

**Judging Minorities in Anti-Terror Cases  
The Behaviour of India's Supreme Court**

Shylashri Shankar

Fellow, Center for Policy Research, New Delhi

Email: [shylashris@gmail.com](mailto:shylashris@gmail.com)

*Abstract: How have India's Supreme Court judges behaved towards minorities detained under anti-terror laws? Do judges make distinctions between the religious and political affiliations of the accused in anti-terror cases? If so, why, and under what conditions? The paper investigates these questions through a probability analysis of anti-terror cases.*

## **1. Introduction**

*"It is very difficult to assess the Supreme Court's role in the area of civil liberties...The Court has, however, permitted the extensive curtailment of the individual's rights...Over the years, no consistent and overall policy is discernable. It seems as if the Court acts on an ad hoc basis with a different emphasis on policy in different cases. It is doubtful if a consistent and evolutionary trend of decisions on civil liberties is in the offing." (Rajeev Dhavan, *Judges on Trial*, 1980)*

Does the Indian legal scholar Dhavan's statement hold true today? How have India's Supreme Court judges behaved towards minorities on anti-terror cases? Do judges make distinctions between the religious and political affiliations of the accused in anti-terror cases? If so, why, and under what conditions? The paper investigates these questions through a probability analysis of anti-terror cases.

Why is it important to assess judicial behaviour on anti-terror laws in democracies facing wars on terror and secessionism? The 9/11 attacks triggered stringent anti-terror laws in old and new democracies like the US, UK, Spain, India, and Turkey, among others.<sup>1</sup> Anti-terror laws typically target minority groups: the Patriot Act arguably targets Islamic militancy, while India's Terrorist and Disruptive Activities (Prevention) Act was enacted to deal with Sikh secessionism. "[The] Country was lulled into the belief that the police must be armed in that strategic part

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<sup>1</sup> Human rights groups have classified the US anti-terror laws as the most draconian followed by UK, Canada, Germany and France.

of India to suppress Pakistan-prodded terrorists...Instead law was made applicable to whole of India and upheld in Kartar Singh,” said former Justice Krishna Iyer. Civil rights activists allege that Sikhs and Muslims are unfairly targeted by India’s anti-terror laws, echoing the criticism of the US Patriot Act. In the western state of Gujarat (a site of violent religious riots in the last two decades), Muslims were 9% of the population but accounted for a quarter of all jail inmates in the state.<sup>2</sup>

Democratic states pride themselves on an impartial rule of law that does not discriminate against minorities. In the fight against terrorism, states face the dilemma of balancing security with liberty. As Waldron (2003) points out, any balance includes the possibility that the liberties of few could be held hostage to the security of the majority, that the invasive power of the state could increase, that the consequent security could be more symbolic rather than real. Terrorism induces higher levels of insecurity and greater willingness on the part of citizens to allow legislatures to enact laws even allowing secret trials, detention without trial, surveillance and even torture. Public fear of terrorist attacks may make majority opinion tilt towards security concerns at the expense of civil liberties, but the judiciary is supposed to be the last bastion when all other institutions succumb to prejudice. Is it? Have the judges balanced the demands of security with obligations of democracy?

An assessment of the Indian Supreme Court on anti-terror cases is instructive because it sheds light on the challenges faced by judges in poor and multi-religious democracies. Indian judges have to walk a difficult path between upholding a constitutional mandate of parliamentary (and majoritarian) primacy in emergency laws, and ensuring fair treatment to religious minorities. India is the world’s most

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<sup>2</sup> Seema Chishti (2006) “Too many Muslims in prison, Sachar edits this out,” The Indian Express, November 25, 2006. Also see Singh (2006) for figures of detainees under POTA.

populous parliamentary democracy with “the most powerful court in the world” following a common law system, with a large Muslim minority with a complicated history of strife with the Hindu majority, and experienced secessionist movements in Kashmir, the North East and Punjab. Polarization of Hindus and Muslims increased in recent decades with a resurgence of Hindu nationalism and a Hindu nationalist BJP led coalition government from 1998-2004. India is also one of the few countries that allows preventive detention laws to operate in peacetime – a legacy of the fact that the constitution was created during a violent partition of the country into India and Pakistan.

