

Opposing the enactment of POTO—the Prevention of Terrorism Ordinance, after the dastardly attack on Parliament on December 13 would normally risk being charged as acting against the national interest. I demur. We in India would do well to heed the warning given by the American media within a couple of days of September 11. For example, The *New York Times* wrote: “The temptation will be great in the days ahead to write draconian new laws that give law enforcement agencies, or even military forces, a right to undermine the civil liberties that shape the character of the United States. President George Bush and Congress must carefully balance the need of heightened security with the need to protect the constitutional right of Americans.”

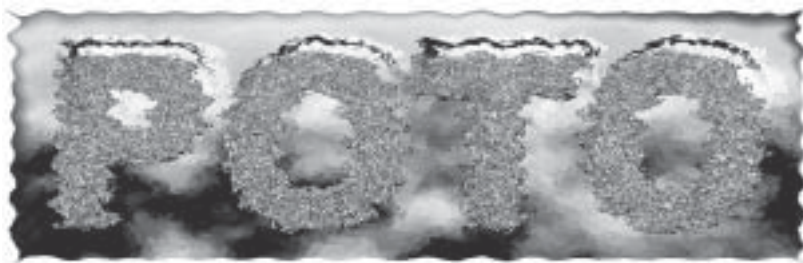
Similarly *The Washington Post* wrote: “The country cannot allow terrorists to alter the fundamental openness of US society or the Government’s respect for civil liberties.”

The Philadelphia Inquirer wrote: “We feel rage. We feel fear. We are bewildered. We can’t avoid acting on those feelings. Yet we must calibrate our response against the ideals of liberty and tolerance that have made this nation work so well for so long.”

It may be that US media overwhelmed under war hysteria generated in that country caved in. But to yield to such fear will be counter productive in the long run. The fact that the nation is at war is no justification of any relaxation in seeing that the law is duly observed in the matter of the liberty of the citizen.

As Justice Khanna of the Supreme Court said: “Greatest danger to liberty lies in insidious encroachment by men of zeal, well meaning, but lacking in due deference for the rule of law.”

Though the validity of TADA (Terrorist and Disruptive Activities



Unleashing Tyranny by Law

○ Rajindar Sachar

Act) was upheld when it was challenged by the People’s Union for Civil Liberties (PUCL), the Supreme Court recognized the abuses committed under TADA when it said, “It is heart-rending to note that day in and day out we come across news of blood-curdling incidents of police brutality and atrocities, alleged to have been committed in utter disregard of humanitarian law and universal human rights as well as in total negation of the constitutional guarantees and human decency...”

The Law Commission has admitted of POTO that “it is basically modelled on the repealed TADA.” Provisions in POTO, violative of civil rights were retained despite the recommendation of the Law Commission. For example, POTO empowers the Central Government in Section 18 to include or remove an organisation from the list of terrorist groups already declared unlawful under the Unlawful Activities Act, 1967. The Law Commission

categorically stated that: “We have not suggested herein any amendments providing for banning of unlawful organization and for confiscation of their assets in as much as there is already an enactment in force, namely, the Unlawful Activities (Prevention) Act which deals with the said aspects.” Thus Section 18 of POTO has been included with mischievous intent.

Take the case of SIMI (Students Islamic Movement of India), which has been banned under the 1967 Act. The High Court still has to hear that appeal. A possible outcome under POTO would be that even if SIMI succeeds in its appeal against being listed as a terrorist group under the 1967 Act, it will continue to be treated as a terrorist organisation. Paradoxically, this will be possible even after the Ordinance has been disapproved by Parliament. This is because the Supreme Court (1985) has held that, in a decision of doubtful correctness, “An Ordinance shall not become void from the commencement of its ceasing to operate as a result of the State Legislature’s disapproval of it,” and further, that the expression ‘shall cease to operate’ in Articles 123(2) and 213 (2) only means that the Ordinance should be treated as being effective till it ceases to be operative.

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organizations which have been listed in the schedule will still continue to remain terrorists but will have no remedy because they have been declared terrorists under POTO. The Union Law Minister has publicly endorsed this position.

Section 32 makes confessions made to the police admissible as evidence contrary to the general law where it is inadmissible. Reacting to a similar provision (Section 15 of TADA) two out of five Judges castigated this provision as unfair. Justice K.Ramaswamy observed that such a provision offends the principles of fair justice, shocks the conscience and violates fundamental fairness. He warned that if people lose their respect for the courts, their respect for law and order will vanish to the greater detriment of society. He therefore, held that Section 15 was unfair, unjust and unconstitutional.

Similar was the view expressed by the other Judge R.M.Sahal, who said the basic philosophy of a Confession from the accused.

