

The slow erosion of fundamental rights: How *Romila Thapar v. Union of India* highlights what is wrong with the UAPA.

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Introduction

On September 18, 2018, the Supreme Court pronounced judgment in *Romila Thapar & Others v. Union of India & Others*.¹ The five petitioners in the case – ‘academics [who] are seriously concerned with the preservation of the democratic fabric of this country’² – filed their Public Interest Petition in response to the arrest of five human rights activists by the Pune police for terrorism-related offences under the Unlawful Activities (Prevention) Act 1967 (UAPA). These activists were: Gautam Navlakha, Sudha Bharadwaj, Varavara Rao, Vernon Gonzalves and Arun Ferreira.

The petition asked the Supreme Court to set up a Special Investigation Team (SIT) to conduct a ‘fair and independent investigation’³ into the allegations made by the Pune police against them. The petitioners contended that the police had arrested the five on unfounded accusations of terrorism, in order to

stifle if not kill independent voices and a different ideology from the party in power.

The impugned actions of the Pune Police is [sic] the biggest attack on freedom and liberty of citizens by resorting to high handed powers without credible material and

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¹ *Romila Thapar & others v. Union of India & others* (September 28, 2018) <https://www.sci.gov.in/supremecourt/2018/32319/32319_2018_Judgement_28-Sep-2018.pdf> accessed December 12, 2018.

² Writ Petition, p. 3. On file with author.

³ Writ Petition, p. 15.

evidence. The entire exercise is to silent dissent, stop people from helping the downtrodden and marginalised people across the nation and to instill [sic] fear in minds of people.⁴

At the time of their arrests, the allegations against the accused activists were far from clear – with the police variously claiming before different courts the that the five accused were plotting to assassinate the Prime Minister, part of the designated terrorist organisation the Communist Party of India (Maoist) and instigators of inter-caste violence that originated in the town of Bhima Koregaon in January 2018. What was clear however, that the police had arrested the five accused under sections of the UAPA on allegations that they had committed terrorist acts, were members and supporters of a terrorist organisation and were part of a terrorist conspiracy.

While the political stakes in the case – as narrated in the petition – were nothing less than the saving of India’s democracy, the writ petition itself made a narrow legal claim. It did not ask the court to quash FIR or halt the investigation, but instead asked the court to set up a SIT to investigate the allegations.

The petitioners broadly alleged that the investigation thus far had been marred by important procedural irregularities – offences under the UAPA had been added to the FIR without due authorisation from the competent authority; the arrested activists were not told of the reason for their arrest in a language that they understood; the *panch* witnesses were stock witnesses used by the Pune police; the police had selectively leaked evidence to the media; allegations made by the police in the media have not been mentioned in any investigative documents, indicating that these allegations had been fabricated. According to the petitioners, the totality

⁴ Writ Petition, p. B

of facts demonstrated that the Pune Police were not conducting a fair investigation and were acting in a *mala fide* manner.

In response the state raised a number of jurisdictional objections pertaining to whether the petitioners had the *locus* to file this petition on behalf of the activists, whether a the court could interfere in a criminal investigation through a PIL, and whether this *habeas corpus* petition under Article 32 was maintainable given that ordinary criminal law remedies were available to the accused. The main argument that the State raised was that the investigating officer was senior police official and was being supervised by officers who were higher up in the chain of command. The implicit logic of this statement echoed the arguments made about policing by the colonial state⁵: that as the investigation was being conducted by a ‘senior’ police officer, and not a junior officer, this meant that the investigation was bound to be fair. Moreover, there was nothing on record, according to the State, that would indicate that the police were conducting the investigation in a *mala fide* manner.

Strictly speaking, then, the legal issue presented in the judgement was a straightforward one: In what circumstances can the Supreme Court acting under Article 32, intervene in the investigation of a criminal offence and appoint another investigatory body?

In a 2-1 decision, the majority (comprising of Dipak Mishra and A.M Khanwilkar) observed that precedent established the principle that unless there was material to suggest that the investigation was conducted in a *mala fide* manner⁶, the accused has no right to ‘ask for changing the Investigating Agency or to do investigation in a particular manner including for

⁵ A. Bhuwania “‘Very wicked children: ‘Indian torture’ and the Madras Torture Commission Report of 1855” *Sur: International Journal of Human Rights* (2009) Vol. 6, No. 10, pp. 6-27.

⁶ *Divine Retreat Centre v. State of Kerala and Others* (2008) 3 SCC 542; *State of West Bengal & Others v. Committee for the Protection of Democratic Rights & Others* (2010) 3 SCC 571.

