Gujarat’s Anti-Terrorism Bill
Another Building Block in the Edifice of Authoritarianism

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The Gujarat Control of Terrorism and Organised Crime (GCTOC) Bill is the latest effort at the devolution of authoritarianism. As passed, it has many problems. Considering a few of the provisions is educative.

Detention without Charge
(1) It brings back the detention of suspects for up to 180 days without charge. This is far beyond the maximum length permitted under Section 167(2)(a) of the CrPC, which is 90 days.

Use of Confessions
(2) It has reincarnated one of the most dangerous aspects of the Terrorist and Disruptive Activities (Prevention) Act (TADA) of 1987, which allowed confessions before a police officer admissible in evidence. Section 32 of the Prevention of Terrorism Act (POTA) had a similar provision.

Confessions made by a person before a police officer of rank not lower than a superintendent of police become admissible as evidence during the trial. This flies in the face of Article 20(3) of the Constitution, which proscribes the state from compelling a person to be a witness.
against himself. Even though the substantive content of this constitutional guarantee has been read down over the years, the admissibility of such confessions as evidence in trial is nevertheless inconsistent with the present exposition of the law. In addition, it is directly contrary to the intention of the provisions of the Indian Evidence Act. Under the Evidence Act, confessions made to a police officer or in police custody are not admissible in evidence on the ground that such provisions may lead to the use of torture and other coercion by the police to obtain evidence. Section 27, which is an exception to the above rule, carves a limited opening of admissibility if a fact discovered pursuant to a confession in police custody can be independently corroborated.

The GCTOC does not explicitly prohibit statements made to the police and extracted under torture from being admissible in evidence against an accused. This provision also violates the right of an accused set out in Article 14(3)(g) of the International Covenant on Civil and Political Rights (ICCPR)—that of not being “compelled to testify against himself or to confess guilt.” India has ratified the convention.

The prohibition of torture is absolute. However, India does not appear to be committed to bringing an end to it. The experience of TADA is instructive. One of the draconian provisions of TADA was Section 15 that made confessions to a police officer admissible as evidence. A challenge to this provision was made on the ground that it violated Article 14 of the Constitution relating to equality of persons. The right to equality carries with it protection of personal life and liberty. The court answered the matter of Article 14 at the time such a statement was made.3

The investigation being known to be afoot, the police may be in a position to influence the maker of a statement. The accused, therefore, must be protected against such likelihood of prejudice.4

TADA made the pretence of providing safeguards against the abuse of this provision. Though Section 32(3) of TADA stated that “confessions shall be recorded in an atmosphere free from threat or inducement,” it did not specify the criteria for such an atmosphere.

In normal circumstances, confessions made in police custody are not admissible as evidence under Section 25 of the Evidence Act. No amount of safeguards can prevent “torture” of the accused so long as a confession made to a police officer, whatever the rank may be, is admissible as evidence.

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**Interception of Phone Calls**

(3) The GCTOC permits the interception of telephone conversations and their admissibility in evidence.

The POTA had provisions governing surveillance measures, and authorised police officers to intercept communications. The Indian Telegraph Act 1885 provides for the cessation, interception, or detention of any message transmission if required in the interests of the sovereignty and integrity of India and the security of the state. It also authorises the government to tap the phones or communications of terrorist organisations or organised crime syndicates.

Though the police were previously authorised to tap phones under the Indian Telegraph Act 1885, under POTA, they had to abide by specific safeguards to justify their encroachment on the privacy of the individual, including: the submission of an application by a superintendent of police detailing the facts to justify interception. The permission could be granted only by a specially appointed “competent authority,” which in turn was required to submit this order to the Review Committee; an order of interception was strictly limited to 60 days; and misuse carried with it a penalty of imprisonment for up to one year. The GCTOC has done away with these safeguards in their entirety. Obtaining the home secretary's permission, as the GCTOC suggests, is no protection. We are painfully aware that the bureaucracy in Gujarat crawled when it was merely asked to bend.

Such unregulated power has created an aperture for future misuse and may become a cause of serious violations of the right to privacy. Article 17 of the ICCPR also provides for the right of every person to be protected against arbitrary or unlawful interference with his/her privacy, family, home, or correspondence.
Immunity from Prosecution

There is a major problem with Section 25 of the GCTOC Bill that makes the government immune from any legal action for “anything which is in good faith done or intended to be done in pursuance of this Act.” The Unlawful Activities (Prevention) Act 2004 granted immunity from prosecution to the union and state governments, and their employees. The 2008 amendments did not alter the provisions in the 2004 Act on immunity from prosecution for government officers and authorities and for members of the armed forces. Thus, an individual wrongly arrested, detained, and/or imprisoned under the GCTOC has virtually no legal recourse to seek compensation or combat impunity.

The bail provisions are outlined in Section 20(4) of the bill. Under the provisions, as in TADA, at a bail hearing the judge is forced to make a preliminary judgment of the guilt of the accused. In ordinary bail proceedings, a judge is supposed to weigh various factors—such as ties to the community, reputation, employment status—that would indicate the likelihood of absconding, rather than simply likelihood of guilt. In addition, under Section 20(4.b) of the bill as in TADA, when the public prosecutor opposes a bail application, no suspect may be released on bail unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of the offence for which he is suspected, and that he is not likely to commit any offence while on bail. By reversing the ordinary burden of proof, the task of the accused to show reasonable grounds of innocence at such an early stage of the proceedings is made unreasonably difficult.

It should be noted that the principle of the presumption of innocence has been enunciated by the Supreme Court of India on numerous occasions. In Kali Ram vs State of Himachal Pradesh, the apex court stated that the burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused.

The Supreme Court further stated that every criminal trial begins with the presumption of innocence in favour of the accused; and the provisions of the Code [of Criminal Procedure 1973] are so framed that a criminal trial should begin with and be throughout governed by this essential presumption.

As Parliament and the corporate-owned media cede democratic space in the name of fighting terrorism, the deep state wants more. A bloated security establishment, which is increasingly more powerful than Caesar, seeks untramelled power.

NOTES
2 Article 14 states, “The State shall not deny to any person equality before law or the equal protection of the laws within the territory of India.” Article 20(3) states, “No person accused of any offence shall be compelled to be a witness against himself.” Article 21 states, “No person shall be deprived of his life or personal liberty except according to procedure established by law.”
3 Article 162(1) of the Criminal Procedure Code.
4 Braund, J in Emperor vs Aftab Mohd Khan, AIR 1940 All 291, quoted with approval in Tahsildar Singh and anr vs State of Uttar Pradesh, AIR 1959 SC 1012.
5 See, e.g., Husainara Khatoon & Ors vs State of Bihar, 1979 AIR 1360.
6 TADA, Section 20(8).