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To,

The Chairperson & Other members
International Commission of Jurists
33 rue des Bains, 1211 Geneva 8,
Switzerland.

Sub: Submission for South Asia Sub-Regional Hearing in New Delhi, New Delhi, 27-28 February 2007

So-called Anti-Terrorist Laws are Tools of State Terrorism

Dear Sirs/Madams

Executive Summary

The following letter is in response to the International Commission of Jurists South Asia Sub-Regional Hearing in New Delhi 27-28 February, 2007. The overall claim of the report is to show the hypocrisy of the state. In an effort to prevent terrorism, the State has overlooked inherent human rights, as stated by the Constitution. The report outlines the details of three Acts: Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA), The Prevention of Terrorism Act, (POTA) 2002 and the Gujarat Prevention of Anti-Social Activities Act 1985

(PASA). It also includes an extensive overview of the Commission of the Supreme Court of India's remarks about the police force.

The Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) was one of the more draconian pieces of legislation to be passed by the Indian state. The Chairperson of the National Human Rights Commission, created by a presidential order, wrote an extensive letter outlining the problems with the act and requesting the removal of it. Despite its violation of human rights, TADA remained in force for 10 years (1985-95). It was allowed to lapse on 23rd May 1995 following a nation-wide protest by human rights organizations. During this period, 77,500 persons were arrested. According to an NHRC report, Gujarat – with no so-called militant activity at all – once accounted for as many as 19,000 out of 65,000 TADA cases. In other states like Punjab, Maharashtra, Kashmir, and Andhra Pradesh, tens of thousands of people were lying in jail without even once appearing before the court of law.

A survey of TADA cases reveals many instances of false arrests, police excesses, and extortion. People were imprisoned under the act for matters entirely unconnected with violent political acts. In 1987, six workers of Reliance Industries Limited in Ahmedabad, Gujarat, were arrested under TADA for legitimate trade union activity.

The Prevention of Terrorism Act, (POTA) 2002 is no better than TADA in that human rights were not considered in the implementation. Dr. Mukul Sinha, advocate and founder member of Jan Sangharsh Manch described the POTA as ***Production of Terrorist Act*** – to preserve and perpetuate the communal divide in Gujarat. In the state of Gujarat, POTA is selectively invoked against minorities. Between 2002 and 2003 in Gujarat State, there are 287 instances in 9 different categories of cases registered under POTA. Among them, one is against a Sikh and remaining are all against Muslims.

According to Zakia Jowher, renowned activist from Gujarat, the POTA is used in Gujarat is different from the way it is used in the rest of the country. She states, “In Gujarat, POTA is systematically used to perpetrate and preserve a communal divide between the Hindu and the Muslim communities.”

The Gujarat Prevention of Anti-Social Activities Act 1985 (PASA) was another act misused by the authorities to target certain members of the community. In this case three different trade union leaders of Apollo Tyres Ltd. Waghodia, district Vadodara, from three different unions were arrested one by one from 2002 to 2005. The collector only briefly overlooked the cases before the men were arrested under PASA. The men were detained for months waiting for judgement until finally released. Mr. Inder Singh upon his release was asked to not enter five districts in Gujarat and was therefore exiled from the state. During this time, the police traumatized the families of the union leaders. It appears from the facts of these cases that Apollo Tyres Ltd and the State Machinery colluded to terrorize workers by misusing the PASA.

Lastly, the issue of human rights and the prevention of terrorism cannot be limited to examining these few Acts. The police authority and state machinery must also be scrutinized. In September 2006, the Supreme Court of India announced the judgement remarking on the misuse of power by the police force. The report showed that Police and Armed forces when operating under laws like POTA or The Armed Forces (Special Powers) Acts take action with the certainty that they are immune from the reach of the law, making them more violent and atrocious. In the name of fight against terrorism, torture by the police has spread to every corner of the country. In fact, it could be argued that the fight against terrorism is a far greater danger to the public and the Constitutional fabric of the country than terrorism itself.

The story of TADA, POTA, and PASA illustrates how these and other such laws are tools of state terrorism. I would also like mention that we should demand in all countries the new law “The Prevention of Atrocities and State-Terrorism Act, **(PASTA) 2007** to counter State-Terrorism. It is an unfortunate reality that the debate around “fight against terrorism” has been overshadowed by rhetoric. The support for POTA is centered on its two core provisions. One section that makes confessions of the accused before a police officer admissible as evidence, and the second is the harsh provision regarding bail. Even under British rule, confessions recorded by a police officer have been barred as inadmissible on the grounds that torture by the police is prevalent, routine, and out of control, thus rendering any confession doubtful.

With the inclusion of the remarks by the Supreme Court regarding Police activity and the National Human Rights Commissions statement on TADA, it is apparent that not only activists but state entities as well are concerned about human rights in reference to the fight against terrorism. The only true way to fight terrorism must be to work with the community, rather than illegally detain people on the basis of their religion, status, or political affiliations. All the Acts outlined in this letter inherently target the human rights of the very people they are claiming to protect.

If we follow the logic of the state’s anti-terrorism legislation, the terrorist is you and me, those who are harassed by police officials, political party’s leaders, communal organizations, mafias, and Government’s top officials. In a state like Gujarat, the “Terrorism of the State” is one of the main issues we are trying to fight. Private individuals have little power compared to the state. The laws discussed above transforms the state into an institution of crime that aims to eternally perpetuate itself. Therefore, we are generally concerned about the acts of these governments and their officials who shelter themselves from the purview of the law.