One of the most objectionable features is Section 30 of the Ordinance empowering the Court to issue directions that the identity of witnesses not be

disclosed to the accused. This would mean that the right of the accused to show his innocence through cross-examination of the witness is denied. This is a denial of fair trial recognised by all regional and international human rights instruments to which India is a signatory. These international covenants recognize the right of fair trial be provided to the accused. One of the serious objections against anonymous witnesses is that if the defence is unaware of the identity of the person it seeks to question, it may be deprived of the particulars to demonstrate that the witness is prejudiced, hostile or unreliable. Furthermore, a trial court cannot

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observe a witness' demeanour under questioning and it thus becomes more difficult to form its own opinion of the reliability of the witness.

The importance of the right of cross-examination was summed up by Dr. Ambedkar thus: "Unless the provincial Government goes absolutely stark mad and takes away this provision, it is not necessary to make any provision of that sort. Defending includes cross-examination."

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The Austrian Government was found to have violated the Convention. The European Court held that a domestic Court may not rely on the evidence obtained from anonymous sources whom the defendant has not had the opportunity to challenge.

Section 49 of the Ordinance dealing with bail is a serious inroad on the liberty of the citizen. Thus the reversal of burden of proof for bail onto the accused for a period of one year and before filing of a charge-sheet is contrary to a basic principle of criminal jurisprudence, apart from being an unfair requirement to perform the impossible task of proving at that stage that he is not guilty.

National Human Rights Commission (NHRC), a body established by India to protect human rights, has given its firm opinion against POTO. It was the considered



view of the Commission that all the additional purposes the Government wishes this law to serve are substantially taken care of under the existing laws. It specifically deprecates this attempt by the Government and warns that the problem cannot justifiably be solved by providing a more drastic and unconstitutional procedure for the prosecution of certain crimes by making confessions before the police admissible as evidence, contrary to the provisions of the Evidence Act, and for creating a presumption of guilt as set out in the Bill, and by creating special courts. These provisions seriously affect human rights

guaranteed under the Constitution and violate basic principles of criminal jurisprudence as internationally understood. The NHRC stated that there was no need to enact a special law. A solution to terrorism could be found under existing laws. If enacted, in NHRC's view, POTO would have the ill effect of providing a strong weapon capable of gross misuse and violation of human rights which must be avoided particularly in view of the experience of the misuse of TADA and earlier of MISA during the Emergency.

In order to justify POTO, the Central Government continues to seek support for its position by citing legal changes in the USA purportedly to meet the danger of terrorism. There is a deliberate suppression of fact on the Government's part since the USA law applies mainly to non-citizens. Though there are certain restrictions on the freedom of the individual in it, they are not as draconian as POTO. Even the USA law has its very strong critics. To quote Laura W. Murphy, Director of the American Civil Liberties Union's Washington

National Office, "This law is based on the faulty assumption that safety must come at the expense of civil liberties;" and "The USA Patriot Act vests law enforcement agencies nationwide with extraordinary new powers unchecked by meaningful judicial review." The USA law against terrorism applies to immigrants and non-citizens. The



Constitutional Rights of citizens are not affected unlike in the case of POTO.

The Government's efforts to mollify the Press by purporting to delete Section 3(8), is an eye wash, because if Section 14 is continued, journalists would still continue to be forced to reveal their sources, unless of course journalists are excluded specifically from these provisions. The argument that journalists can claim no special rights is fallacious. It has been negated by six out of nine judges of the US Supreme Court, (Branzburg) which said "The right to know is crucial to the governing powers of the people... Fear of exposure will cause dissidents to communicate less openly to trusted

reporters and fear of accountability will cause editors and critics to write with more restrained pens." The intrusion of government into the rights of a free press is symptomatic of this increasingly diseased state of mind of our ruler. It has that power to suffocate both the people and their causes. The whole excuse of issuing an Ordinance of this kind is to create

psychological terror, so that the arbitrary actions of the Government are glossed over and a climate is created wherein opposition to its actions restricting civil rights may be considered anti-national.

The BJP

Government should realize how unacceptable such tactics are in a democracy.

That POTO is not the answer to terrorism was shown on and after December 13, 2001; POTO had been in force for over a month. The Bombay Police maintains that Delhi was informed about this attack a month earlier. Also it should be noted that Afroz, the alleged terrorist, was not arrested under POTO, indicating that the existing laws are sufficient for dealing with this type of terrorist.

Meeting the challenge of terrorism requires determination, proper utilisation of intelligence information and the support of the public and not these draconian laws that violate the basic human rights of our citizens. □

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Justice Rajinder Sachar, (Retd.), is the former Chief Justice of the Delhi High Court and one of the founders of the People's Union of Civil Liberties.