Court monitored investigation’⁷. The majority did state that the court may intervene if it finds that the investigation was conducted in a *mala fide* manner, but went on to hold that this writ petition only contained ‘vague and unsubstantiated allegations’ of an unfair investigation.⁸ Further, the majority held that the Supreme Court, by acting on PIL, could not interfere in a criminal investigation. The only people who could ask for such a relief, according to the Supreme Court, were the arrested people themselves – not third parties acting via a PIL. Given these circumstances, the majority dismissed the petition.

On the other hand, the dissent by D.Y. Chandrachud, found that the conduct of the Pune police (which I will discuss below) had ‘cast a cloud on whether the Maharashtra police has in the present case acted as a fair and impartial investigating agency’.⁹ Chandrachud was of the opinion that the precedent relied upon by the majority was not as clear-cut as it made it out to be. He pointed out to the diversity of situations in which the Supreme Court had, acting under Article 32, either appointed a SIT¹⁰ or supervised the investigation¹¹ into particular offences. Chandrachud relied upon the Supreme Court’s judgment in the 2G case¹² to reject the contention relied upon by the State and the majority that a SIT could not be appointed when acting on a PIL. Chandrachud was of the opinion that there was enough material on record to legitimately question whether the Maharashtra police could be ‘trusted to carry out an

⁷ *Romila Thapar* para 27.

⁸ *Romila Thapar* para 26.

⁹ *Romila Thapar* para 40.

¹⁰ *National Human Rights Commission v. State of Gujarat* (2009) 6 SCC 767; *Ram Jethmalani v. Union of India* (2011) 8 SCC 1; *Common Cause v. Union of India* (2017) 3 SCC 501.

¹¹ *Vineet Narain v. Union of India* (1996) 2 SCC 199; *Babubhai Jamnadas Patel v. State of Gujarat* (2009) 9 SCC 610.

¹² *Centre for Public Interest Litigation v. Union of India* (2011) 1 SCC 560.

independent and impartial investigation'¹³ and that it was constitutionally incumbent on the court to appoint a SIT.

The difference between the majority and dissenting judgements revolved around whether the investigation conducted by the Maharashtra police was fair. The question that was not asked – and perhaps could not be asked in this writ petition – was whether an investigation into offences under the UAPA could ever be fair.

Academic and activist literature has forcefully argued that investigations and prosecution under the UAPA and its predecessor legislations¹⁴ have been shoddy and deliberately targeted at religious, caste and tribal minorities and towards human rights activists.¹⁵ While this literature has argued broadly that the UAPA erodes fundamental rights, I will argue that this case shows in granular detail how this erosion is actualised through ordinary legal procedures. To be sure, the issues presented by this instance of how the UAPA has been used is neither limited to this case, nor is it limited to cases under the UAPA. The history of laws criminalising terrorism, sedition (such as s. 124A of the IPC or s. 4 of the Terrorist and Disruptive Activities (Prevention Act) or TADA) or state-enacted security legislations (for e.g. the Chhattisgarh Special Public Security Act, 2005) is one of impunity masquerading under the garb of legality.¹⁶

¹³ *Romila Thapar* para 24 (D.Y. Chandrachud, J).

¹⁴ The Terrorist and Disruptive Activities (Prevention) Act, 1985, Prevention of Terrorism Act, 2004.

¹⁵ K. Balagopal "Drought and TADA in Adilabad" *Economic and Political Weekly* (1989) Vol. 24 No. 47, pp 2587-2591; K. Balagopal, "In defence of India: Supreme Court and Terrorism" *Economic and Political Weekly* (1994) Vol. 29, Iss. 32, pp. 2054- 2060; Ujjwal Kumar Singh *The State, democracy and anti-terror laws in India* (New Delhi: SAGE, 2007); Jamia Teachers Solidarity Association *Framed, Damned, Acquitted: Dossiers of a 'Very' Special Cell* (2014)

¹⁶ Jyoti Punwani "The Trial of Binayak Sen" *Economic and Political Weekly* (2010) Vol. 45 No. 52 pp. 21-23; S. Senthilir "Violence against the non-violent struggle of Koodankulam" *Economic and Political Weekly* (2012) Vol. 47, No. 38, pp. 13-15.

