

'Detrimental to the Peace, Integrity and Secular Fabric of India'

The Case against the Students' Islamic Movement of India

**Mayur Suresh and
Jawahar Raja**

WORKING PAPER SERIES

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INTRODUCTION

The power to ban associations is an ‘exceptional’ power that has regularly been claimed by the colonial and post-colonial Indian State. Contestations around this power to ban organisations highlights the tension between civilizational commitments to constitutionalism and due process on the one hand, and perceived threats to this constitutional order on the other. It has been pointed out that anti-terror legislations—such as the Unlawful Activities (Prevention) Act, 1967 (UAPA), the Prevention of Terrorism Act, 2001 (POTA), and the Terrorist and Disruptive Activities Act (TADA)—masquerade as substantive laws, but in fact serve to facilitate prolonged detention, extending the period of police and judicial custody, extending the period within which the chargesheet is to be drawn and allowing for the use of confessions and make bail more difficult to obtain (Singh, 2007). Hence, apart from creating new offences of terrorism and providing enhanced punishments, all of these laws are marked by the use of special procedures and rules of evidence. These special rules of evidence and procedure create an anxiety over their adherence to constitutional principles, due process and the rule of law.

In his insightful work, Nasser Hussain (1995) argues that the debates on the form of law to be introduced in early colonial India

took place between those who advocated a civilizing regime based on a rule of law and those who argued that natives were accustomed to the oriental despot and hence legal limits on the colonial military state would be unsuited for local conditions. Those who argued in favour of introducing the rule of law, did so with the moral urgency that accompanied the British Raj's civilizing mission: it was the moral responsibility of the British to be bound by the laws in their rule. But at the same time, it was acknowledged that force might have to be used to discipline a recalcitrant population of colonial subjects. Hence, the first enactments of the colonial state dealt with legal procedure. Hussain argues that this allowed the cover of the rule of law in to be maintained while absorbing the 'despotic' acts occasionally required by colonial authority, hence ensuring the moral claims of legality could co-exist with the political claims of government. Procedural law is thus marked by two competing claims—the moral legitimacy of the rule of law on the one hand, and political reasons of State on the other.

In a state of emergency, or in times of distress, the tension between these two positions is productive of discourse on the contours of the exceptional threat that is faced by the law. In the context of the case against Students Islamic Movement of India (SIMI), this paper examines the image of the terrorist organisation that emerges in a discussion on the appropriate legal response to terrorism. How does the anxiety over the nature of the terrorist threat surface through a discussion on the potency of law to counter the terrorist threat? How does the picture of the terrorist organisation that is created by the law, engender subversion of the law by the State? Through a narrative of how law responds to what it perceives as a violent threat to its existence, this paper aims to show how the state of emergency is not initiated through grand declarations, but instead through a reading of the bare texts of the law.

The first part of this paper briefly deals with the power to ban associations and contestations around its limits in pre and post-independence India. In colonial India, the banning of associations

was done by executive fiat, which was contested by nationalist elites who argued that even the colonial rule of law required that there be judicial oversight over this power. In post-colonial India, the state acknowledges that this is an exceptional power, but seeks to temper criticisms of its law authorizing the proscription of organisations by incorporating a system of checks into this law. The paper then looks specifically at the case against SIMI. Through a discussion on the appropriate evidentiary rules to be followed in the case against SIMI we hope to show that states of exception emerge through the bare text of the law.

The Criminal Law Amendment Act, 1908

In 1908 the British Raj gave itself power to ‘declare an association as unlawful if it interferes or has for its objects interference with the administration of the law or with the maintenance of the law and order, or that it constitutes a danger to the public peace.’¹ This power was unchecked by any judicial oversight and the colonial state regularly used this enactment most notably against the Congress Party², but also against a myriad of organisations.³ In September, 1924, a bill was moved in the Central Legislative Assembly which was aimed at repealing the 1908 Act. Speaking in support of this bill M.A. Jinnah said:

I say that it is opposed to every principle of the constitution that in normal times the executive should have such power. Even if the

¹ Criminal Law Amendment, 1908

² Notification dated 12th January 1932.

³ For example, the Rashtriya Swayamsevak Sangh, see *N.G. Sabde and Ors. Vs. The Crown* AIR 1950 Bom 12; Samata Sainik Dal notification dated 10th February 1948, See *Haridas Damaji Awade Vs. Provincial Government, C.P and Berar*, 1949 Cri LJ 492; I.G.N and Railway Workers’ Union, see *In re. Inland Steam Navigation Workers’ Union* AIR 1936 Cal 57; Gujerat Prantik Samiti Government of Bombay notification dated October 10, 1908

executive were responsible to the legislature I should be the last person to give it this power. Mr. Chatterjee said that the executive is loath to use this Act [...] I recognize that, but you must remember if the argument was applied, then why have at all any judicial tribunals in this country? Why not leave everything to the executive?"⁴