Traditional explanations that focus on the law, ideology of judges, preferences of political regimes, or institutional goals only partially explain the pro-minority behaviour of Indian Supreme Court evident in the econometric model. My approach sees judges as negotiators, embedded in institutional, political and societal contexts. Within the scope of the laws, judgments reflect a judge’s negotiation with the political (single party or coalition) and societal (public approval or displeasure with judges; crisis or non-crisis) environments. The judiciary as an institution mediates these influences. The empirical econometric model demonstrates that a post-Emergency judiciary (as compared to pre-Emergency judges) is more likely to support vulnerable minorities particularly during coalition regimes. The mechanism driving an embedded negotiator approach is the presence or absence of a judicial institutional crisis of legitimacy. This, in conjunction with increased operational judicial independence produces more protection for vulnerable minorities.

The second section assesses conventional explanations of judicial behaviour; the third section outlines the embedded negotiator approach; the fourth section provides a profile of the Indian Supreme Court; the

fifth section discusses the empirical evidence for our approach and the final section highlights the implications for theories about law, terrorism and democracy.

## **2. Conventional Explanations (and why they don't work in India)**

What influences judicial behaviour in anti-terror cases? Let us step back and examine what sorts of influences operate on a judgment. Legal reasoning, as Levi (1949) points out, is reasoning by example. Courts have greater freedom to interpret constitutional fundamental rights in countries like India and the USA with written constitutions and common law systems. By setting up conflicting ideals, the constitution gives judges the space to frame the boundaries of a law. The question then is what influences judicial decisions within this space? Is it the law (Dworkin 2001) or politics (Dahl 1957) or ideology (Segal and Spaeth 1996) or strategic choices (Ordeshook 1992) or interest groups (Epp 1996; Kobylka 1995) or public opinion (Barnum 1985; Caldeira 1991; Cook 1973; Kulinski & Stanga 1979; Marshall 1989)? Three models, constructed from a study of Anglo-American courts, dominate the field of judicial decisionmaking: the legal, the attitudinal (including strategic rational choice), and the institutional models.

### *a) Merits of the case + judges as impartial interpreters (Legal Model)*

The legal model holds that judges make decisions based on the facts of the case including the language of the law, intentions of the framers of those laws, precedents established in previously decided cases and a balancing of societal interests. Ronald Dworkin distinguishes between justice (a quality of the outcomes of a decision process), fairness (a quality of the structure of that decision procedure), and procedural due process (right procedures for judging whether some citizen has violated

laws laid down by political procedures).<sup>3</sup> Judges, according to Dworkin, must often compromise commitments to fairness and justice by finding a fit with settled law. This model assigns law (and judges) with the task of acting as a neutral guardian of the boundary between state and civil society.<sup>4</sup> So in anti-terror cases, if the laws mandate stringent and abridged due process, the courts will approve these measures. For instance, the Indian Supreme Court upheld the admissibility of confessions to a police officer under TADA.<sup>5</sup>

The legal approach is right in emphasizing the importance of law, but apart from precedent, it is hard to test the empirical validity of the approach. Several (Segal and Spaeth, 1993; Dotan, 2003) question the assumption of constitutional passivity and ideological neutrality of courts. Even precedents are problematic because one can find multiple precedents, and there is no guarantee that all judges will use the same precedent or view a precedent in the same way. For instance, as a famous constitutional scholar (Seervai 1983) pointed out, India's Supreme Court judges were confused about the precedent set by a 1950 judgment on preventive detention.<sup>6</sup> Our analysis shows that judges did not distinguish between cases dealing with village feuds and those pertaining to the security of the state (see the model).