MAIN PRESENTATION

There are a number of oppressive laws passed in the name of curtailing "terrorist" activities. At the Central level, there is, , (1) The Prevention of Seditious Meetings Act 1911, (2) The Armed Forces Special Powers Act 1958, (3) The Disturbed Areas Act, the Unlawful Activities (Prevention) Act 1967, (4) The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974, (5) The Disturbed Areas Special Courts Act 1976, (6) The National Security Act 1980, (7) The Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act 1980, (8) The Anti-Hijacking Act, 1982, (9) The Suppression of Unlawful Acts against Safety of Civil Aviation Act 1982, (10) Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) [Because of pressure of people's movement it remained in force only till May 1995],, (11) The Religious Institution (Prevention of Misuse) Ordinance 1988, (12) The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act 1988, (13) The Indian Telegraph Act, (14) The Information Technology Act 2000, (15) The Prevention of Terrorism Act, (POTA) 2002 [The government was forced to repealed the law on September 21, 2004] and so on.

The list of State-specific legislation includes (1) The Jammu and Kashmir Public Safety Act 1978, the Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act 1988, (2) The Assam Preventive Detention Act 1980, (3) The Maharashtra Prevention of Communal, Anti-Social and other Dangerous Activities Act 1980, (4) The Bihar Control of Crimes Act 1981, (5) The Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers and Drug Offenders Act 1981, (6) The Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Goondas, Immoral Traffic Offenders and Slum Grabbers Act 1982 and others like this. (7) The Gujarat Prevention of Anti-Social Activities Act 1985, (8) The Karnataka Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum-Grabbers Act 1985, (9) The Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits,

Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act 1986,

The TADA and POTA experience:

Let us examine the misuse of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) and The Prevention of Terrorism Act, (POTA) 2002 to understand the use of these so-called anti-terrorist laws by the Government of India.

Even if we go by the opinion of the National Human Rights Commission, it is clear that the character of TADA and POTA lends itself to state abuse of ordinary people.

The National Human Rights Commission in India was set up under Presidential Ordinance in October 1993. Parliament drafted the Protection of Human Rights Act, 10 of 1994, which came into force from 8th January 1994 and replaced the ordinance. The Commission operates within the parameters of this legislation.

The Chairperson of NHRC's letter dated 20 February 1995 on TADA [1] states

> "… In 1984, when terrorist activities increased in Punjab, the Terrorist Affected Area (Special Courts) Act, 1984 was legislated. As terrorist activities increased and functioning of the special courts became difficult, Parliament legislated the Terrorist and Disruptive Activities (Prevention) Act, 28 of 1987. This law was a temporary legislation mainly intended to deal with the prevailing situation in the Punjab. It made considerable deviations from the normal law to meet the emergent situation. The principal ones are:
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> (i) raising of the presumption of guilt and shifting the burden on the accused to establish his innocence;

[1] Annual Report of National Human Rights Commission of 1994-95

(ii) drawing the presumption of guilt for possession of certain unauthorized arms in specified areas;

(iii) making confession before a police officer admissible in evidence;

(iv) providing protection to witnesses such as keeping their identify and address secret and requiring avoidance of the mention of their names and address in order or judgments or in any records of the case accessible to the public;

(v) modifying the provisions of the Code of Criminal Procedure particularly in regard to the time set for investigation and grant of bail.

The title of the Act indicates that it was intended to combat terrorist activities and was not, therefore, intended to apply to areas where such activities were not visible. The Act has, however, been extended to the whole country and has been freely applied to situations not contemplated by the Act.

India is also a signatory to the International Covenant on Economic, Social, and Cultural Rights and International Covenant on Civil and Political Rights of 1966. Article 51 of the Constitution as one of the Directive Principles of the State policy states that the State shall endeavour of foster respect for international peace and treaty obligations.

The Indian Evidence Act, 1872, almost 125 years old, has provided that confession before a police officer would not be taken as evidence. Article 20(3) of the Constitution which is one of the Fundamental Rights of the citizens, proclaims that no person accused of any offence, shall be compelled to be a witness against himself. Notwithstanding this, the special provision in TADA makes the confession before a police officer admissible; the withholding of particulars of witnesses, takes away the guarantee of fair trial for accused persons. The shift of the presumption makes it difficult for the TADA accused to establish his innocence to get bail and the amendment of the Code of Criminal Procedure keeps the accused in jail for a long period of 6 months as against the maximum limit of 3 months provided in Section 167 (2) of the Code of Criminal Procedure. If investigation in a case of murder can be completed, in 90 days and if not completed bail is admissible to a murderer as an automatic process, there can be no justification for a longer period to be provided in respect of TADA matter.

The TADA legislation is, indeed, draconian in effect and character and has been looked down upon as incompatible with our cultural traditions, legal history, and treaty obligations. Provisions of the statute as such have yielded to abuse and on account of such a situation, the Act has been misused over the years and thousands of innocent

people who could have been otherwise dealt with, have been roped in to languish in jail. Many feel that the police have found it a convenient legal process to silence opposition and that it has been frequently abused for political considerations.

My honourable colleagues and myself in the Commission are aware of the fact that the Supreme Court in Kartar Singh's case has made an attempt to water down some of the harsh provisions. Besides our international obligations have also to be taken into account. The fact that the law has yielded scope for gross abuse on account of its inherent defects and flexibility has not been given adequate consideration and its draconian procedure has not been weighed. The quarterly review of cases, as directed by the Supreme Court, does not appear to have sufficiently met the grave situation arising on account of the abuse of statute. During these eleven months following the judgement, the expected result has not been achieved. The Commission has involved itself in the process with all seriousness; yet the desired effect remains illusive.