This case shows how the UAPA (like other national security legislations) engenders systems of impunity through the legal process. It shows how the FIR is not merely the first complaint of a cognizable offence, but the foundation of a story that will narrate legitimate political protest as a terrorist activity. The expansive account provided in the FIR also forms the kernel of a narrative that will come to ensnare ever widening circles of people. It shows us how at the early stages of the trial process, insinuation of terrorist activity can lead to the arrest of people and keep them behind bars, regardless of the evidence actually presented to a court. In doing so this case shows us the virtual meaninglessness of regular criminal law remedies, such as bail, in UAPA cases. This case therefore presents a timely entry point into a discussion of how investigations and prosecutions under the UAPA take place. In this case note I read the judgment, along with some case papers (the FIR, the writ petition and its annexures and the counter-affidavit of the State of Maharashtra) as well as academic and activist literature about how cases under the UAPA are pursued.

Converting social protest into a terrorist activity

The facts as narrated in the FIR and subsequent documents filed by the State before the Supreme Court, demonstrate how the state can convert a social protest into a terrorist activity. The state claims to itself the ability to narrate certain forms of political activity as forms of terrorism, and therefore illegitimate. In order to do so, as we see here, the state attempts to establish connections – however tenuous – between political activity and violence.

This case originates in a commemoration of a battle between a smaller force the East India Company and the Maratha army, which has become a symbol of Dalit assertion against upper-caste domination. On January 1, 2018, thousands of people – mostly Dalits – gathered at the town of Koregaon Bhima to celebrate the 200th anniversary of the battle of Koregaon. This battle, which was fought as a part of the Third Anglo-Maratha War came to have an important

symbolic value to the Mahars of Maharashtra. It was here that the army of the Maratha Empire, led by the Peshwa himself, was defeated by a smaller force of the British East India Company that was comprised of many Mahar soldiers. With time, memory of the battle transformed from symbolising imperial dominance over the subcontinent, to one of Dalit victory over the upper castes. The Peshwas and the Maratha empire were notorious for their brutal enforcement of caste norms and with Dr. Ambedkar – himself the son of a Mahar soldier – visiting the site on January 1, 1927, the battle is now remembered as ‘historical evidence of the ability of Dalits ‘to overthrow high-caste oppression.’¹⁷

The commemorative event of the 200th anniversary of this battle was organised by about 250 civil society organisations was titled Elgaar Parishad and was held at the Shaniwar Wada Fort in Pune. According to the organisers the theme of the event was to ‘save the constitution’ from right wing Hindutva forces who ‘neither believe in democracy nor socialism nor secularism’¹⁸.

The event attracted the attention of members of the Hindu right-wing. People who were on the way to the Elgaar Parishad were attacked by members of two right-wing groups, which led to the death of one person and injury to several others. Clashes between Dalit groups and right-wing groups continued for about two weeks leading to the arrest, according to media reports, of hundreds of Dalits.

Soon after the violence, two First Information Reports (FIRs) were registered – one against the members of the leaders of the Hindu right-wing parties that allegedly attacked the parishad, and the second against the organisers and participants of the Elgar Parishad. The first FIR was

¹⁷ Shraddha Kumbhojkar ‘Contesting Power, Contesting Memories: The History of the Koregaon Memorial’ *Economic and Political Weekly* (2012) Vol. 47, No. 42 pp. 103-107

¹⁸ Arefa Johari ‘‘They want fascist forces to reign’’: Retired judges who organised Pune’s Elgaar Parishad speak out’ *Scroll.in* (1 September 2018) <<https://scroll.in/article/892631/they-want-fascist-forces-to-reign-retired-judges-who-organised-elgar-parishad-speak-out>> accessed January 23, 2019.

registered on January 4, 2018 by the Pune (rural) police against the two ‘Hindutva right wing leaders’¹⁹ for attempt to murder, rioting, membership of an unlawful assembly, outraging beliefs and for the offences of committing an atrocity against members of a scheduled caste as well as other arms- related offences.

The second FIR was filed on January 8, 2018, by the Pune city police on the basis of information provided by a person who was allegedly present at the Elgaar Parishad event. This second FIR, according to the Petitioners in the Supreme Court was a ‘motivated process’²⁰ – it was filed only in order to counter the first FIR. The use of what is colloquially known as ‘cross-FIRs’ is a common occurrence – where parties with disputes file FIRs against each other. According to many human rights activists the use of cross FIRs often shields the more powerful party from the legal process.²¹

According to complaint in the second FIR, several people and organisations – in particular the Kabir Kala Manch – sang provocative songs, made seditious speeches and conducted dramatic readings and ‘dance events with malice and enmity intentions.’²² In his FIR he named 5 people ‘and others’ whom he accused of

Express[ing] malice statements and tried to incite disputable words, sentences between two society groups, raise some provable slogans, songs and road drama, imposed wrong and false history.²³ (sic)

¹⁹ Romila Thapar, para 4.

²⁰ Writ Petition, p. 6.