Unlawful Activities (Prevention) Act

Jinnah's concerns over unchecked state power and the lack of procedure to narrow the scope of the executive's power were echoed four decades later in the Indian parliament. By this time, the 1908 Act had been declared unconstitutional by the fledgling Supreme Court and India was in the midst of its first Emergency. Declared in 1962 in response to Chinese incursions across India's northern borders, the emergency was extended in October 1963 for three more years and the 1965 war with Pakistan provided additional justification for it to remain in effect. The 1962 emergency was never formally revoked—it came to an end when its term finally lapsed in 1967 when the government did not to renew it.⁵ Under the first emergency, the President suspended the protection of life and liberty and certain rights of an accused pending trial, the right to freedom of speech, assembly and the right to form associations.⁶

⁴ A.G. Noorani, 'Jinnah's Commitment to Liberalism' *Economic and Political Weekly*, Vol. 25, No. 2 (Jan. 13, 1990), pp. 71–73

⁵ Jaya Nandita Kasibhatla, *Constituting the Exception: Law, Literature and the State of Emergency in Postcolonial India* (2005, PhD Dissertation, Duke University)

⁶ The state of emergency was not the only government action that limited the exercise and protection of rights. Adding to an earlier colonial law called the Defense of India Act, both houses of Parliament ratified a series of rules called the Defense of India Rules (DIR) that made it possible to ban organisations. Rule 32 of the Defence of India Rules, 1962 reads:

'32. Control and winding up of certain organisations. (1) If the Central Government or the State Government is satisfied with respect to any organisation either

that it is subject to foreign influence or control; or

Several months prior to the end of emergency, the Congress Government had introduced the Unlawful Activities (Prevention) Bill in parliament. This Bill sought to extend the power claimed by the Government during the emergency, i.e. the power to ban associations. In moving the Unlawful Activities (Prevention) Bill in Parliament, the then Home Minister acknowledged that the power to ban organisations was an exceptional 'drastic' power, but one nonetheless that he thought necessary in the interests of protecting

that the persons in control thereof, have, or have had association with persons concerned in the Government of, or sympathies with the system of Government of any state committing external aggression against India or have been conspiring to assist such state,

and in either case that there is a danger of the utilization of the organisation for the purposes prejudicial to the defence of India and civil defence, the public safety, the maintenance of public order, the efficient conduct of military operations, the maintenance of supplies and services essential to the life of the community, that Government may by notified order direct that this rule shall apply to that organisation.

2) If the Central Government of the State Government is satisfied that any organisation is engaged in succession to any organisation to which this rule applies, in activities substantially similar to those formerly carried on thereby, that Government may be notified order direct this rule shall apply to that organistaion.

3) No person shall-

manage or assist in managing any organisation to which this rule applies;

Promote or assist in promoting any meeting of any members of such an organisation, or attend any such meeting in any capacity;

Publish any notice or advertisement relating to any such meeting;

Invite persons to support such an organisation; or otherwise in any way assist the operations of such an organisation.

4) The provisions of sections 17A to 17E of the Indian Criminal Law Amendment Act, 1908 (14 of 1908) shall apply in relation to an organisation to which this rule applies, as they apply in relation to an unlawful association:

Provided that all powers and functions exercisable by the State Government under the said section as so applied shall be exercisable also by the Central Government.

5) If any person contravenes any provision of this rule he shall be punishable with imprisonment for a term which may extend to seven years or with fine, or with both.

the ‘sovereignty and territorial integrity’ of the country. Opposition members of Parliament, reeling under 5 years of emergency rule questioned the necessity of the legislation, and more particularly, feared that the proposed law could be used, like the 1908 law, to target the political opposition and organisations opposed to the Congress government’s brand of nationalist socialism. Speaking in opposition to the bill, G.Viswanathan, member of an opposition dravidian party, the Dravida Munnetra Kazhagam (DMK), feared that this bill represented the permanent entrenchment of an exceptional power:

The Bill is a great fraud on the Constitution and on the confidence of the public. What is the purpose of this Bill? The party in power wants arbitrary, dictatorial, fascist and draconian powers to be put on the statute book permanently. Even now they enjoy all these powers under the Defence of India Act. They want to continue it under another name and they want to put in on the statute book forever.⁷

In response, the Home Minister himself characterized the power to ban associations as one that is ‘extraordinary’ and ‘radical’. However, he and other ruling Congress Party MPs defended the Bill, arguing that while it was indeed permanently entrenching an emergency power of the government, this power was qualitatively different from the power claimed by the colonial state. They pointed to the fact that the bill placed the burden on the government to state reasons for its decision to ban an organisation, and that the decision to ban an organisation was mandatorily subject to adjudication before an independent tribunal. As one Congress MP pointed out, the government would have to place all its evidence before the Tribunal, and the sittings of the tribunal would be open. Other Congress MPs highlighted the fact that the tribunal would be bound, by and large, by ordinary civil procedure and rules of evidence. The Congress

⁷ Lok Sabha debates, December 19, 1967, column 8152

government hence falls back on the fact that their exceptional power to declare associations unlawful, unlike the colonial power to ban associations, would be checked by procedural and evidentiary safeguards, and hence in full conformity with the rule of law.