The Act is a temporary legislation and its life is due to expire on 24th May, 1995, unless Parliament in its wisdom decides to extend the same. The Commission has thought it appropriate to appeal to the law makers of the country to take into consideration these features and to bring to an end this very draconian legislation by not granting any fresh lease of life. The plea that without this special law the integrity of our motherland would be in jeopardy is a stand without merit. The law and order machinery should not be permitted to operate any longer under the cover of such a black law. If considered indispensable, some provision to meet terrorism may be incorporated into the ordinary criminal law of the land by amendment ensuring that the objectionable provision are not brought in. The Act itself has been condemned both within the country and internationally as violating our international treaty obligations. We set "liberty" of the individual as our goal in the freedom struggle. How can any of our lawmakers be party to a system of legalizing undue curtailment thereof? The Act operates unjustly and has as its very base a foundation of injustice. It is appropriate to take note of the fact that the rate of conviction even with the several special provisions is grossly low. That clearly indicates indiscriminate use of the Act. Daniel Webster in his funeral oration on Mr. Justice Story a century and half ago said:

"Justice, Sir, is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands, there is a foundation for social for social security, general happiness and the improvement and progress of our race. And whoever labors on this edifice with usefulness and distinction, whoever clears its foundation, strengthens its pillars, adores its entablatures or

contributes to raise its august dome still higher in the skies, connects himself in name and fame and character with that which is and must be as durable as the frame of human society."

We hope and trust that you would give your anxious consideration to the matter and help in the taking of steps for protecting the human rights of the Indian people keeping in view the noble traditions of this great country and restore confidence in the minds of the people. In the Indian democratic set up, equality is the rule and the rule of law provides the umbrellas under which all are treated at par in real life.

I remind you that have entrusted the Commission with the charge of maintaining human rights and the Commission is finding it difficult to do so unless this draconian law is removed from the statute book."

TADA remained in force for 10 years (1985-95). It was allowed to lapse on 23rd May 1995 following a nation-wide protest by human rights organizations. During this period, 77,500 persons were arrested. According to an NHRC report, Gujarat – with no so-called militant activity at all – once accounted for as many as 19,000 out of 65,000 TADA cases. In other states like Punjab, Maharashtra, Kashmir, and Andhra Pradesh, tens of thousands of people were lying in jail without even once appearing before the court of law.

A survey of TADA cases reveals many instances of false arrests, police excesses, and extortion. People were imprisoned under the act for matters entirely unconnected with violent political acts. In 1987, six workers of Reliance Industries Limited in Ahmedabad, Gujarat, were arrested under TADA for legitimate trade union activity. In August 1991, a member of the Haryana Legislative Assembly, Om Prakash Jindal, had a TADA case filed against him.

A study conducted by the Peoples Union of Democratic Rights (PUDR) shows that of the 53,000 TADA cases all over the country only one per cent had yielded convictions in the court of law.

A high-level inquiry committee appointed by Maharashtra government to review TADA cases observed that out of 20 cases involving 150 accused reviewed by it so far, the act was wrongly applied in at least 16 cases.

In October 1993, according to the Union Home Ministry, the total number of detentions under TADA was 52,268; the conviction rate of those tried by designated courts was 0.81% ever since the law came into force. Punjab, with 14,557 detainees, showed a conviction rate of 0.37%. On 24 August 1994, then Minister of State of Home, Rajesh Pilot, stated that of the 67,000-odd persons detained since TADA came into force, only 8,000 cases were tried. Of the 8,000 tried, only 725 persons were convicted. Thus, 59,509 people had been needlessly detained; no cases were brought against them. The review committees of TADA stated that 5,000 cases inappropriately applied TADA was wrong, and asked for the withdrawal of those. In more than 50,000 cases, TADA was wrongly applied.

Six years after TADA lapsed; it still brought shivers under the spines of those who suffered under it. The statistics speak for themselves: out of a total of 77,500 persons arrested under TADA, only 8,000 were tried, 725 (0.81 per cent) convicted and 3,000 are still believed to be in jails. This is not a healthy track record.

In some parts of India, the Act was used almost exclusively against non-Hindus in a discriminatory manner. According to the National Commission for Minorities, the total number of persons arrested under TADA in Rajasthan as of 1 September 1994 was 432 of which 409 persons belonged to minority groups.

Same is the case with POTA. Responding to a question relating to POTA, Justice A. S. Anand chairperson of NHRC[2] stated

> It did have some provisions to safeguard against its misuse though those provisions may not be enough. Care has to be taken to see that the provisions of POTA are not abused.

> There are apprehensions that POTA can be misused. Any law can be misused. What we have to see is whether there is an inbuilt mechanism to safeguard the Act from being misused. It has. But more safeguards are required to be provided against its abuse.
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> The rights of a person in uniform are equally important as those who belong to civil society and a balanced approach to both was necessary.
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> No civilized country could allow terrorism to flourish, but one has to differentiate between a criminal and a terrorist. While all terrorists are criminals, it does not necessarily mean that all criminals are terrorists.

Dr. Mukul Sinha[3], advocate and founder member of Jan Sangharsh Manch described the POTA as ***Production of Terrorist Act*** – to preserve and perpetuate the communal divide in Gujarat. In the state of Gujarat, POTA is selectively invoked against minorities. Between 2002 and 2003 in Gujarat State, there are 287 instances in 9 different categories of cases registered under POTA. Among them, one is against a Sikh and remaining are all against Muslims.

According to Zakia Jowher[4], renowned activist from Gujarat, the POTA is used in Gujarat is different from the way it is used in the rest of the country. She states, "In Gujarat, POTA is systematically used to perpetrate and preserve a

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[2] Position of the National Human Rights Commission in respect of Anti-Terrorism Legislation, 21 February 2003 - http://nhrc.nic.in/NHRC-AntiTerrorism.htm

[3] Testimony by Mukul Sinha, The Terror of POTA and other Security Legislation, A Report on the People's Tribunal on the Prevention of Terrorism Act and other Security Legislation, New Delhi, March 2004, Editor : Preeti Verma.