²¹ Human Rights Law Network. *Defend the Defenders: Resisting Attacks on Human Rights Activists in India* (New Delhi: Socio Legal Information Centre, 2012); Indian Peoples’ Tribunal for Human Rights and Justice in Indian-administered Kashmir & Association of Parents of Disappeared People. 2015. *Structures of Violence: The Indian State in Jammu and Kashmir*. Srinagar: Jammu and Kashmir Coalition of Civil Society.

²² Translation of FIR as filed in the Writ Petition, on file with author.

²³ Ibid.

He also stated that ‘the banned Maoist Organisation (CPI) have organised role to boast and implicate the strong Maoist thoughts in the depressed class and misdirect or misguide them and turn them towards unconstitutional violence activities.’²⁴ (sic) He continued, naming the organisations and individuals

‘carrying the same thoughts, Kabir Kala Manch’s Sudhir Dhawale and others had presented different areas in Maharashtra, malice speech, had spread false history, disputable statements and incite objectionable slogans, sung songs and road dramas. They distributed some objectionable and provokable pamphlets, books too.’²⁵

He then went on to blame the organisers of the Elgaar Parishad for the violence that followed by stating that the activities of the organisers ‘reflected at Bheema Koregaon and nearer places by stone throwing, cast[e] clashes and arson incidents.’²⁶(sic)

In the Supreme Court, the Maharashtra police said that they then discovered that 6 other people were involved with the crimes mentioned in this FIR. Upon conducting searches of the premises of this second set of people, they said they discovered digital material (laptops, pendrives, computers) that

was shocking and clearly implicating the aforesaid persons not only as active members of CPI [Maoist] but clearly reflected an on-going sinister design of having committed and in the process of committing criminal offences having the potential of destabilizing the society. The contents also clearly reflect the preparation, planning and coordination not only amongst the aforesaid persons but with others [subsequently arrested] to carry

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

out a violence, planned ambush / rebellion against the “enemy” (which is our country and its security forces).²⁷

After this revelation that the accused persons were active members of the CPI (Maoist) – the investigation proceeded under various sections of the UAPA. With this, the original FIR about the speeches at Elgaar Parishad came to include charges for terrorism and the list of accused was expanded to 8 more people in addition to ‘other underground members’²⁸ (sic). Five of these eight named people were arrested early in June of 2018.

Then, according to the Maharashtra police, they seized electronic material from these five individuals, which then revealed the central involvement of five others – who are the subject of the eventual writ petition – ‘in the criminal offences committed and / or planned by others.’²⁹ (Sic). The Maharashtra police argued in the Supreme Court that the individuals who were the subject of the writ petition are ‘are active members of a banned terrorist organization called Communist Party of India [Maoist].’³⁰

It is important to pay attention to the narrative trajectory of the FIR registered by the Pune Police and the response of the state of Maharashtra in the Supreme Court. Notice how the FIR is narrated in such a way that it would seem that activities of the Elgaar Parishad had a close relationship to violence. Here the police are seemingly aware of the principle that for speech to be considered criminal, it had to incite public disorder or violence.³¹ The FIR makes two broad allegations in order to link speech with violence. First, that the songs, speeches and performances were ‘objectionable’ and ‘provocative’ that led to the inter-caste violence that

²⁷ Counter Affidavit of the State of Maharashtra, p. 10. On file with author

²⁸ Ibid.

²⁹ Counter affidavit, p. 13

³⁰ Ibid, p. 14.

³¹ *Kedar Nath Singh v. State of Bihar* AIR 1962 SC 955

soon followed. According to the State's reply in the Supreme Court, no violence had occurred in previous years. The violence only ensued because the organisers had made provocative statements – in the process, giving a clean chit to the Hindutva groups in the ensuing violence. Secondly that the organisers were a front for the banned terrorist organisation, which according to the complainant, had committed acts of violence and was inciting people to commit acts of violence. By linking Elgaar Parishad to the violence that followed, and to the CPI(Maoist), the State attempted to delegitimise forms of political protest. Implicit in the logic of the state, these political protests are a mere façade for a terrorist organisation.

Banning Organisations and crimes of membership

This case also highlights the fact that terrorism investigations and prosecutions by local police are built on the central government's power to ban organisations by executive fiat. In this case, as the CPI(Maoist) has been declared a terrorist organisation by the Central Government, all the police needed to do is to state that certain persons are members of the banned organisation for the police then to take recourse to the extraordinary pre-trial procedures contained in the UAPA. Later on, in this note, I discuss how these special procedures do not lead to greater convictions, but rather, are meant to prolong the trial and to extend detention of accused 'terrorists' during their trial.