Structure of the 1967 Act

Ultimately the Unlawful Activities (Prevention) Bill passed into law in 1967. But the drafters of the law had to take into account the Supreme Court's decision in the *VG Row* case which invalidated the earlier 1908 law as being violative of the constitutional right to freedom of association. The Supreme Court, echoing Jinnah's concern's decades earlier, found that the act of banning an association without giving the association reasons for the government's decision nor the opportunity to be heard before an impartial tribunal fell outside constitutionally permissible limits on the restriction on the freedom of association.⁸ The 1967 Act therefore weaves the power to ban associations within the constitutionally defined limits set by the Supreme Court. The Act gives the Central Government the

⁸ *V.G. Row v. State of Madras*, 1952 AIR SC 196. In September 1949, the Government of Madras Province had declared the Peoples' Education Society (PES) an unlawful association under the 1908 Act. The Government accused the PES of actively helping the Communist party in Madras (which itself had been banned in August, 1949) by funding and carrying out propaganda activity on behalf of the Communist Party and thus government was of the opinion that the PES 'has for its object interference with the administration of the Law and the maintenance of law and order, and constitutes a danger to the public peace'. The Secretary of the PES, VG Row challenged the validity of the 1908 law on the grounds that it violated his right to freedom of association, in the then newly adopted constitution. The Supreme Court agreed and held that the 1908 Act unconstitutional. It held that 'the right to form association or unions has such wide and varied scope for its exercise, and its curtailment is fraught with such potential reactions in the religious, political and economic fields, that the vesting of authority in the executive government to impose restriction on such right without allowing the grounds of such imposition both in then factual and legal aspect to be duly tested in a judicial inquiry, is strong element which, in our opinion, must be taken into account in judging the reasonableness of the restriction'

power to ban an association if the association or its members (1) does anything which supports or is intended to bring about the cession or secession of any part of India, or (2) does anything which disclaims or questions the 'sovereignty and territorial integrity of India', or (3) violates India's hate speech laws.

The Act gives the power to the Government of India to declare an association an unlawful association by notification which must contain a list of charges against the association. The Act lays down that upon publishing the notification, the Central Government must constitute a tribunal comprising of a sitting judge of a High Court, which upon hearing the Government and the association will declare whether or not there is sufficient cause to sustain the government's declaration.

THE CASE AGAINST SIMI

The Students Islamic Movement of India (SIMI) was established on April 25, 1977. According to SIMI's constitution, membership in the organisation was open to all youth who were below thirty years of age. While, according to SIMI's constitution, there was no bar on non-Muslim individuals from joining the organisation, members had to obey 'Allah's commandments and abstain from what He has forbidden'⁹ and had to acquire 'knowledge of Islam to understand Qur'an and Sunnah'.¹⁰

Prior to its banning in 2001, SIMI's then president, Dr. Shahid Badar had been involved in a public war of words with the then Union Home Minister, L.K. Advani of the Hindu nationalist Bharatiya Janata Party (BJP). He accused the BJP Government and Home Minister LK Advani in particular of leading the assault on the Babri Masjid in 1992, which triggered riots around India. In August 2001, Dr.

⁹ Article 8(d) of the Constitution of SIMI.

¹⁰ Article 11(a) of the Constitution of SIMI.

Badar had issued an angry press release where he warned the Hindu nationalist government that Muslims would not 'tolerate injustice and atrocities' anymore and would 'fight a decisive battle for their rights.'¹¹ He continued: 'The increasing Islamic awakening has disturbed the Sangh Parivar as it considers SIMI the biggest obstacle in building the Ram temple at Ayodhya and making India a Hindu rashtra.'¹²

With the events September 11, 2001 in the United States, the Government of India gained an opportunity to crack-down on dissent from Muslim minority organisations and used the opening to declare SIMI an unlawful association on September 27, 2001. Justifying the ban on SIMI, the Home Secretary stated that 'SIMI has links with Al Qaeda and other militant organisations in the Gulf, Middle East, the U S, Pakistan, Bangladesh and Nepal ... [SIMI was] unabashedly lauding the Osama bin Laden as the quintessential Mujahid and portraying Maulana Masood Azhar (a terrorist released in exchange of Kandhar plane hostages) as Mehmood Ghaznavi' (*sic*).¹³ Around 240 members of SIMI were arrested in midnight raids in states around the country for being members of an unlawful association.¹⁴ Dr. Badar himself was arrested along with other members of SIMI from its head office in a Muslim neighbourhood in South Delhi. Subsequent to the first ban, the ban was imposed again in September, 2003, February, 2006, February 2008 and the latest ban was declared on 5 February, 2010.