[4] Testimony by Zakia Jowher, The Terror of POTA and other Security Legislation, A Report on the People's Tribunal on the Prevention of Terrorism Act and other Security Legislation, New Delhi, March 2004, Editor : Preeti Verma.

communal divide between the Hindu and the Muslim communities." She describes in her testimony at the People's Tribunal,

> We have been speaking to several families where a member has been charged or detained under POTA. We have conducted a survey of more than 25 families. The facts that emerge as common are as follows:

1. In all the 25 cases, people have been detained illegally before they were arrested. This period of illegal detention varies from three days to as many as 25 days.

2. They have been invariably been picked up from their homes or neighborhoods, whereas the Crime Branch version gives the location of their choice as the place of arrest.

3. In some instances, family members were detained as substitutes till the person named by the police turned up. Sometime even two family members were detained for days. The broad patterns of police operation suggest that for every person arrested, several other are illegally detained. During September 2003, about 350 to 450 persons were being kept in illegal detention in Ahmedabad city, according to the estimates of civil society groups.

4. In all 25 cases, there is no pervious history of crime for the accused or their families.

5. Most of the accused are small-time employed people such as electrician, radio/TV repairers, drivers, religious teachers, etc. Some have an activist background and actively helped others irrespective of religion in the earthquake and during the riots.

6. All the accused are young, mostly below 30.

7. The general pattern of this picking-up operation has been as follows: burst into peoples' homes at an unearthly hour in a group of 25-30. Ransack the home, terrorise the inmates, and never leave without picking up at least one family member. This includes picking up of a senior citizen of 65, like Mr. Karimi, when the person of their choice is not at home at the time.

8. In some cases, important documents like degree certificates, wedding photos, etc., have been taken away by the Crime Branch.

9. In almost all cases, the families are threatened with encounter killing and POTA invocation if they speak up or inform anyone about their plight. Tarun Barot is bandied about as the encounter specialist.

10. There have been instances of harassing extended family members, like grandparents, uncles, etc., who live elsewhere. Again, the favourite time appears to be well past midnight.

11. In almost all cases, signatures have been taken on blank sheets from not just the accused but, in quite a few cases, from their family members too. If the family members refused to sign on blank paper, they were threatened with the continuation of the illegal detention. At times, they were told their son or relative could be freed only if they signed such papers.

12. The family members are not allowed to meet with the accused for quite some time, and certainly not before the confession have been extracted. In one case, the old parents of one of the victims only got a glimpse of their son when he was brought to the court with his head covered and that too from a distance from at which they could not speak to him, and he could not bear them or know that they were there.

13. In some cases, the person thus picked up is the sole breadwinner and thus the arrest or detention leaves the family in dire economic condition.

14. We also have access to six complaints written by some of the accused while they were in judicial custody. Copies of these were sent to various agencies but to no avail. Some of the shocking facts are follows:

a. Torture – these people have been subjected to severe torture, including electric shock administered to private parts, and the moving of a wooden roller-like object on their bodies. Several victims (Kalim/Anas) fell unconscious during the course of this torture a number of times. They have also named the officers who routinely tortured them.

b. The accused have been forced to hold weapons in postures dictated by the police, and the police recorded this on video.

c. They were asked to work with some electric gadgets (apparently gestures of making bombs) while photos were taken and videos were shot.

d. Repeated threats of encounters: “Ab ki baar upar jayega”. (This time you will go up) (meaning, this time he will be killed).

e. Forced to memories statements before being taken to the Magistrate. Forced to read out statements while it was being taped.

f. There seems to be a systematic brainwashing or the perpetration of a certain ideology into the Crime Branch workforce, as becomes evident from the number of instances where hatred of Muslims is evident. The accused have repeatedly complained about insult to their religion and gaalis (abuses) hurled at their community even by clerical and support

staff (who are not directly connected with the accused), suggesting a systematic demonisation of a whole community.

g. In shocking incident, an accused has complained of (and named) a Magistrate who told the Crime branch to "properly prepare" the accused when he refused to sign a pre-written statement. This is not enough. This same Magistrate reminded another accused (as found in the complaint) of history of encounter of Crime Branch officials when he hesitated in signing the confession.

Mr. Anas Abdul Rashid Machiswala in his written submission sent to the People's Tribunal[5] records an event when he refused to sign on the papers before the Magistrate. The Magistrate himself said 'take him away, prepare to bring him back by 4.00 – 4.30. Dr. S. K. Gupta slapped him before the Magistrate and brought him to the circuit house in Shahivan. He was taken to a room and was brutally beaten up. The police official said, 'Everything here belongs to us. If you do not sign, we can take more remand and we will also call your old father here. Then both of you can sit together in jail. We can make more remand and also encounter.'

Ms. Yasmin Haneef Shaikh wife of M. Haneef A. Razak Shaikh revealed in her testimony to the People's Tribunal[6] that "Most of my husband's business dealings were with the Hindu Sindhi community, however, now we are in a bad state as we are being boycotted by our business associates. After the story about my husband's "terrorist actions" was carried in detail in the *Sandesh* newspaper; we have been subjected to a severe economic boycott."

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[5] Testimony by Abdul Rashid Machiswala father of Aans, The Terror of POTA and other Security Legislation, A Report on the People's Tribunal on the Prevention of Terrorism Act and other Security Legislation, New Delhi, March 2004, Editor: Preeti Verma.

[6] Testimony by Ms. Yasmin Haneef Shaikh wife of M. Haneef A. Razak Shaikh, The Terror of POTA and other Security Legislation, A Report on the People's Tribunal on the Prevention of Terrorism Act and other Security Legislation, New Delhi, March 2004, Editor : Preeti Verma.