Here, I want to draw attention to legal basis of this power to proscribe terrorist organisations, as it is central to the state's case. The UAPA specifies two ways in which organisations can be proscribed. The first way is to declare an organisation as an 'unlawful association' and then have that declaration adjudicated upon by an independent authority. This method has been in in the original text of the UAPA since it was enacted in 1967. Under this process, the government issues a notification setting out the grounds for declaring an organisation an 'unlawful association', and this notification would then be adjudicated by an independent

tribunal. The ban itself would only last a specified period of time. The reason why the process to declare an organisation as an unlawful association was so stringent was because the law had to meet the tests laid down by the Supreme Court in the Supreme Court in *V.G. Row v. State of Madras*.³² In that case, the Court found that a colonial-era provision³³ empowering the government to ban organisations without having to give grounds for its decision and without any independent judicial scrutiny of its decision, was an unreasonable infringement of the right to freedom of association.

The second way in which the Central government can ban associations is one that it can do by executive fiat. All the government needs to do is to designate an organisation as a ‘terrorist organisation’ in the First Schedule to the UAPA. This method was granted to the central government under Prevention of Terrorism Act (POTA) and was brought into the UAPA in 2004, when POTA was repealed and most of its provisions were transposed into the UAPA by way of an amendment.

What is now section 35 of the UAPA gives the central government the unilateral power to ban terrorist organisations. Section 36 prescribes the procedure for de-notifying an organisation as a ‘terrorist’ organisation – first an application to the Central Government and if the Central Government rejects this application, the organisation may apply to a ‘review committee’ which can review the government’s decision. In order to ban organisations, the central government merely has to issue a notification: neither does it have to give grounds for its decision, nor is this decision reviewed by an independent authority. This power is clearly in contravention of the Supreme Court’s decision in *V.G. Row*.

³² [1952] SCR 597

³³ S. 15 of the Criminal Law Amendment Act, 1908

The review committees under section 36 only come into play after the decision has been made by the central government and if the organisation chooses to challenge it. In any event, the latest information that we have indicates that review committees have not been set up.³⁴ Section 36, therefore, only provides the flimsiest veneer of legality to this otherwise untrammelled power to violate the right to freedom of association.

What is at stake here is not just the freedom of association, but one's guilt or innocence of a criminal offence. According to the UAPA, membership of both unlawful associations³⁵ and terrorist organisations³⁶ is a crime. In a recent series of decisions³⁷, the Supreme Court has held that the criminalisation of mere membership of an organisation would constitute an unreasonable restriction on the right to freedom of association. While these judgments pertained to the criminalisation of membership of organisations under the (since lapsed) Terrorist and Disruptive Activities (Prevention) Act (TADA) the logic of these cases is equally applicable to membership-crimes under the UAPA.

These judgments held that the criminalisation of mere membership of banned organisations was unconstitutional. What was constitutional, however, was the criminalisation of membership if that membership led to violence or the incitement to violence. This is an important caveat to membership related crimes. However, as we have seen in this case, the police have framed the activists' membership of the CPI(Maoist) as one that has led to violence. The questions of whether the activists were members of the CPI(Maoist) and whether this

³⁴ Ujjwal Kumar Singh *The State, democracy and anti-terror laws in India* (New Delhi: SAGE, 2007) p 147-148.

³⁵ S. 10 UAPA.

³⁶ S. 20 UAPA. S. 20 also states that being a member of a 'terrorist gang' is also an offence. Unlike unlawful associations and terrorist organisations, there is no process of designating an organisation as a 'terrorist gang'. It appears that both the existence of 'terrorist gang' and the individual's membership of that gang, is something that would have to be proved at trial.

³⁷ *Arup Bhuyan v. State of Assam* (2011) 3 SCC 377; *Sri Indra Das v. State of Assam* (2011) 3 SCC 380; *State of Kerala v. Mohammed Raneef* (2012) 1 SCC 40.

membership led to violence are issues that will perhaps be adjudicated at trial – a trial that will keep these activists behind bars as it slowly grinds its way to a conclusion.

Omnibus FIRs and the spectre of ‘other persons’

Another feature of this case – and other cases under the UAPA – is the expansive nature of the FIR. Not only do the FIR and other documents repeatedly invoke the spectre of ‘other people’ who may be involved in the offence, but it leaves the actual details of their offences very vague.