*b) Ideological preference of a judge (Attitudinal Model)*

Attitudinalists emphasize the importance of non-legal influences on a judge's decision. "What explains why judges, at least those on the U.S. Supreme Court, decide cases the way they do? To answer this question we need to focus on judges' decisions rather than on the reasons they give in their opinions for deciding the way they have. For the

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<sup>3</sup> Dworkin (1986), p.165

<sup>4</sup> See Spaeth (1995); and Segal & Spaeth (2002) for a critique of the legal model.

<sup>5</sup> Kartar Singh v State of Punjab

<sup>6</sup> A.K. Gopalan v State of Madras, AIR 1950 SC 27

explanations that persons – including judges – give for what they have do not necessarily correspond to their actions,” argued political scientist Harold J. Spaeth in *The Attitudinal Model*. Spaeth’s answer was that the judges’ decisions were based on the facts of a case in light of the ideological attitudes and values of the participating justices i.e. a judge’s personal preferences mattered. Segal and Cover(1989) argue that the US supreme court’s structure grants the justices great freedom to base their decisions solely upon personal policy preferences. But the model does not tell us the conditions under which a judge would protect minority rights.

*Variation: Ideology of judge + preference of ruling regime (Strategic)*

Among attitudinalists, there are several disagreements on whether political regimes drive judicial choices or whether judges’ preferences within an autonomous framework influence judgments. Predating modern attitudinalists, political scientist Robert Dahl argued that American judges would be regime supporters because the appointment process (the President appoints and the Congress approves) ensured that the Court’s decisions would never be too wildly discordant from the preferences of the political majority. More recently, in a variation on Dahl’s thesis, rational choice theorists argue that judges would take the preferences of the *ruling* regime into account.<sup>7</sup> These variations emphasized the separation of powers model in the USA, seeing courts either at the institutional mercy of the executive and legislature or playing a balancing game in retaining at least part of their preferences.

The attitudinal model has its strengths – it regards judges as fallible beings with ideological preferences, capable of making strategic choices. But the biggest drawback is the exportability. The pioneers of the

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<sup>7</sup> Epstein 1995; Eskridge 1991

attitudinal model themselves point out that it would be hard to test it in situations like India where judges are in a court for a short period of time. Indian Supreme Court judges, who retire at the age of 65, serve in that court for an average term of 4-6 years.<sup>8</sup> To test the attitudinal model, we would first have to map the preferences of judges – a Herculean task since on average, each judge hears at least 700 cases during his term in the Supreme Court. Secondly, unlike in the USA where nine Supreme Court judges sit en banc and hear every case making dissents a common feature, in India cases are usually (unanimously) decided by two or three judge panels. Very few cases (generally constitutional cases) are heard by 9 or 11 judge benches. Thirdly, judicial norms discourage dissenting opinions, which makes it hard to understand the ideological biases of individual judges.<sup>9</sup> Finally, the American versions of liberal and conservative do not apply in India. As constitutional scholar Upendra Baxi noted:

“The ideological universe of Indian Supreme Court Justices is not easy to discover and delineate, so extraordinarily varied are their tenures and the nature of cases and controversies coming before them for adjudication. The lack of a dissenting tradition aggravates the task. And it is difficult to get at the deep structure of decisions, especially in constitutional adjudication, without a mature grasp of regressive and progressive tendencies in politics of the time. Western labels and rubrics (like conservatism, liberalism, activism and restraint) further becloud understanding.”<sup>10</sup>

*c) Law + institutional norms (Institutional model)*

The attitudinal model ignores the importance of institutional norms and institutional memory in influencing a justice’s actions. As

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<sup>8</sup> The Supreme court began with six judges, increased to ten in 1956, thirteen in 1960, seventeen in 1978, and presently numbers 25. This is unlike the American court, where all nine justices sit en banc to hear cases, and often disagree For an analysis of the politics of judicial appointments in India, see Rajeev Dhavan (1980) *Justice on Trial – The Supreme Court Today*

<sup>9</sup> See Dhavan (1980) for a discussion of the early years of the Supreme Court.