Misuse of the Gujarat Prevention of Anti-Social Activities Act 1985 (PASA):

On the morning of 26 July 2004[7], Apollo Tyres Kamgar Sangh's President and employee of Apollo Tyres Ltd. Waghodia, district Vadodara, Mr. Inder Singh was arrested. In subsequent days, various new FIRS were launched against him and later he was booked under the PASA. The union anticipated such action against them on 25 July 2004, one day prior to the arrest, and they approached various authorities for protection. While arresting him on 26 July 2004, the police had violated all legal norms and specifically D. K. Basu's guidelines[8]. Further, invoking PASA was a calculated move which had no basis other than terrorising other workers of the company. The Vadodara district administration had hurriedly prepared the PASA file very early in the morning against Mr. Singh, to help the management of Apollo Tyres Ltd. The PASA board agreed to ultimately to drop the PASA charges against Mr. Inder Singh.

Even in May 2002, Mr. Balvindar Singh, a union leader of Apollo Tyres Karmachari Sangh was arrested under PASA for his union activity.

On 4th June 2005 Mr. Naresh Patel[9], President of Apollo Tyres Employees Union was also arrested under TADA for his union activity. PASA board agreed to ultimately relieve Mr. Naresh Patel from PASA.

It appears from the above history that all three main leaders of all three unions of Apollo Tyres were arrested one by one under PASA. It appears from the facts that Apollo Tyres Ltd and the State Machinery colluded to terrorise workers by misusing the PASA.

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[7] Letter dated 29th July 2004 of People's Union for Civil Liberties, Gujarat.

[8] Writ Petition (Criminal) No. 539 of 1986, with Writ Petition. (Criminal) No. 592 of 1987 of D K Basu v State of West Bengal; Ashok K Johri v State of Uttar Pradesh, India, Supreme Court, 18 December 1996, AIR 1997 SC 610

[9] Interview of Naresh Patel, dated 10th December 2005 by Rohit Prajapati

Supreme Court remarks about the Police Authority:

Let me inform the Commission of the Supreme Court of India's remarks about the police force, which is looking for indiscriminate power.

The Supreme Court in its recent interim order dated 22nd September 2006 in Writ Petition (Civil) No. 310[10] of 1996 observed:

> "… 4. In its first report, the Commission (National Police Commission) first dealt with the modalities for inquiry into complaints of police misconduct in a manner which will carry credibility and satisfaction to the public regarding their fairness and impartiality and rectification of serious deficiencies which militate against their functioning efficiently to public satisfaction and advised the Government for expeditious examination of recommendations for immediate implementation. The Commission observed that increasing crime, rising population, growing pressure of living accommodation, particularly, in urban areas, violent outbursts in the wake of demonstrations and agitations arising from labour disputes, the agrarian unrest, problems and difficulties of students, political activities including the cult of extremists, enforcement of economic and social legislation etc. have all added new dimensions to police tasks in the country and tended to bring the police in confrontation with the public much more frequently than ever before. The basic and fundamental problem regarding police taken note of was as to how to make them functional as an efficient and impartial law enforcement agency fully motivated and guided by the objectives of service to the public at large, upholding the constitutional rights and liberty of the people. Various recommendations were made.
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> In the second report, it was noticed that the crux of the police reform is to secure professional independence for the police to function truly and efficiently as an impartial agent of the law of the land and, at the same time, to enable the Government to oversee the police performance to ensure its conformity to the law. A supervisory mechanism without scope for illegal, irregular, or mala fide interference with police functions has to be devised. It was earnestly hoped that the Government would examine and publish the report expeditiously so that the process for implementation of various recommendations made therein could start right away. The report, inter alia, noticed the

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[10] Writ Petition (Civil) No. 310 of 1996, interim order dated 22nd September 2006 in case of Prakash Singh and Ors. Vs. Union of India (UOI) and Ors

phenomenon of frequent and indiscriminate transfers ordered on political considerations as also other unhealthy influences and pressures brought to bear on police and, inter alia, recommended for the Chief of Police in a State, statutory tenure of office by including it in a specific provision in the Police Act itself and also recommended the preparation of a panel of IPS officers for posting as Chiefs of Police in States. The report also recommended the constitution of Statutory Commission in each State the function of which shall include laying down broad policy guidelines and directions for the performance of preventive task and service oriented functions by the police and also functioning as a forum of appeal for disposing of representations from any Police Officer of the rank of Superintendent of Police and above, regarding his being subjected to illegal or irregular orders in the performance of his duties.

With the 8th and final report, certain basic reforms for the effective functioning of the police to enable it to promote the dynamic role of law and to render impartial service to the people were recommended and a draft new Police Act incorporating the recommendations was annexed as an appendix.

5. When the recommendations of National Police Commission were not implemented, for whatever reasons or compulsions, and they met the same fate as the recommendations of many other Commissions, this petition under Article 32 of the Constitution of India was filed about 10 years back, inter alia, praying for issue of directions to Government of India to frame a new Police Act on the lines of the model Act drafted by the Commission in order to ensure that the police is made accountable essentially and primarily to the law of the land and the people. The first writ petitioner is known for his outstanding contribution as a Police Officer and in recognition of his outstanding contribution, he was awarded the "Padma Shri" in 1991. He is a retired officer of Indian Police Service and served in various States for three and a half decades. He was Director General of Police of Assam and Uttar Pradesh besides the Border Security Force. The second petitioner also held various high positions in police. The third petitioner-Common cause is an organization which has brought before this Court and High Courts various issues of public interest. The first two petitioners have personal knowledge of the working of the police and also problems of the people. It has been averred in the petition that the violation of fundamental and human rights of the citizens are generally in the nature of non-enforcement and discriminatory application of the laws so that those having clout are not held accountable even for blatant violations of laws and, in any case, not brought to justice for the direct violations of the rights of citizens in the form of unauthorized detentions, torture, harassment, fabrication of evidence, malicious prosecutions

etc. The petition sets out certain glaring examples of police inaction. According to the petitioners, the present distortions and aberrations in the functioning of the police have their roots in the Police Act of 1861, structure, and organization of police having basically remained unchanged all these years.