SIMI was first declared an unlawful association on 27 September, 2001. The notification was adjudicated by a tribunal which upheld the notification. Up until 1999, according the records of the first SIMI tribunal of 2001, all the cases registered against members of SIMI pertained to speech acts which challenged the narrative of

¹¹ Ajit Shahi, *The Kafka Project* http://www.tehelka.com/story_main40.asp?filename=Ne160808thekafka_project.asp, accessed on 3 November 2012

¹² *Id.*

¹³ 'Centre Bans SIMI, 3 die in protests in Lucknow' *Mid-Day* 28 September, 2001.

¹⁴ 'Nationwide swoop on SIMI' *The Hindu* 29 September, 2001.

Indian nationalism. For example, cases were registered against SIMI for distributing a poster depicted the demolished Babri Masjid along with the Quranic *ayaat*. 'He who prevents people from offering namaz and damages mosques is the most cruel man'¹⁵ According to the police, this poster had the tendency to instigate communal violence and hence a case was registered under India's hate speech laws and sedition. Similarly in another case brought before the Tribunal, SIMI allegedly published a calendar questioning Indian sovereignty over Kashmir, and here again, the charges brought against SIMI were for sedition and for making assertions prejudicial to national integration. It is only with the election of the Hindu right-wing BJP government in 1999, that more serious charges of terrorism were leveled against SIMI.

As each ban lapsed after two years, SIMI was banned again on the 26 September 2003 and again on 8 February 2006 and on both these instances, the specially constituted tribunal upheld the government's declaration. The Central Government once again declared SIMI an unlawful association by notification dated 6 February, 2008. However on this occasion, the Tribunal cancelled the notification as it had found that the government had not applied its mind to the facts before it and found the government had failed state any of the grounds for its declaration. The Tribunal gave its order on 5 August, 2008, only to be stayed by the Supreme Court the next morning. SIMI was again declared an unlawful association on 5 February, 2010. Dr. Badar represented the association before each of the Tribunals, except for the Tribunal of 2010.

Before each of the Tribunals, the Central Government submitted a document called the 'Background Note' to the Tribunal¹⁶. This

¹⁵ Para 28 of award of the Unlawful Activities (Prevention) Tribunal presided over by Justice S. Agarwal on file with the authors.

¹⁶ "Background Note" submitted by the Central Government to the Unlawful Activities (Prevention) Tribunal (2008) presided over by Justice Gita Mittal, on file with the authors.

ostensibly provided the details of cases pending against members of SIMI, and the various infractions that SIMI members had committed. The background note of 2008 contains a variety of allegations against SIMI ranging from the expression of Muslim identity, such as ‘exhorting Muslims to live their according to Islamic law’ and organizing a discussion on the Quran. Even the performance of religious activity (an ‘ex-SIMI activist’ giving a sermon in a mosque, or ‘Members of SIMI are having inclination towards the Ahl-e-Hadis sect’) finds mention in the background note. SIMI is accused of ‘protest against the publication of blasphemous cartoons of Prophet Mohammed in a Danish newspaper’, for conducting ‘agitations in different parts of the country over the incident of the alleged burning of the Holy Quran in New Delhi...’ and for ‘trying to create the impression that Kashmiri Muslims had been suppressed and exploited for long.’¹⁷ Prior to its banning in 2001, SIMI had published posters showing the Babri Masjid with caption ‘Waiting for the Mehmood of Ghaznavi’—referring to the 11th century Afghan king who invaded many parts of northern ‘Hindu’ India.¹⁸

Engaging in what can broadly be termed as anti-Hindu activity, SIMI members are accused of making speeches using ‘derogatory language for Hindu Gods/Goddesses’.¹⁹ A purported SIMI publication in 2004 allegedly states that ‘polytheism is a curse.’²⁰ The background note also states that SIMI members ‘engineered communal incidents’ in several cities across the country.²¹

Lastly, SIMI is accused of terrorist activity. The term ‘terrorist activity’ is a term used to describe a range of activities of alleged SIMI members—from playing ‘CCD/DVD/Audio cassettes of Osama Bin Laden, Maulana Masood Azhar etc’ to maintaining ‘close touch

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

with Kashmir militant groups' to actually planning and executing bomb blasts across the country.²² For example, the background note of 2008 accuses SIMI members of planting bombs near government buildings and military installations. It also accuses the organisation of attempting to bomb the offices of rightwing Hindu groups in addition to civilian targets in cities throughout India.

In addition to the background note, before the Tribunal the Government examined police officers as witnesses to prove its case against the association. These police officers are from several states who are investigating cases against alleged SIMI members. The police officers brought—often selective—records of the cases which are exhibited in evidence. The vast majority of the evidence brought by these police officers is in the form of 'confessional' statements made by the accused in those cases stating that they are members of SIMI.

During the parliamentary during the enactment of the 1967 Act, the Home Minister in 1967 repeatedly stated in parliament, the purpose of the Act was to counter 'secessionist and cessionist tendencies' and the Act itself states that the object of the act was to 'make powers available for dealing with activities directed against the integrity and sovereignty of India.' The definition of unlawful activity also indicates that the Act was framed in the context challenges from regional and religious nationalist assertions that challenged the official narrative of the Indian nation. The Act was, however, not framed in the context of contemporary 'terrorism'.

