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FUTILE PENALTY

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COVER STORY

Futile penalty

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Anti-terrorism laws create cultures of impunity, making it a route fraught with peril for the imposition of the extreme penalty of death.

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Representatives of the Sikh community meet UPA chairperson Sonia Gandhi on February 6, 2011, at her residence in New Delhi seeking clemency for Devinder Pal Singh Bhullar (below).

When the Terrorist and Disruptive Activities (Prevention) Act, or TADA, was enacted in 1985, it was intended to be in force for two years as an extraordinary measure. During that period, terrorist activities were expected to be brought under control. That, of course, did not happen. So the life of this law was extended, time after time, until 1995, when it became a political embarrassment because of the excesses that were practised, especially by the police, under its shelter. The Prevention of Terrorism Act (POTA), enacted in 2002 following the attack on Parliament House on December 13, 2001, met an early death when the cynical abuse of the law against political adversaries became manifest.

TADA and POTA provided for the death sentence, and there are those who are still on death row for convictions under these laws. The death sentence in anti-terrorism laws, however, rests on an uneasy premise. If the death penalty in anti-terrorism laws is to have any meaning, it must deter others from committing similar crimes. Experience, however, shows something different. Over the years, it has proved difficult to define terrorism. The law makes it clear that it is a political offence – it is politics that makes the distinction between murder in ordinary law and murder when committed as part of a terrorist act. This has meant that those who face the penalty of death tend to acquire the sheen of martyrs. The conviction based on a confession, the refusal to appeal, and the bravado displayed by Harjinder Singh Jinda and Sukhdev Singh Sukha, convicted for the assassination of General Arun Vaidya, are illustrative. Suicide bombers and the cyanide capsule are evidence that the penalty is unlikely to have a deterrent effect. It is an aspect of anti-terrorism laws that certain sections of the polity get identified as aggressors and as working against the state. It is no coincidence that those accused in the Godhra train burning case have been charged under POTA, while those accused of the carnage in the days that followed are being tried under regular criminal law.

Anti-terrorism laws have demonstrably exacerbated the sense of wrong and of alienation, against which communities that feel targeted have been speaking out. Protests in Punjab against the carrying out of the death sentence on Devinder Pal Singh Bhullar (Bitta bomb attack case) and Balwant Singh Rajoana (Beant Singh assassination case), or by sections of the Kashmiri people in relation to Afzal Guru (Parliament House attack case) or those in Tamil Nadu against the execution of the assassins of Rajiv Gandhi are expressions of communities, and their voices need to be heard and interpreted to understand what the death penalty for terrorist acts is actually achieving.

It also seems a futile penalty. The roll call of people convicted in terrorist offences consists largely of marginal players who would have little effect on the ending, or even the lessening, of terrorism. Nalini, Perarivalan, Murugan, Santhan (convicted in the Rajiv Gandhi assassination case, they were tried under the anti-terrorism law too, but only convicted under the Penal Code), Afzal, Rajoana and Bhullar – none of them could have turned the tide against terrorism. So, too, Ajmal Kasab. Kasab's was a horrific crime, no one would question that. Yet, other than as an act of retribution, what other purpose would Kasab's execution serve? How will it change the nature of terror? It is also wise and necessary to pause and consider what it means when we make the state an instrument of retribution.

There is a problem that dogs all extraordinary laws: they dilute standards and norms that have been developed over time and through involved processes of thought and practice. Anti-terrorism laws are no exception.

Among the deviations TADA and POTA have made from regular criminal law is making confessions to a police officer admissible in evidence. Torture, coercion and deaths in custody are disturbingly common phenomena. In making confessions admissible, excesses by investigators begin to be tolerated as a political necessity, and investigations become peremptory. The Evidence Act recognised this when it made confessions to a police officer inadmissible as evidence.

Bhullar was accused, and tried, in connection with a remote-control bomb attack on a cavalcade, which left nine persons dead and 29 injured. He was sentenced to death by a TADA court. Three judges heard his appeal in the Supreme Court. It was a split verdict, with the majority upholding the conviction and sentence of death. The conviction was based on a confession that was supposedly made to the police officer investigating the case. This was later retracted, but the two judges concluded that the confession was voluntary and could be relied upon even without corroboration.

Justice M.B. Shah did not agree. His judgment reveals that there was no independent corroboration of the confession which Bhullar was claimed to have made. In the confessional statement, it was said that he had hired rooms at Sahibabad, Jaipur and Bangalore. No neighbours deposed, nor did the landlords; no incriminating articles were found. No one was produced to identify him in connection with any of the events mentioned in the retracted confessions, nor were records or documents produced that could corroborate the confession. The abdication of the role of the investigator is plain. Why did the law enforcement agencies not follow up on Bhullar's alleged confession?