6. The petition sets out the historical background giving reasons why the police functioning have caused so much disenchantment and dissatisfaction. It also sets out recommendations of various Committees which were never implemented. Since the misuse and abuse of police has reduced it to the status of a mere tool in the hands of unscrupulous masters and in the process, it has caused serious violations of the rights of the people, it is contended that there is immediate need to re-define the scope and functions of police, and provide for its accountability to the law of the land, and implement the core recommendations of the National Police Commission. The petition refers to a research paper 'Political and Administrative Manipulation of the Police' published in 1979 by Bureau of Police Research and Development, warning that excessive control of the political executive and its principal advisers over the police has the inherent danger of making the police a tool for subverting the process of law, promoting the growth of authoritarianism, and shaking the very foundations of democracy.

The commitment, devotion, and accountability of the police have to be only to the Rule of Law. The supervision and control has to be such that it ensures that the police serve the people without any regard, whatsoever, to the status and position of any person while investigating a crime or taking preventive measures. Its approach has to be service oriented; its role has to be defined so that in appropriate cases, where on account of acts of omission and commission of police, the Rule of Law becomes a casualty, the guilty Police Officers are brought to book and appropriate action taken without any delay.

7. The petitioners seek that Union of India be directed to re-define the role and functions of the police and frame a new Police Act on the lines of the model Act drafted by the National Police Commission in order to ensure that the police is made accountable essentially and primarily to the law of the land and the people. Directions are also sought against the Union of India and State Governments to constitute various Commissions and Boards laying down the policies and ensuring that police perform their duties and functions free from any pressure and also for separation of investigation work from that of law and order. The notice of the petition has also been served on State Governments and Union Territories. We have heard Mr. Prashant Bhushan for the petitioners, Mr. G. E. Vahanvati, learned Solicitor General for the Union of India, Ms. Indu Malhotra for the National Human Rights Commission

and Ms. Swati Mehta for the Common Welfare Initiatives. For most of the State Governments/Union Territories, oral submissions were not made. None of the State Governments/Union Territories urged that any of the suggestion put forth by the petitioners and Solicitor General of India may not be accepted.

Besides the report submitted to the Government of India by National Police Commission (1977-81), various other high powered Committees and Commissions have examined the issue of police reforms, viz. (i) National Human Rights Commission (ii) Law Commission (iii) Ribeiro Committee (iv) Padmanabhaiah Committee and (v) Malimath Committee on Reforms of Criminal Justice System.

8. In addition to above, the Government of India in terms of Office Memorandum dated 20th September, 2005 constituted a Committee comprising Shri Soli Sorabjee, former Attorney General and five others to draft a new Police Act in view of the changing role of police due to various socio-economic and political changes which have taken place in the country and the challenges posed by modern day global terrorism, extremism, rapid urbanization as well as fast evolving aspirations of a modern democratic society. The Sorabjee Committee has prepared a draft outline for a new Police Act (9th September 2006). About one decade back, viz. on 3rd August, 1997 a letter was sent by a Union Home Minister to the State Governments revealing a distressing situation and expressing the view that if the Rule of Law has to prevail, it must be cured. Despite strong expression of opinions by various Commissions, Committees and even a Home Minister of the country, the position has not improved as these opinions have remained only on paper, without any action. In fact, position has deteriorated further. The National Human Rights Commission in its report dated 31st May 2002, inter alia, noted that:

Police Reform:

28(i) The Commission drew attention in its 1st April 2002 proceedings to the need to act decisively on the deeper question of Police Reform, on which recommendations of the National Police Commission (NPC) and of the National Human Rights Commission have been pending despite efforts to have them acted upon. The Commission added that recent event in Gujarat and, indeed, in other States of the country, underlined the need to proceed without delay to implement the reforms that have already been recommended in order to preserve the integrity of the investigating process and to insulate it from 'extraneous influences.

9. In the above noted letter dated 3rd April, 1997 sent to all the State Governments, the Home Minister while echoing the overall popular

perception that there has been a general fall in the performance of the police as also a deterioration in the policing system as a whole in the country, expressed that time had come to rise above limited perceptions to bring about some drastic changes in the shape of reforms and restructuring of the police before the country is overtaken by unhealthy developments. It was expressed that the popular perception all over the country appears to be that many of the deficiencies in the functioning of the police had arisen largely due to an overdose of unhealthy and petty political interference at various levels starting from transfer and posting of policemen of different ranks, misuse of police for partisan purposes and political patronage quite often extended to corrupt police personnel. The Union Home Minister expressed the view that rising above narrow and partisan considerations, it is of great national importance to insulate the police from the growing tendency of partisan or political interference in the discharge of its lawful functions of prevention and control of crime including investigation of cases and maintenance of public order.

Besides the Home Minister, all the Commissions and Committees above noted, have broadly come to the same conclusion on the issue of urgent need for police reforms. There is convergence of views on the need to have (a) State Security Commission at State level; (b) transparent procedure for the appointment of Police Chief and the desirability of giving him a minimum fixed tenure; (c) separation of investigation work from law and order; and (d) a new Police Act which should reflect the democratic aspirations of the people. It has been contended that a statutory State Security Commission with its recommendations binding on the Government should have been established long before. The apprehension expressed is that any Commission without giving its report binding effect would be ineffective.

10. More than 25 years back i.e. in August 1979, the Police Commission Report recommended that the investigation task should be beyond any kind of intervention by the executive or non-executive. For separation of investigation work from law and order, even the Law Commission of India in its 154th Report had recommended such separation to ensure speedier investigation, better expertise and improved rapport with the people without of-course any watertight compartmentalization in view of both functions being closely inter-related at the ground level. The Sorabjee Committee has also recommended establishment of a State Bureau of Criminal Investigation by the State Governments under the charge of a Director who shall report to the Director General of Police. In most of the reports, for appointment and posting, constitution of a Police Establishment Board has been recommended comprising of the

Director General of Police of the State and four other senior officers. It has been further recommended that there should be a Public Complaints Authority at district level to examine the complaints from the public on police excesses, arbitrary arrests and detentions, false implications in criminal cases, custodial violence etc. and for making necessary recommendations.