Along with those people named, there are unnamed ‘other people’ who are accused of ‘of presenting objectionable songs’³⁸; of delivering ‘provocative speeches’ where ‘objectionable and provocative books were kept for sale’³⁹; of delivering ‘misleading history, inflammatory songs and street plays’⁴⁰; of ‘carry[ing] out a violence, planned ambush / rebellion against the “enemy” (which is our country and its security forces)’⁴¹; and of being ‘underground members’ of the CPI (Maoist)⁴². While excerpts of one speech and one song are provided in the FIR, it is completely silent on the details of the ‘objectionable’ books, or street plays. The FIR merely asserts that the Elgaar Parishad is a front for CPI(Maoist) activities and provides no information about how this is known. As Chandrachud notes in his dissent⁴³, none of the case documents presented to the courts manage to link specific individuals to specific offences. By reading the FIR and other documents, it could not be said with certainty that a particular person committed a certain offence. Rather, it is only alleged that ‘some of them’ committed certain offences,

³⁸ FIR; Counter affidavit, p. 20

³⁹ FIR; Counter affidavit, p. 19.

⁴⁰ Ibid.

⁴¹ Counter affidavit p. 11.

⁴² Counter affidavit p. 12.

⁴³ *Romila Thapar*, paras 25, 26. (D. Y. Chandrachud, J).

along with ‘others’. This FIR is an example of what several authors and activists have called an ‘omnibus FIR.’⁴⁴

The omnibus FIR often contains general allegations and are ‘bereft of any details’⁴⁵, and they often ‘relate to different places, times and accused persons’, with ‘unconnected events’ clubbed together.⁴⁶ Instead of referring to specific people, and distinct offences and incidents, omnibus FIRs read like general essays, making unsubstantiated allegations, with no specific details.

There is a definite use that the state puts to this deliberate vagueness. In post-riot situations like Delhi in 1984 or Gujarat in 2002, where the accused individuals often bear a close relationship to the ruling party, the omnibus FIR is a deliberate strategy to frustrate the prosecution.⁴⁷ In terrorism cases, the deliberate vagueness of the FIR helps the state in a different way. It enables the state to cast a wide net in order to trap an ever-increasing number of people.⁴⁸

The invocation of the spectre of ‘other people’ in the omnibus FIR highlights the state’s imagination of terrorist offences as an omnipresent threat. Unlike ordinary criminal offences which are seen as discrete individualised events bound in time and place, anyone could be a terrorist and terrorism is potentially everywhere, hidden in loosely connected ‘underground’

⁴⁴ Vrinda Grover ‘The elusive quest for justice: Delhi 1984 to Gujarat 2002’ in *Gujarat: The making of a tragedy* (Siddharth Varadarajan ed., New Delhi: Penguin 2002) pp 355-388; Human Rights Watch *We have no orders to save you: State participation and complicity in Communal violence in Gujarat* (New York: Human Rights Watch, 2002; Ujjwal Kumar Singh ‘Mapping anti-terror legal regimes in India’ in *Global Anti-terrorism Law and Policy* (Victor V Ramraj et al eds., 2nd ed., CUP, 2012) pp. 420-446; Moyukh Chatterjee ‘The Impunity Effect: Majoritarian rule, everyday legality and state formation in India’ [2017] *American Ethnologist* Vol. 44, No. 1, pp. 118-130;

⁴⁵ Grover, 363.

⁴⁶ *Ibid.*

⁴⁷ Chatterjee 123.

⁴⁸ Singh 2012, 440.

sleeper cells.⁴⁹ The investigation into these ‘other people’ is presented as a never-ending project of revealing people who are part of this highly networked conspiracy.

Accusation by imagination –the plot to assassinate the Prime Minister

During one of the hearings of this petition, Justice Chandrachud reportedly ‘remarked that the State cannot infringe upon an individual’s liberty on the basis of conjecture’.⁵⁰ Yet that is what the omnibus FIR allows the police to do. Nothing in this case was more conjectural than the claim that the five activist who were arrested as they were involved in a plot to assassinate the Prime Minister.

In June 2018, the Maharashtra police stated the those so far arrested had been involved in this plan to assassinate the Prime Minister.⁵¹ By August, this plotline had been extended to the five activists who had been arrested.⁵² Days after the arrest of the five activists, the police held a press conference where a senior police officer read out emails that were allegedly seized during the arrests of June 2018, which purportedly showed evidence of their involvement in this

⁴⁹ Julia Eckert "Law for enemies" in *The social life of anti-terror laws: The war on terror and the classification of the 'dangerous other.'* (London: Transaction Publishers 2009) pp 7-31.

⁵⁰ Abhishek Sankritik ‘Arrested Activists: Romila Thapar v. UoI’ *Supreme Court Observer* ≤<http://scobserver.clpr.org.in/court-case/activists-arrest-case/arrested-activists-day-5>≥ accessed January 25 2019.