<sup>10</sup> Baxi (1985), p. 80



Whittington(2000) says, “[T]he faithful interpretation and application of the law or the duty to protect individuals and minorities may be important motivations of the justices that are inadequately captured in attitudinalist and rational choice explanations of judicial behavior.”<sup>11</sup> The institutional approach privileges the importance of institutional internal norms in explaining judicial choices. The judiciary acts as an important site of “preference formation and the constitution of a normative order. Justices are likely to think about and act on public problems differently as a consequence of their experiences and expectations on the Court. For historical institutionalists, institutions are both regulative and constitutive. They constrain choices by structuring incentives, but they also shape preferences by influencing ideas.”<sup>12</sup> This model assumes that judges have the time to reflect on and shape their judgments. The same problems bedeviling the attitudinal model apply here. Moreover, the institutional approach does not give sufficient importance to the political and social influences on a judge’s decisions, or to the tensions between political preferences, institutional norms and social influences.

Perhaps it is not useful to pursue research primarily directed at demonstrating which model of judicial behaviour is right. Rather, as Whittington (2000) rightly argues, the results are most compelling when they are explaining particular empirical arguments rather than when they are used to make broad claims about the superiority of a universal model of judicial behavior.

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<sup>11</sup> Whittington (2000)

<sup>12</sup> *ibid*

### **3. Judges as embedded negotiators**

*Post-Emergency + interaction with law, political and societal elements*

The view of judges as embedded negotiators captures the complex process of judicial decision-making. The perspective emphasizes a judge's negotiation with three external elements mediated through institutional norms: the presence and content of laws, political configurations, and public concerns. For instance, the constitutional exclusion of the judiciary from overseeing the necessity for preventive detention laws made Indian judges less likely to uphold challenges to the constitutional validity of anti-terror laws.<sup>13</sup> This approach allows us to avoid the trap of an 'either law or preferences or politics' paradigm and address the diverse influences on judicial decision-making. As a former Chief Justice said, "judges do not cease to be citizens and as such they take part in all educational, cultural, and social activities which are intended to make the national life of the country richer, broader, more tolerant, and progressive."<sup>14</sup> Judges read newspapers (environmental litigation initially started as suo moto), have similar concerns as other citizens (clean air, miscarriage of justice) and respond to security threats (terrorism).

The mechanism underlying the embedded negotiator model is presence or absence of an institutional crisis of legitimacy. On 25 June 1975, the Prime Minister Indira Gandhi suspended Article 21 and imprisoned hundreds of people (mainly political opponents and civil society groups) under an Executive Order proclaiming a State of Emergency. Article 21, a fundamental right, states that no person shall be deprived of their personal liberty except according to the procedure established by law. When these detentions were challenged, nine High Courts rejected the

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<sup>13</sup> The Supreme Court dismissed challenges to the constitutionality of TADA and POTA even when these laws were applied to the whole country. *Kartar Singh v Union of India*, 1994 3 SCC 569; *PUCL v Union of India*

<sup>14</sup> Gajendragadkar (1965), p. 13

constitutionality of the order. The Supreme Court, except for the lone dissenting voice of Justice Khanna, overruled the lower courts and allowed the Emergency. The majority's rationale portrayed by Chief Justice Ray was that the judiciary was 'ill equipped to determine whether a given configuration of events threatens the life of the community and thus constitutes an emergency.'<sup>15</sup> The implication was that the judiciary should abandon all scrutiny of governmental control of individual activities once an emergency was proclaimed, even if there was egregious misuse of such power by the executive. The court's decision was reviled by many as the nadir of justice and weakened the court's legitimacy.