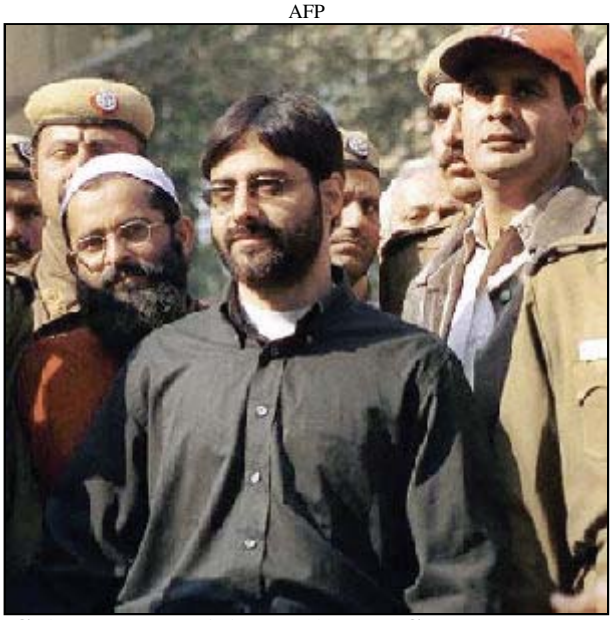
The July 9, 2011, edition of Open Magazine carried a report on a writ petition that Bhullar's wife and the Delhi Sikh Gurudwara Management Committee had filed in May 2011, which tells a tale of abduction and torture. Bhullar was a young teacher in an engineering college. His wife maintains that it was his persistent questioning of the authorities about the whereabouts of the 42 students who had gone missing that provoked the ire of the police. When S.S. Saini, described as a "notoriously brutal SSP [Senior Superintendent of Police]" was attacked with a remote control bomb, Bhullar was listed as an accused. When he was not found in a raid on his house, the police, it is claimed, "abducted his father and maternal uncle", who were "tortured to death in police custody". Bhullar's engineer friend, Balwant Singh Multani, it is averred, was "abducted at the same time and detained in police custody by Saini... and tortured to death". Bhullar's father-in-law, too, is alleged to have been picked up, detained, tortured over one and a half months, leaving him "mentally disturbed and barely capable of walking".

These are facts and circumstances that are verifiable. Yet, there is a deathly silence on these grave allegations. In the meantime, Bhullar's clemency petition has been rejected by the President at the instance of the Ministry of Home Affairs. Why are the shortcomings of the investigations and the events and allegations in the writ petition and reports not stirring the Ministry to look within and assess how the anti-terrorism law has been used? The Supreme Court has asked the government how delays, changed political conditions, and the possibility that the prisoner has reformed in the intervening period had impacted the mercy plea, if indeed it had. Will it need the court to direct an investigation into the circumstances surrounding the various times and events in this episode?

India has had over 25 years of experience with anti-terrorism laws, and we are yet to

assimilate the lessons they teach. It is now indisputable that extraordinary laws encourage excesses.

AFP



Afzal Guru (left), S.A.R. Geelani (centre), and Shaukat Hussain, accused in the Parliament House attack case, being brought to the special court in New Delhi on December 18, 2002, when the verdict was decided.

The years of heightened military activity in Punjab, when TADA was enacted as a tool in the hands of the law-enforcing agencies, saw very few prosecutions and even fewer convictions. What it did see was a profusion of cases of custodial torture and death, illegal detention, encounters and disappearances. Reduced to Ashes: The Insurgency and Human Rights in Punjab documents hundreds of individuals – identified by name and accompanied by sketches of their personal and political backgrounds – who were the victims of "police abductions leading to illegal cremations". Jaswant Singh Kalra, who, with Jaspal Singh Dhillon, released copies of the official document, which showed "that security agencies in Punjab had secretly cremated thousands of bodies after labelling them as 'unidentified, unclaimed' was himself 'disappeared' even as his case was in the High Court, having filed a petition asking for an investigation into the matter of illegal cremations. It was a period when there was a deepening of impunity."

The Parliament House attack case, too, is situated in a maze of curious circumstances and unanswered questions. The five attackers who entered the precincts of Parliament House were slain and their identity and antecedents continue to be shrouded in silence. Afzal Guru's alleged confession and his answers to the trial court's questions say completely different things. Both are reproduced in Nirmalangshu Mukherji's December 13: Terror over Democracy.

It is now on record that Assistant Commissioner of Police Rajbir Singh, an encounter specialist, made Afzal Guru "confess" before a phalanx of television cameras. It is also now known that the ACP reprimanded Afzal Guru for having said that S.A.R. Geelani, his co-accused and a university teacher, had no part in the crime to which he was confessing, and that he directed the media not to telecast that part of the statement. The tragedy is that the media complied – until 100 days after the attack – by which time the public mind had

already condemned Afzal Guru and Geelani. The death penalty that Afzal Guru faces emerges from this maze. The problem is that anti-terrorism laws, like other extraordinary laws, create cultures of impunity, making it a route fraught with peril for the imposition of the extreme penalty of death.