The Government thus had to frame the alleged terrorist acts of SIMI in the language of the statute, i.e. SIMI's alleged bombings had to be narrated in such a way that it appeared that SIMI was either promoting secession or cession of India's territory or were promoting enmity between religious groups. In the background note, therefore, SIMI was linked to separatist groups in Jammu

²² *Id.*

and Kashmir and in Punjab. SIMI, through its poster campaigns, is also accused of attempting to foment communal violence between Hindus and Muslims. However, often this effort to fit SIMI's terrorist activities into the prohibitions contained in the Act resulted in absurd allegations. For example, the government's witnesses from the state of Maharashtra—which has no history of an independence movement akin to those in Kashmir and Punjab—all stated that SIMI's alleged bomb blasts in the Mumbai trains in 2006 and other blasts in Maharashtra, were aimed at the secession of Maharashtra from the Indian Union.

Emergency legislations, or laws that give exceptional powers to the State are often assailed as being 'lawless'. The 'state of exception' is seen as an arena in which the law yields to unchecked sovereign power. However, the efforts of the State to construct a narrative about SIMI to fall within the language of the Act reflects that the State must at least show that it is acting in conformity with textual law. Even where the UAPA was not meant to deal with terrorist acts, the Government still had to justify and frame its decision to ban SIMI in terms of the text of the statute. The term 'lawless' is therefore somewhat inadequate to describe the tenuous relationship between law and its other. The power of the state to ban an organisation is not claimed in the vocabulary of a power that is without legal foundation. This power is claimed through the language of the law, and it is through the meaning of legal text that anxieties over the exceptional danger posed by SIMI is articulated.

Procedure, Evidence

The UAPA states that the ordinary civil procedure law will apply to the tribunal. However, the rules promulgated by the Government under the UAPA state that the tribunal shall follow 'as far as practicable, the rules of evidence laid down in the Indian Evidence Act, 1872.' As procedural law and the laws of evidence determine what can be heard and seen by the tribunal, these rules form the

terrain of contestation, and the arena in which anxieties over ability of the law to deal with terrorism, emerge. The debate around the extent and applicability of rules of procedure and evidence is hence, framed by two concerns: firstly ensuring that the basic, minimal, requirements of the rule of law and due process are met and secondly, the production of a knowledge around the omnipotent, yet elusive nature of terrorist organisations, and by specific assumptions on the milieus of terrorist activity.

The Supreme Court judgment of *Jamaat-e-Islami Hind v. Union of India*²³ can be read in this context. In this case, where the primary issue was whether a ban on an association on the basis of secret evidence that was kept from the association on the ground of privilege was sustainable, the Supreme Court held that the strict rules of evidence do not apply in proceedings under the UAPA. However, the Court articulated the need to adhere to the ‘minimum requirements of a proper adjudication.’ It stated that:

It is obvious that the unlawful activities of an association may often be clandestine in nature and, therefore, the source of evidence of the unlawful activities may require continued confidentiality in public interest. In such a situation disclosure of the source of such information, and, may be, also full particulars thereof, is likely to be against public interest...The Tribunal can devise a suitable procedure whereby it can itself examine and test the credibility of such material before it decides to accept the same for determining the existence of sufficient cause for declaring the association to be unlawful.²⁴

Hence the Supreme Court concluded that the evidence before the tribunal ‘need not be confined only to legal evidence in the strict sense.’ Thus the underground nature of illicit organisations is taken to be a reason for bending the rules of evidence. And the

²³ 1995 SCC (1) 428

²⁴ 1995 SCC (1) 428 at para 22

modified evidentiary and procedural rules are justified on the ground that they follow minimal due process standards. All the SIMI tribunals thus far have bent procedural and evidentiary laws. They have relied upon hearsay evidence, unauthenticated documents, and secret evidence—which the Government has only revealed to the Tribunals, giving no chance to the association to contest the ‘evidence’.

In fact the discussion on the necessity of a flexible approach to evidence also reveals much about the nature of the ‘threat’ that SIMI poses. In its justification for modified rules of evidence, the 2008 Tribunal betrays its anxiety over the impotence of the law in the face of the overwhelming danger that SIMI purportedly presents if the evidentiary laws are followed in their entirety. In doing so, the Tribunal also gives us an insight into how it imagines a terrorist organisation. In its decision the Tribunal states:

The impact of the ban would make it impossible for an organisation to operate openly or to gather its cadres overground. It would be well near impossible to secure records of the existence of the organisation, its membership, accounts or any written records of its activities. Several of the witnesses have dealt at length with the sophistication with which the objective is being pursued and the manner in which several incidents and offences are being executed. As per the Government, the persons who are now members of SIMI include technocrats, chartered accountants, doctors, many of whom have received training in explosives and arms and ammunition abroad. The allegations include availability of advanced and sophisticated technological means to the highly motivated cadres funded from beyond the borders and would render it impossible to place hard evidence before a court of a tribunal.²⁵