⁵¹ ‘PM Modi Assassination Plot Revealed in Maoist Letter: Pune Cops to Court’ *NDTV* (8 June 2018) ≤ <https://www.ndtv.com/india-news/maoists-were-plotting-to-assassinate-pm-modi-pune-police-tell-court-1864460>≥ accessed on January 25, 2019.

⁵² Ashish Pandey, ‘Raids in 5 states in connection with Maoist plot to assassinate PM Modi’ *India Today* (August 28 2018) ≤ <https://www.indiatoday.in/india/story/police-raid-maoist-plot-narendra-modi-1325153-2018-08-28>≥ accessed in January 25 2019.

conspiracy.⁵³ This allegation was reportedly repeated two days later by the Public Prosecutor in Pune.⁵⁴

As the dissent points out, none of these allegations made it into any documents that the police filed in the Pune courts, or any other courts, nor is any mention of them made in the case diaries that the police have to maintain and present periodically to the jurisdictional magistrate. These allegations, along with the letters between the accused and the Maoists, were only paraded before the media and were referenced orally in several courtrooms. The case diary did not contain any reference to these letters (as they should have), nor was there any mention of this assassination plot in them. In fact, the State's does not say anything in the Supreme Court in response to a specific averment regarding the assassination plot in the petition!

While the dissent is right to point out that these statements do not find backing in the documents submitted by the state police⁵⁵, it misses the point as to why these statements were made in the first place. They are not meant to be proved in evidence and have probably been made with the full knowledge that these allegations will never be proved. The police and prosecution know that the validity of this 'evidence' will only be decided on years later, at the time of the trial court's judgment, by which time the accused would have spent years in jail. These allegations are meant to justify the arrests and to ensure that the accused remain behind bars during their trial.

The aim of UAPA trials is not to secure a conviction

⁵³ 'Activists had links with Naxals: Maharashtra Police Press Conference' *India Today* (31 August 2018) ≤ <https://www.youtube.com/watch?v=PCVKfstx2Q> ≥ accessed on January 25, 2019.

⁵⁴ Arnab Ganguly, 'It's official: proud F-word proclamation' *The Telegraph* (Mumbai 30 August 2018), ≤ <https://www.telegraphindia.com/india/it-s-official-proud-f-word-proclamation/cid/1655106> ≥ accessed 30 January 2019.

⁵⁵ *Romila Thapar*, para 24 (D.Y Chandrachud, J).

The State argued that the Supreme Court should not interfere, as the investigation was being monitored by senior officials who in turn ‘would be monitored by the jurisdictional Courts at different stages.’ The State further argued that if the accused had any concerns with the investigation, they could approach the jurisdictional courts for a number of remedies, including judicial remand, bail, discharge and quashing of the prosecution.

The Court’s majority in *Romila Thapar* seemed to have been taken in by these arguments. If the accused wished to, why couldn’t they apply to the jurisdictional court for bail or discharge? If there was no evidence (as they claimed in the writ petition) for the charges against them, surely they would be acquitted. What was the issue then, with approaching the local court?

The problem with anti-terror trials is that are not pursued with the aim of obtaining a conviction. Their function is more akin to preventive detention, than it is to criminal justice.⁵⁶ As Gautam Navlakha had written fifteen years prior to his own arrest on charges of terrorism, anti-terror prosecutions are meant to keep the accused in jail for as long as possible.⁵⁷ Trials whether under previous anti-terror statutes⁵⁸ or the UAPA⁵⁹ rarely result in a conviction, with terror-

⁵⁶ Anil Kalhan et al ‘Colonial Continuities: Human Rights, Terrorism and Security Laws in India’ 2006 *Columbia Journal of Asian Law* 93.

⁵⁷ Gautam Navlakha “POTA: Freedom to Terrorise” *Economic and Political Weekly*, (2003) Vol. 38, No. 29, pp. 3038-3040.

