Justice Kait Tribunal on SIMI: A critical update

On July 30, 2014 Justice Kait headed SIMI Tribunal upheld the ban after examining 21 cases, 18 of which were "fresh cases" and examining 30 state officials in "support of the ban" and concluded that: "the *evidence* brought on record clearly and unambiguously establishes that despite being banned since 27th September, 2001, except for a brief period in between, the SIMI activists are associating, meeting, conspiring, acquiring arms & ammunitions, and indulging in activities which are disruptive in character and capable of threatening the sovereignty and territorial integrity of India. They are in regular touch with their associates and masters based in other countries. Their actions are capable of disrupting peace and communal harmony in the country. *Their stated objectives are contrary to the laws of our country. Especially their object of establishing Islamic rule in India can, under no circumstances, be permitted to subsist.*" [para 255 of the Order].(Italics added).

Our fears over Judicial Tribunal are once again borne out by Justice Kait's Order. For one "evidence" in an adjudication is a flexible category and rigour required for considering anything as 'evidence' in a criminal court are made elastic. We invite readers to refer to p 26-28 of our report [*Banned and Damned: SIMIs Saga With UAPA Tribunals*"; PUDR June 2015]. The 'evidence' comprised testimonies of Police Witnesses who are not the Investigating Officer but senior Police officers not conversant with "details (see point 12 below), confidential intelligence reports from the states, information on Front Organizations, ban notifications and ratifications from 2001 onwards, and an illegal category "banned" literature. Much of this evidence is also based on "confessions" in Police custody, which criminal justice rejects but is upheld under Civil Law. Such infirm 'evidence' is yet again invoked to uphold the ban which strikes at a fundamental right to form association/union.

Oaths of Allegiance

There is a new issue which arises from this Order. In particular, Tribunal's order for the advances a claim that SIMI's ideology itself is "anti-secular" and cannot be allowed to "subsist". In this he agreed with the GoI which insisted that ideology of SIMI is anti-Constitution. The Judge drew his inference from the 'Oath of Allegiance' (Para 255 of his Order) pledged by SIMI members:

"...The aim of my life is reconstruction of human society according to the principles given by Allah and His messenger, thereby achieving pleasure of Allah. I am joining SIMI in order to be able to work for this aim, purely for Allah's pleasure. I fully agree with the methodology and programme of SIM and will abide by its discipline according to its constitution. I will invite students and youth towards Islam and will try to organize them. I promise that I would work for liberation of humanity and establishment of Islamic system in my country. I will spend my time, resources and capacities in this cause and won't spare my life if need be. My prayer and my sacrifices and my life and death are all for Allah, the lord of universes. No one is His partner. I have been instructed to do so and I am among those who surrender. May Allah help me to keep these promises. (Amen)".

"Any constitution", says the Judge**,** "which prescribes such an Oath of Allegiance to its members must be seen as in direct conflict with the democratic sovereign setup of India and should not be allowed to be perpetuated in our secular society". (Empasis added) In so doing, the Judge, without a proper trial, declared SIMI"s memorandum of association as malafide. This amounts to an outrageous infringement of Freedom of speech and expression. There is nothing sinister in the 'Oath of allegiance' in itself. Every association/trade union asks its members to take a pledge. Contrary to Justice Kait's belief, it is perfectly alright to work for any cause so long as it does not incite violence. Communists can take a pledge to work to change/transform the State and Society. Right wing groups can work for the benefit of corporate sector and work for their parochial objectives. Identity based politics can chase their own concerns and dreams. RSS or other religious denomination can work to establish their own version of faith based and driven politics. Dal Khalsa propagates creation of a Sikh Nation and is no longer banned. In fact a citizen/s can form an Association to even criticize and demand change in the Constitution, including a call for a new Constitution. None of this has ever been considered as contradicting the Constitution. So, finding SIMI's oath of allegiance to be pernicious, when everyone else is entitled to advocate, preach, propagate, pursue, mobilize and struggle legitimately for their beliefs and convictions, brings out how subjective biases are allowed free play to trample on Constitutional rights. The fact that the Supreme Court has barred 'guilt by association' drives home this point even more sharply. The Tribunal makes a mockery of judicial process by illegitimately and arbitrarily abridging freedoms, unmindful of what the law, and the Constitution and judicial pronouncements have upheld.

One organization, which is worth comparing SIMI with, as far as Oaths of Allegiance are concerned, is the RSS as it is similar to SIMI in its appeal for a religious group. Since the Tribunal has taken to arrogate for itself the powers to decide what falls foul of the Constitution and restrict freedoms which flow from Part III of the Constitution, the Tribunal confirms our worst fears about arbitrariness in this entire process. To explain this consider RSS 'oath of allegiance', (*pratijna*) given to active workers:

"In the name of Almighty God and our ancestors, I hereby vow that I have become a unit of the Rashtriya Swayamsevak Sangh in order to protect our sacred Hindu Dharma, Hindu culture and Hindu society and to achieve the all-round development of the **Hindu nation**. I will do the Sangh's work sincerely with a selfless mind and with all my body, heart and wealth. I will observe this vow all my life. (Emphasis added) Bharat Mata ki jai."