Undoubtedly and undisputedly, the Commission did commendable work and after in depth study, made very useful recommendations. After waiting for nearly 15 years, this petition was filed. More than ten years have elapsed since this petition was filed. Even during this period, on more or less similar lines, recommendations for police reforms have been made by other high-powered committees as above noticed. The Sorabjee Committee has also prepared a draft report. We have no doubt, that the said Committee would also make very useful recommendations and come out with a model new Police Act for consideration of the Central and the State Governments. We have also no doubt that Sorabjee Committee Report and the new Act will receive due attention of the Central Government which may recommend to the State Governments to consider passing of State Acts on the suggested lines. We expect that the State Governments would give it due consideration and would pass suitable legislations on recommended lines, the police being a State subject under the Constitution of India. The question, however, is whether this Court should further wait for Governments to take suitable steps for police reforms. The answer has to be in the negative.

11. Having regard to (i) the gravity of the problem; (ii) the urgent need for preservation and strengthening of Rule of Law; (iii) pendency of even this petition for last over ten years; (iv) the fact that various Commissions and Committees have made recommendations on similar lines for introducing reforms in the police set-up in the country; and (v) total uncertainty as to when police reforms would be introduced, we think that there cannot be any further wait, and the stage has come for issue of appropriate directions for immediate compliance so as to be operative till such time a new model Police Act is prepared by the Central Government and/or the State Governments pass the requisite legislations. It may further be noted that the quality of Criminal Justice System in the country, to a large extent, depends upon the working of the police force. Thus, having regard to the larger public interest, it is absolutely necessary to issue the requisite directions. Nearly ten years back, in Vineet Narain and Ors. v. Union of India and Anr. SC/0827/1998, this Court noticed the urgent need for the State Governments to set up the requisite mechanism and directed the Central Government to pursue the matter of police reforms with the State Governments and ensure the setting up of a mechanism for

selection/appointment, tenure, transfer and posting of not merely the Chief of the State Police but also all police officers of the rank of Superintendents of Police and above. The Court expressed its shock that in some States the tenure of a Superintendent of Police is for a few months and transfers are made for whimsical reasons which has not only demoralizing effect on the police force but is also alien to the envisaged constitutional machinery. It was observed that apart from demoralizing the police force, it has also the adverse effect of politicizing the personnel and, therefore, it is essential that prompt measures are taken by the Central Government.

12. The Court then observed that no action within the constitutional scheme found necessary to remedy the situation is too stringent in these circumstances. More than four years have also lapsed since the report above noted was submitted by the National Human Rights commission to the Government of India. The preparation of a model Police Act by the Central Government and enactment of new Police Acts by State Governments providing therein for the composition of State Security Commission are things, we can only hope for the present. Similarly, we can only express our hope that all State Governments would rise to the occasion and enact a new Police Act wholly insulating the police from any pressure whatsoever thereby placing in position an important measure for securing the rights of the citizens under the Constitution for the Rule of Law, treating everyone equal and being partisan to none, which will also help in securing an efficient and better criminal justice delivery system. It is not possible or proper to leave this matter only with an expression of this hope and to await developments further. It is essential to lay down guidelines to be operative till the new legislation is enacted by the State Governments."

The Supreme Court in its interim order dated 18th December 1996[11] in Writ Petition (Criminal) No. 539 of 1986, with Writ Petition. (Criminal) No. 592 of 1987 observed:

" … 18. However, in spite of the constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, growing incidents of torture and deaths in police custody has been a disturbing factor. Experience shows that worst violations of human rights take place during the course of investigation, when the police with a view to secure evidence or confession often resorts to third degree methods including torture and adopts techniques of screening arrest by either

[11] Writ Petition (Criminal) No. 539 of 1986, with Writ Petition. (Criminal) No. 592 of 1987 of D K Basu v State of West Bengal; Ashok K Johri v State of Uttar Pradesh, India, Supreme Court, 18 December 1996, AIR 1997 SC 610

no! recording the arrest or describing the deprivation of liberty merely as a prolonged interrogation. A reading of the morning newspaper almost everyday carrying reports of dehumanising torture, assault. tape and death in custody of police or other governmental agencies is indeed depressing. The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the credibility of the Rule of Law and the administration of criminal justice system. The community rightly feelsperlurbed. Society's cry for justice becomes louder.

19. The Third Report of the National Police Commission of India expressed its deep concern with custodial violence and lock-up deaths. It appreciated the dcmoralising effect which custodial torture was creating on the society as a whole. It made some very useful suggestion. 1; suggested :

". . .An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances :--

(i) The case involves a grave offence like murder, dacoity, robbery, rape etc., and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror-stricken victims.

(ii) The accused is likely to abscond and evade the processes of law.

(iii) The accused is given to violent behavior and is likely to commit further offences unless his movement are brought under restraint.

(iv) The accused is a habitual offender and unless kept in custody be is likely to commit similar offences again. It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines.....

The recommendations of the Police Commission (supra) reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. These recommendations, however, have not acquired any statutory status so far.

…..

… 29. Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of an offence but it must be remembered that the law does not permit use of third degree methods or torture of accused in custody during interrogation and investigation with a view to solve the crime. End cannot justify the means. The interrogation and investigation into a

crime should be in true sense purposeful to make the investigation effective. By torturing a person and using third degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No society can permit it.