It has been argued that the characterization of terrorism as an ‘omnipotent but elusive threat, arising from a de-individualised general

²⁵ Award dated 5 August, 2008 of the Unlawful Activities (Prevention) Tribunal presided over by Justice Gita Mittal on file with the authors.

and diffuse Islamist terror, security measures are said to be necessary which presume that the enemy could be everywhere and everyone' (Eckert, 2008). Similarly, SIMI's elusive and potentially destructive presence emerges as the justification for following special rules of evidence. SIMI is thus portrayed as a diffuse organisation, which is potentially everywhere and can threaten not only persons, but also the integrity of the Tribunal's process itself. With its mastery over technology, and highly educated cadre base, SIMI is characterized as a clandestine mercurial organisation, elusive and invisible to the normal evidencer's eye, hence making normal evidence laws inadequate and flexible evidentiary rules necessary.

Use of Confessions

One of the examples of this flexible approach to evidentiary laws is the use of confessions. As stated earlier, the only evidence against SIMI was brought by police officers from around the country who stated that they were investigating offences allegedly committed by SIMI members. They exhibited documents concerning the cases they were investigating and almost all the police officers exhibited 'confessional' statements made by alleged SIMI members in their evidence. These confessional statements have been relied upon to indicate that the persons who made the statements were members of SIMI, and that they were committing unlawful activities as defined by the act and hence that unlawful activities of SIMI were continuing—thereby justifying its further proscription. Before the tribunal, counsel for SIMI argued that these confessional statements were barred by section 25 of the Evidence Act.

Enacted in 1872 by the colonial state, section 25 reflected the British Raj's suspicion that native police officials may use torture to obtain confessional statements and hence bars the use of confessions made to police officers. Racist origins notwithstanding, it is widely acknowledged that police officials still resort to torture and hence section 25 is an important measure to prevent persons accused of

an offence to confessing under torture. Despite the bar in admitting confessional statements in criminal cases, this bar is lifted in civil proceedings, such as those before the tribunal. Responding to the argument that confessional statements are inadmissible in evidence against the association, the first SIMI tribunal (2003) held that:

The confessional statements referred to and relied upon by the Government were recorded during investigation of the criminal cases in which they were arrested. Section 25 of the Evidence Act provides that no confession made to a police officer shall be proved against *a person accused of any offence* ... The adjective clause 'accused of an offence' is therefore descriptive of the person against whom a confession is sought to be proved ... The inquiry before this tribunal is clearly not a trial against the accused persons who made the confessional statements. Therefore, in my considered view confessional statements ... are admissible in evidence to show whether the accused persons were or are members of the association as well as to show whether the activities of the association are unlawful or not.²⁶

Therefore 'confessional' statements made by persons accused of being members of SIMI—which may have been a product of torture—are admissible not only to show that they are members of SIMI, but also that the activities of the association are unlawful. This stand has been taken by the subsequent SIMI tribunals as well.

Before the 2008 Tribunal SIMI's lawyer argued that even if the statements were admissible, under the ordinary rules of evidence, the association still had the right to cross-examine those people who made the confessions, which implicated the association. SIMI's lawyers argued that allowing the police to depose in order to prove the contents of the confessions, would violate the rule against hearsay

²⁶ Award of the Unlawful Activities (Prevention) Tribunal, Gazette Notification No. SO 397(E) on file with authors.

and hence, these confessional statements could not be relied upon. In response, the Tribunal stated that it would not be practical for the Central Government to bring the people who made the confessional statements as witnesses:

[M]ost of the cases have involved multiple accused persons. The cases in Maharashtra include the seven serial bomb blasts on the Mumbai trains. In some cases, the person who has been implicated in an offence in one state and released on bail therein, is found to have committed an offence in another state, while enlarged on bail. The disclosure statements (confessions) recorded and recoveries have been effected on several dates and different persons have witnessed the same ... it is well near impossible to examine the officers and witnesses in all the places where the investigation has led the agencies.²⁷

The Tribunal then raises the spectre of the terrorist threat:

‘[A]pprehensions have been expressed with regard to the safety and security of not only the persons carrying the records but of the record itself which would endanger the prosecution of the case itself.... There may be fear of retribution from those persons who may be members of the banned association or have sympathy or shared views of the association. To impose the requirement as of proof, as required under the Indian Evidence Act, 1872, would render it impossible to meaningfully conduct an inquiry of the nature required under section 4 of the Unlawful Activities (Prevention) Act.’²⁸

SIMI is thus portrayed as an association, which poses a threat not only to the integrity of the nation, but also to the integrity of the judicial process, necessitating taking a procedural short-cut in the laws of evidence.

