defined new offences such as terror funding and holding of terror camps, and voila you will suddenly find these charges surfacing in the FIRs – though with the sketchiest possible details" (Sethi 2014: 5) [19].

State of exception or the annihilation of exception

Professor GN Saibaba a 90% handicapped person who worked as an Assistant Professor at University of Delhi was picked up in 2014 by the Maharashtra Police, without following any procedure laid down by the law. He was later charged under Sections 13, 18, 20, 38 and 39 of the UAPA. Professor Saibaba has been a vocal supporter of rights of Adivasis and poorest of the country against all forms of oppression by state machinery. In an 827-page judgment given in March 2017 the Sessions Court in Maharashtra, sentenced him to life imprisonment.

The bias of the judiciary was evident in the manner that the learned court time and again termed the failure of prosecution to show conclusive evidence as "minor discrepancies". The Committee for Defence and Release of GN Saibaba, which released a critique of the judgement (2017) noted that:

> The court also turned the other way when the prosecution failed to prove the whereabouts of the accused persons on the days before the arrest, and simply sidestepped the responsibility of producing the call records of the missing days of the accused persons. Crucially, the judge in the case dispensed with the requirement to apply basic principles of criminal law jurisprudence and delivered a judgement which is not only noncompliant with criminal legal jurisprudence but is also ignorant of the precedents laid down by the high courts and Supreme Court of India [the judge shifted the burden of proof on the prosecution].

The court was transparent in its intentions to hand a conviction on the logic that the activities of the accused persons are criminal because they are a hindrance to the "development" of the Indian State. In the closing paragraph of the judgement (*State of Maharashtra v. GN Saibaba and Others 2017*) [23], the underlying current of the judge's arguments is visible through these lines:

> Gadchiroli district from 1982 till today is in paralyzed condition and no industrial and other developments are taking place because of fear of Naxal [referring to the presence of Communist Party of India (Maoist)] and their violent activities. Hence, in my opinion, the imprisonment

[1] "In the case of Ram Manohar Lohia v. State of Bihar (AIR 1966 SC 740) the court explained the difference between the three concepts of "law and order", "public order", and the "security of the State" and fictionally drew three concentric circles, the largest representing law and order, the next representing public order, and the smallest representing security of the state. Every infraction of law must necessarily affect order, but an act affecting law and order may not necessarily also affect the public order. Likewise, an act mat affect the public order, but not necessarily the security of the State." (Shankar 2009: 97)

> for life is also not a sufficient punishment to the accused but the hands of the Court are closed with the mandate of Section 18 and 20 of UAPA and in my opinion it is a fit case to award sentence of imprisonment of life. (*State of Maharashtra v. GN Saibaba and Others 2017*: 819) [23]

It is crucial that nowhere do the anti-terror legislations in India provide that the courts are allowed to sentence on the basis that the accused or their activities are a "hindrance to development". Therefore, the political-corporate nexus of such legislations is laid bare by such convictions.

Quoting Benjamin, Agamben says that "No sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself" (2003: 9). While theorising the 'state of exception', Agamben states that "any discussion of the structure and meaning of the state of exception first requires an analysis of the legal concept of necessity" (Ibid: 24). He posits that either "necessity does not recognise any law," or "necessity creates its own law" (Ibid). The concept of 'state of exception' is summarised as follows:

> The state of exception is…but a space devoid of law, a zone of anomie in which all legal determinations – and above all the very distinction between public and private – are deactivated…The essential task of a theory of the state of exception is not simply to clarify whether it has a juridical nature or not, but to define the meaning, place, and modes of its relations to the law. (2003: 50-51)

Dealing with this theory of state of exception propounded by Agamben and illustrating through the example of Guantanamo Bay detainees, Johns (2005) [11] proposes that:

> The plight of Guantanamo Bay detainees is less an outcome of law's suspension or evisceration than of elaborate regulatory efforts by a range of legal authorities. The detention camps of Guantanamo Bay are above all works of legal representation and classification. (614)

It has been argued that the Indian nation-state has rendered the state of exception or emergency as the norm (Singh, 2007) [22] and through it "hegemonic structures of nation-state are maintained, by externalising plural, diachronous and contending structures, forms and sites of self-realisation as 'extraordinary'" (49):

> A significant aspect of the debates surrounding extraordinary laws [the anti-terror laws] is the manner in which they are seen as an essential and appropriate response to various popular/identity struggles and political/ideological diversity. (Ibid: 50)

Additionally, given the context of Global War on Terror at the time of enforcing the POTA, "entire community came to be perceived in law as 'suspect'" (Singh, 2007: 63) [22] and the status of trials demonstrated the "state of perpetual fear" that was maintained through wide powers of arrest, detention, and surveillance (Ibid).

Conclusion

Given the operations of these anti-terror legislations in India and particularly their colonial legacy, Singh (2007) [22] also questioned whether these laws constitute the exception or the norm. Within the grand exercise of constitution making and nation building, slight and underhanded negotiations with the fundamental human rights of the citizens of the country have been repeatedly made. It is no wonder then that the operation, perpetual continuance of (otherwise meant to lapse) anti-terror laws, and the extreme misuse of these laws has over the years actually become the norm within the Indian legal system.

Theoretically, the concept of state of exception proposed by Agamben is useful only to analyse how the legislature and political parties seek to legitimise the formation of such laws by artificially creating situations that need controlling (a necessity, so to speak). As is evident through the permanence gained by UAPA, anti-terror laws have now been extracted from the place of "necessity" to be made the mainstream legal refuge for dealing with "suspect communities". It is no longer a "state of exception", no longer "a space devoid of the law". Therefore, through a reading of Agamben and Johns it can be said that initially anti-terror legislations (in nascent India) were purported to be utilised under exceptional circumstances. However, more than 70 years post-independence these legislations have become the norm more than the exception.

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