30. How do we check the abuse of police power ? Transparency of action and accountability perhaps are two possible safeguards which this Court must insist upon. Attention is also required to be paid to properly develop work culture, training, and orientation of the police force consistent with basic human values. Training methodology of the police needs restructuring. The force needs to be infused with basic human values and made sensitive to the constitutional ethos. Efforts must be made to change the attitude and approach of the police personnel handling investigations so that they do not sacrifice basic human values during interrogation and do not resort to questionable forms of interrogation. With a view to bring in transparency, the presence of the counsel of the arrestee at some point of time during the interrogation may deter the police from using third degrees methods during interrogation.

…

35. In addition to the statutory and constitutional requirements to which we have made a reference, we are of the view that it would be useful and effective to structure appropriate machinery for contemporaneous recording and notification of all cases of arrest and detention to bring in transparency and accountability. It is desirable that the officer arresting a person should prepare a memo of his arrest at the time of arrest in the presence of at least one witness who may be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. The date and time of arrest shall be recorded in the memo which must also be counter signed by the arrestee.

36. We, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention (ill legal provisions are made in that behalf as preventive measures :

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible, and clear identification and nametags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest al the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality

from where the arrest is made, it shall also he countersigned by the arrestee and shall contain the time and dale of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed; of the arrest and the names and particulars of the! police officials in whose custody the arrestee is,

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor-injuries, if any, present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory, Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the: officer causing the arrest, within 12 hours of effecting the arrest and al the police control room it should be displayed on a conspicuous police, board."

The story of TADA, POTA, and PASA illustrates how these and other such laws are tools of state terrorism. I would also like mention that we should demand in all countries the new law "The Prevention of Atrocities and State-Terrorism Act, **(PASTA) 2007** to counter State-Terrorism.

It is an unfortunate reality that the debate around "fight against terrorism" has been overshadowed by rhetoric and not remained genuine[12]. Why would the Government want POTA or WOTA (the War of Terrorism Act)? The support for POTA is centered around its two core provisions. One section that makes confessions of the accused before a police officer admissible as evidence, and the second is the harsh provision regarding bail.

Even under British rule, confessions recorded by a police officer have been barred as inadmissible on the grounds that torture by the police is prevalent, routine, and out of control, thus rendering any confession doubtful.

Police and Armed forces when operating under laws like POTA or The Armed Forces (Special Powers) Acts take action with the certainty that they are immune from the reach of the law, making them more violent and atrocious. In the name of fight against terrorism, torture by the police has spread to every corner of the country. In fact, the fight against terrorism is a far greater danger to the public and the Constitutional fabric of the country than terrorism itself. People are brutalized, often without any reason, and frequently for minor crimes. If we accept laws like POTA or the newly planned replacement act known as WOTA (the War of Terrorism Act), then we will next have to contend

[12] "Identify real cause of terrorism" by Rohit Prajapati, Indian Express, Letter to the Editor column, 14th October 2006

with a demand for limitless executive power without any accountability to law or nation.

The threat of terrorism is manipulated by the police and exaggerated in the media, and has thus made the judiciary concede to the police force and ignore naked excess.

Let me make it very clear that history tells us that anti-terrorist laws like TADA or POTA have neither prevented the occurrence of terrorist acts nor acted as deterrents to the violence. Innocent people, rather than terrorists, have been the victims.

The phrase "war on terrorism" creates a wrong impression among some people that there is a solution to terrorism and that is mainly military or use of so-called law like “POTA”.

But in fact, we need to identify the real cause of terrorism, encourage concern and cooperation from the common people, and not fight back with state violence. That is why I strongly feel that you cannot fight terrorism without real popular support. You can only get people’s genuine support if the government addresses the basic problems of the working masses and really represents their viewpoint in the parliament or state assembly.

Even after all this, the state is adamant to enjoy its extra-constitutional power in the name of countering “terrorism”. In 2004, the Government of Gujarat passed “The Gujarat Control of Organized Crime Bill’ which was originally sent for presidential approval on March 26, 2003[13]. The president returned with the suggestion of what are now Sections 14, 15 and 16, which gave blanket powers to district collectors and district superintendents of police to intercept and record telephonic and other means of communications, violating the privacy of citizen. The Gujarat assembly passed the Gujarat Control of

[13] “State Terrorism” by Rohit Prajapati, Indian Express, Letter to the Editor column, 8th September 2006

Organized Crime Bill (GUJCOC), on June 2, 2004, on the lines of The Maharashtra Prevention of Communal, Anti-Social and other Dangerous Activities Act 1980 (MCOCA), which has been in operation in Maharashtra since February 1999 and Delhi since January 2002. The GUJCOC, it may be noted, has provisions allied with POTA that would allow the holding of detention without trial, subject to a review committee's decision on the application of the act. The first MCOCA case of Farooq Abdul Gafoor Chifa in Mumbai became an example, not of efficiency and precision, but of misuse and the familiar casual approach of investigating agencies associated earlier with TADA, and later with POTA.

It is expected that the state is a legal entity which is duty-bound to protect its citizens to ensure that it acts and behaves within the purview of the Constitution. Otherwise, the very foundation of a democratic polity is at stake. However, if we go by the present Government's behaviour during the Gujarat carnage 2002 then we are left with no choice but to say that it was the terrorism of the state, which still continues in one form or other form. I have a strong feeling that in the name of countering "terrorism" the state is becoming a grossly powerful terrorist itself through self-empowerment of indiscriminate authority. Who are the terrorists? If we follow the logic of the state's anti-terrorism legislation, the terrorist is you and me, those who are harassed by police officials, political party's leaders, communal organizations, mafias, and Government's top officials. In a state like Gujarat, the "Terrorism of the State" is one of the main issues and we are trying to fight. Private individuals have little power compared to the state. The laws discussed above transforms the state into an institution of crime that aims to eternally perpetuate itself. Therefore, we are generally concerned about the acts of these governments and their officials who shelter themselves from the purview of the law.

[Rohit Prajapati]

Activist from Gujarat, India