²⁷ *Id.*

²⁸ *Id.*

Membership of SIMI

Section 10 of the UAPA makes it a triable criminal offence to continue to be a member of an association after it had been declared to be an unlawful association. While prosecutions of ‘SIMI members’ under this provision have rarely resulted in convictions, this provision has been used by the state to justify successive bans on SIMI, as the government requires fresh material on which to justify a successive ban on the association. The existence of complaints, without trails or convictions of people alleged to be members of SIMI seems to be enough to persuade tribunals to uphold successive bans on SIMI. Completing the cycle, each ban on SIMI is used to register more criminal cases against ‘members’ of SIMI. How does the state though, attempt to prove membership of a banned organisation? In this section, we will look at the prosecution of Yasin Patel and Ashraf Jaffrey, both of whom were by their own admission, members of SIMI prior to its proscription.

According to the police, on 27/5/2002 ‘a special informer’²⁹ who was deputed in the area to keep watch on SIMI activity’ informed the local police that two SIMI activists were pasting stickers on a wall near the Jamia Milia Islamia University. The local police proceeded to the place at around 1:40 pm. On the way, the police claim that they requested members of the public to accompany them to accompany them so that there are independent witnesses to the arrest. However, according to the police, all the people they asked declined to stand as independent witnesses. Nevertheless, the police proceeded to the spot of the crime at about 1:50 pm. At the pointing out of the informer, the police saw that the accused Yasin Patel was pasting stickers on the wall and Ashraf Jaffrey was holding the bag containing stickers. Both of them were then arrested by the raiding party. The police

²⁹ Judgment dated 21/7/2003 in Sessions Case 76/2002, passed by S.N. Dhingra, Sessions Judge, in FIR No. 13/2002, PS Special Cell on file with authors.

claim that they again made a request to members of the public who were near that spot to stand as independent witnesses, however again, all of those they asked declined to do so. The Police then removed the stickers which—according to the trial court’s description of the poster—had ‘Destroy Nationalism, Establish Khilafah’³⁰ written on it with a picture of a closed fist which was crushing the flags of Russia, America and India. At the bottom of the poster were several Muslim youth raising hands. The bottom of the poster bore the name of the ‘Students Islamic Movement of India.’ The police seized the bag carried by Ahsraf Jaffrey and found that there were 33 similar stickers in the bag.

The police also claim that they thereafter proceeded to Yasin Patel’s residence where they recovered one more poster, and several of SIMI’s publications—July 1998 and September 1997 editions of its English newsletter ‘Islamic Movement’ and the 1998, 1999, and 2000 editions of *Rudaad*, SIMI’s annual report in Urdu. Both these publications showed Yasin Patel as its editor, and several of these publications showed Ashraf Jaffrey speaking to a large crowd. Here again, the police claimed that despite their best efforts, they failed to persuade any members of the public into standing as independent witnesses to the search.

In response the defence argued that the accused were in fact arrested from the home of Yasin Patel in a midnight raid between the 26th and 27th of May, 2002. They argued that the lack of public witnesses to stand as independent corroboration of the police version of the arrest and the seizure of the posters showed that the police version was could not be relied upon, if not read entirely as a fabrication. The defence argued that the place where the posters were allegedly being pasted by the accused was a public place, but yet could not find one independent person to back their story. The only people to back the police’ story, were the police themselves.

³⁰ *Id* at page 5.

The trial Court however, dismissed the defence's objections to the lack of independent witnesses:

The information with the police was about the activists of SIMI. It is not surprising that the people asked by the investigation officer did not agree for joining investigation, because it is well known that SIMI was a banned organisation which was banned, being a terrorist outfit. I consider that the non joining of public witnesses at the time of raid or apprehension of accused persons or recovery cannot be thrown out in this ground.³¹

Yet again we see how the 'exceptional' threat posed by SIMI justifies a deviation from an ordinary rule of evidence. The Court comes to the conclusion that Yasin Patel and Ashraf Jaffrey continued to be members of SIMI and convicts them for being members of designated terrorist organisation. The court reasons that as the aims of SIMI were to destroy the Indian nation and to establish Islamic rule in India, and the accused, in putting up the posters which allegedly advocated the destruction of the Indian nation, did so in furtherance of the aims of SIMI, the accused continued to be members of SIMI, an unlawful terrorist organisation. The Court in doing so, does not rely on any direct evidence—witnesses who can attest to the fact that they continued to be members of SIMI, or documentary evidence such as a list of members—as the court itself admits that it has none.