⁵⁸ While statistical data is varied, they point to the fact that the vast majority of terror-accused are discharged or acquitted. According to one report, in the decade of TADA’s existence 76,036 individuals were arrested for committing acts of terrorism. Of these 25% were dropped by the police without framing charges; trials were completed in only 35% of the cases and of these only 1.5% ended in a conviction. Meaning that out of a total number of 76,036 arrests, only about 400 people were ever convicted. Government of India, *Ministry of Home Affairs, Memorandum to the full Commission of National Human Rights Commission Annexure 1, 19 December 1994*, cited in Ram Narayan Kumar Et al, *Reduced to Ashes: The insurgency and Human Rights in Punjab: Final Report: Volume 1* (Kathmandu: South Asia Forum for Human Rights, 2003), at p. 99;

⁵⁹ NCRB data about UAPA investigations and trials paints a similar picture. Only 56% of all UAPA investigations actually result in a chargesheet under the UAPA. Of those UAPA cases that make it to trial, only 33% end in a conviction. NCRB *Crime in India 2016* (New Delhi: Ministry of Home Affairs, 2017)

accused often spend long years in jail – sometimes up to 14 years⁶⁰ – as their cases grind through the courts. This is for several reasons

Firstly, the UAPA itself slows down the investigative process. Section 43D(2) of the UAPA allows the police to file a chargesheet up to 180 days after the person is first arrested, as opposed to 90 days for ordinary crimes.

Secondly, the bail provisions contained in section 43D(5) of the UAPA are so strict that bail is virtually impossible. No person accused of crimes under the UAPA can be granted bail unless the Public Prosecutor has had a chance to be heard on a bail application. Further, no person can be released on bail if the court finds that upon reading the chargesheet the charges against the accused are true. Effectively this means that if charges are framed against an accused, it is impossible for that person to obtain bail. These provisions are patently unconstitutional as a recent Supreme Court judgment⁶¹ struck down a near-verbatim bail-related provision of the Prevention of Money Laundering Act, 2002 on the ground that the ‘drastic’ provision effectively reverses the presumption of innocence and was manifestly arbitrary and discriminatory.

Thirdly, police resort to forms of proceduralism to ensure the accused spends as much time in jail as possible. For example, the different police forces take turns in arresting the accused. Arun Ferreira, one of the activists arrested, describes in vivid detail how he was acquitted in several cases, and was released from jail, only to be arrested by another police station the

⁶⁰ Mohammad Aamir Khan *Framed as a Terrorist: My 14 year struggle to prove my innocence* (New Delhi: Speaking Tiger, 2016).

⁶¹ *Naresh Tekchand Shah v. Union of India & Another* WP(Crl) 67 of 2017, decided on November 23, 2017. ≤ http://sci.gov.in/supremecourt/2017/13393/13393_2017_Judgement_23-Nov-2017.pdf ≥ accessed January 16, 2019.

moment he stepped out of prison.⁶² Another example of this proceduralism is where the police of one state refuses to let the accused attend the cases in another state. Kobad Ghandy, a person accused of being a member of the Maoist party, describes how the Delhi Police refused to allow him to be taken to stand trial in other states.⁶³ Rather than have all the trials against him run simultaneously, he was then forced to wait for one trial to be completed, after which the next one would begin.

Conclusion

As of the writing of this note, the police have extended their allegations to include Prof. Anand Teltumbde. Prof. Teltumbde petitioned the High Court and then the Supreme Court to quash the FIR – both these courts declined to do so but the Supreme Court gave him protection from arrest till February 18, 2019⁶⁴. Despite this, the Pune police arrested him on February 2, 2019, only for a Pune court to hold his arrest illegal and order his release.

The actions of the Pune police demonstrate what is wrong with prosecutions under the UAPA. The police and prosecution often know that their cases will end up in acquittal yet continue to pursue them, nevertheless. The aim of UAPA prosecutions is to keep people in jail for as long as possible. They are built on edifices of patent unconstitutionality and conjecture that masquerades as evidence, but they are allowed to continue in the name of protecting national security. What this case shows is that the suppression of dissent does not take grand declarations of states of emergency. Instead, the chipping away of fundamental rights is actualised through the minutiae of procedure.

⁶² Arun Ferreira *Colours of the Cage: A prison memoir* (New Delhi: Permanent Black 2014).

⁶³ Kobad Ghandy 'Subverting the legal system' *Economic and Political Weekly* Vol 46, No. 25 (June 18-24, 2011), p. 5

⁶⁴ *Anand Teltumbde v. State of Maharashtra* Order dated 14 January 2019. ≤ https://www.sci.gov.in/supremecourt/2019/86/86_2019_Order_14-Jan-2019.pdf accessed January 25, 2019.

If the Supreme Court had ruled the other way in *Romila Thapar*, it would have come to a great relief to all those arrested in this particular case. There was enough on record to show that the Pune police had acted unfairly. Even so, the act of filing the petition has brought some scrutiny to the Pune police's action.

The main problem here, however, does not lie with the Supreme Court. To be sure, this is not the first time it has failed to uphold civil liberties. It is the UAPA that is the main issue – it engenders systems of impunity masquerading as legality. In this sense, the writ petition is correct: what is at stake in removing the UAPA is nothing less than India's democracy.