By any reckoning, and going by the argument of Justice Kait, RSS clearly contradicts the Law as imagined by the Tribunal, since RSS members take a pledge to work for "**Hindu Nation**". The very

notion of "Hindu Nation", again as per Justice Kait, would make RSS anti-Secular and therefore should also not be allowed to "subsist" because this too is "in direct conflict with the democratic sovereign setup of India and should not be allowed to be perpetuated in our secular society". So should not the RSS be banned using the very same logic? True, the ban was not imposed on RSS and their activities were not under scrutiny, and that is precisely the point. PUDR argues that no organization can be banned for espousing or advancing their beliefs and convictions. However, what the reality shows is that whereas there is one rule which applies to SIMI, there is another for RSS.

"Preventive Bans"

The Tribunal argues that objective behind the law is to "prevent unlawful activities by imposing reasonable restrictions" on freedoms. {Para 182] It claims that the "process of restricting of certain freedoms will entail a restrictive interpretation of Indian Evidence Act" [Para 190]. However, the Tribunal conveniently forgets that in the 1994, *Jamaat-E-Islami Hind vs. Union of India* judgment as well as in the 1952, *State of Madras vs. V.G. Row* judgment, the apex court went into a detailed discussion about what constitutes "judicial review" and why it was important to balance public interest with natural justice. By characterizing the ban on SIMI as "preventive", the Kait Tribunal actually falls foul of settled law which rejected the notion that mere suspicion or the Government's word would suffice to prevent a person or an association from exercising their freedoms. Indeed the apex court has cautioned again and again that since bans pertain to the issue of political freedoms (Part III of the Constitution), a "judicial" inquiry requires a trained judge to balance the issue of natural justice with that of public interest. What we instead see is how Tribunals act arbitrarily, going by their own predilections and show a fawning attitude towards the Government.

Locus-Standi of Respondents

Our report had brought out that Justice Sanjeev Khanna in his Tribunal judgment, in 2010, had expressed concern at the fact that the UAPA makes respondents open to criminal prosecution, because, under law, a banned organization never ceases to exist and continues in its clandestine form. Consequently, anyone challenging the Gazette Notification ban, ipso-facto becomes an 'offender'. Justice Khanna had expressed the hope that authorities would not proceed against the respondents. Justice Shali in 2012 insisted that respondents were very much members of a banned unlawful organization which continues to exist and held the respondents as "surrogate" members who were liable to be prosecuted (See p 24-26, *Banned and Damned*). Justice Kait, in 2014 takes an altogether different line wherein he asserted that, in order "to afford a fair opportunity to the aggrieved persons to contest the ban", the Statute "must be interpreted to include the office bearers of the Association which was banned for the first time and/or *any aggrieved person*."

While we welcome this expansive reading of the Act which opens up possibility for others "aggrieved" to join the Tribunal, however, our concern is that the three different interpretations

offered by the three Tribunals (2010, 2012 and 2014), makes it evident that there is no guarantee that the next Tribunal would not come up with yet another interpretation. It is this variance between Tribunals, in their interpretation of Section 4, especially clause (3) of S 4 of the UAPA, which shows how arbitrariness is intrinsic to Tribunals working and goal posts can shift depending on the predilection of the Judge presiding over the Tribunal.

Issuance of Notice to suspected SIMI members/activists

Nevertheless, we welcome the Kait Tribunal's recommendation that the issuing of Notice of Ban on individuals in a "causal manner" without verification or due diligence, based merely on the basis of suspicion, must cease. It was brought to Tribunal's notice that in Rajasthan police pasted notices arbitrarily, which, augmented the sense of insecurity among Muslims, who feared that this, pasting of notices at their home or office, was a prelude to a crackdown on them. [Para 259] When it was brought to Tribunal's notice in Madhya Pradesh that cases had been registered based on "mere suspicion" it called for "expeditious" investigation into this phenomena and to protect innocent people from coming to harm.

Evidence by Investigating Officer

Finally, we welcome the criticism by the Tribunal of the Senior Level Police Officers giving testimony before the Tribunal when they "normally (are) not intricately involved in the process of investigation..." and are "unable to answer relevant details". [para 266]. The point is that only the Investigating Officer is familiar with "details" of a case. However, the import of this recommendation is that it raises questions about the credibility of many witnesses who proffered testimony before 2014 Tribunal, when they knew that they were ignorant of "relevant details"!

To conclude, while we welcome the three recommendations, our conviction that Tribunals will work to support the authorities, is once again bolstered. While we thank the Tribunal for small mercies the larger question continues to remain unaddressed. Namely, that a Tribunal using Civil Procedure Code is unsuited to adjudicate on matters which pertain to our Constitutional Freedoms. It reveals the UAPA to be a Statute which is a vicious piece of Law which can take away Freedoms at Government's 'sweet will', and there is, in reality, no redress available to those aggrieved by a ban notification. PUDR is convinced, that UAPA must be repealed because it is an unreasonable intrusion into our Freedoms, one in which police powers can arbitrarily and based often on mere suspicion, impose curbs on India's Constitutional Democracy.