The trial Court instead bases its conclusion on assumptions and ideas of how terrorist organisations function. The Court states 'it is well known that an organisation of this nature whose open declared aim is to destroy nationalism and to establish Islamic order do not cease their activities merely because of a ban and such type of organisation go underground' (*sic*). Instead the court must make its deduction from the 'circumstances proved in court'. The trial

³¹ *Id* at page 29

court goes into a history of SIMI and states that ‘the purpose of SIMI was to destroy Indian as a Nation’ (sic) by organised armed struggle. In characterizing SIMI as ‘virulent organisation’ whose aim is to establish an Islamic order, the court, like the Tribunal seamlessly merges expressions of muslim identity with ‘anti-national’ activity and terrorism³². The trial court refers to the fact that the accused were educated in a ‘madrasa and not in regular colleges recognized by the state. Both of them possess education only in Kuraan and Islamic studies.’³³ The Court also refers to the fact that both of them had cases registered against them for inciting enmity between religious communities. In one case in the city of Ahmedabad, Yasin Patel is accused of delivering a public lecture to a large audience, which included Hindus, stating that ‘meat of cow should be eaten by every Musalman and only that Musalman is real muslim who eats meat of cow.’ (sic)³⁴ The trial court refers to another case from Ahmedabad where Yasin Patel is accused of addressing ‘700 muslim community persons’.³⁵ At that meeting the police allege that ‘SIMI leaders instigated the crowd on loudspeakers against Hindu’s and made propaganda against Hindu Gods, religion and books and also against the leaders and they instigated Muslim community against Hindu’s.’³⁶ Yasin Patel was accused of instigating enmity between religious communities. The Court bases its conclusion on the fact that terrorist organisation in India not only take issue with the idea of the Indian nation, but are also rooted in a radical Islamic milieu which is characterized by its hatred for the majority Hindu community. The Court appears to base its reasoning solely on the fact that the

³² *Id* at page 34.

³³ *Id* at page 35.

³⁴ FIR No. 3054/99 PS Sherkotla, Ahmedabad referred to in page 19 of Judge S.N. Dhingra’s judgment.

³⁵ FIR No. 3044/01, PS Rakhiyal, Ahmedabad referred to in page 17 of Judge S.N. Dhingra’s judgment.

³⁶ *Id*.

accused are undoubtedly Muslim in their religion and education, have been members of SIMI prior to its banning, and have publicly challenged majoritarian Hindu brand of nationalism.

CONCLUSION

At a public discussion titled ‘Does Civil Society encourage Terrorism?’ on the television channel *Times Now*, after the terrorist incidents in Mumbai in November, 2008, former Solicitor General of India Harish Salve spoke about the trial of Ajmal Kasab, the sole gunman arrested from those terrorist incidents. He thundered, ‘Somebody came and asked me, ‘Sir, Kasab has said that his trial is unfair. What do you have to say?’ I said, ‘What I have to say is, why the hell are you interested in what Kasab is saying? Are you worried about those tens of thousands of Indians who complain day in and day out about the third rate criminal justice system? At that time you’re not interested. But a chap who has butchered people in Bombay—who according to me should never have been tried in a civilian court, who should have been treated as a prisoner of war and shot—you’re worried if he thinks the system is fair?’

His error of the understanding of the laws of war and the treatment of prisoners of war notwithstanding, Salve’s outburst is indicative of a larger global tendency to infuse the governmental logic of the law with the sovereignty rhetoric of war. Indeed, George W. Bush’s wild-westesque rhetorical ‘smoke ‘em out,’ and ‘bring them in dead or alive,’ seems to animate discussions on anti-terror legislations with a nostalgia for an era where sovereign power was untrammelled by the law.

Butler (2004), thinks through the notions of sovereignty and governmentality using the example of the prisoners of Guantanamo Bay and the new subject inaugurated by the US Government’s policy of indefinite detention of designated ‘enemy combatants’. Reading Foucault’s *Governmentality*, she highlights the fact that it is often understood that the governmental state—that is the mode of

power concerned with the maintenance and control of bodies and persons, the production and regulation of persons and populations and the maintenance and restriction of the life of the population—has replaced sovereignty, the unified locus of state power. Instead, Butler argues what the military tribunals at Guantánamo Bay reveal is that sovereignty—understood as a power that is fundamentally lawless, and whose lawlessness is manifest in the way in which law itself is fabricated or suspended at the will of a designated subject—emerges within the field of governmentality. It is the suspension of the rule-bound governmentality in the exception that gives produces the sovereign space. ‘The new war prison’ she argues ‘literally manages populations, and thus functions as an operation of governmentality. At the same time, however, it exploits the extra-legal dimension of governmentality to assert a lawless sovereign power over life and death. In other words, the new war prison constitutes a form of governmentality that considers itself its own justification and seeks to extend that self-justificatory form of sovereignty through animating and deploying the extra-legal dimension of governmentality.’

How do we understand the relationship between the exception and the law in our discussion of the evidentiary and procedural laws in courts dealing with terrorism? As we have seen in our discussion in of the SIMI tribunal it is upon the terrain of procedure and evidentiary rules that anxieties over terrorism and the law play out. The question in these cases is not whether a constitutionally defined state of exception exists, but rather what meaning is to be attributed to the legal word in times of terror. It is as if the exception creeps up through the space created by legal meaning. Thus the exception appears outside the legal word yet at the same time moored to its textual origin, which allows these judicial authorities to dispense with the ordinary law, yet claim to act in its name.

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