The post-emergency institutional move to reclaim legitimacy within the boundaries of law, political and societal influences, triggered the protection of vulnerable groups. This attitude is evident in the Indian Supreme Court's post-emergency transformation of unjusticiable social rights like rights to health, education, environment etc into legally enforceable rights.

How does the embedded negotiator approach play out in an anti-terror case? In writing the judgment, judges have to walk the path between deference to the political system and judicial autonomy, between outlining workable solutions and capturing the spirit of constitutional rights. They have to create a balance between overstating the problem and losing authority because of non-compliance by the executive and bureaucracy, and understating the solutions and losing the respect of the public. This is more than a *modus vivendi* argued by Mehta (2005) who says that most judgments "are a delicate and political balancing of competing values and political aspirations; they seek to provide a

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<sup>15</sup> ADM Jabalpur v Shiv Kant Shukla (1976) 2 SCC 52

workable *modus vivendi* rather than articulate high values.”<sup>16</sup> We expect that judges will be more careful when minorities are in the dock. As embedded negotiators, judges are aware of the limits but also use the opportunities created by the tension between these elements. For instance, sections of the ruling coalition may favour more anti-Muslim verdicts but judges may use the coalition nature of the regime to give more pro-Muslim verdicts.

#### **4. Profile of India’s Supreme Court and Anti-Terror Laws**

A Supreme Court judge in India still comes from a middle class, Hindu, professional family, armed with an LLB and some experience as a lawyer for a state government before entering the High Court. However, top legal minds prefer to be lawyers rather than judges.<sup>17</sup> Judges were predominantly male (97%) and Hindu (87%). Over 80% belonged to the forward castes, and only 6% came from the backward castes. 13% of the judges were from other religious groups. The northern region accounted for 33% of judges, followed by the south (27%), east (23%) and west (15%). Only 27% of judges had masters level education - 13 judges had LLMs, and 19 judges had MAs. The rest of the judges had completed their bachelors degree followed by an LLB. Only 13% of the judges had a foreign degree (mainly from England); the rest were trained in India. Very few judges entered politics after retiring. Some chief justices headed the National Human Rights Commission for a fixed term after retiring from the court.

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<sup>16</sup> Mehta (2005), p. 170

<sup>17</sup> To qualify for appointment as a Supreme Court judge, a person must be an Indian citizen, and must be either a distinguished jurist, a high court judge for at least five years, or an advocate of a high court for at least ten years (Article 124(3)). According to the Constitution, to qualify for appointment as a High Court judge, a person must be a citizen of India and have held a judicial office in the territory of India or been an advocate of a High Court or of two or more such courts in succession (Article 217 (2)). As far as the higher judiciary is concerned, these professional criteria are followed. But the fact remains that for quite sometime the best talent in the legal profession is not available for judicial appointment (Dhavan, 1980).

There are two streams of entry into the judiciary: judicial services and lateral entry into the High Court. In the initial decades, judges entered the service through judicial services, but now the bulk of higher court judges enter the High Court directly, after practicing as lawyers. A survey of the career path of 116 Supreme Court justices reveals that over 50% had worked for the state government at some point prior to their induction in the high court. About 46% had worked for a state or central government just prior to their induction into the High Court. On average, judges spent 12 years in the high court, serving in at least two before ascending to the Supreme Court. Over 62% of the judges had served as Chief Justices of a high court. About 43% of judges were inducted into the Supreme Court after 1993 (when the Supreme Court seized the power to appoint itself). Only one in three judges became the Chief Justice of the Supreme Court.

### *Judicial Independence and Appointments*

Cameron (2001) distinguishes between structural and operational independence. Structurally, the Indian Supreme Court is independent of the executive and legislature in entry and exit (only by a difficult impeachment process) procedures.<sup>18</sup> Operationally, however, before 1994, political influence occurred in the appointments to the lower and apex courts “but remained concealed in a secret process.”<sup>19</sup> Even after the court seized the power to appoint itself through two judgments in 1993 and 1998, the political wings continued to retain influence, particularly through the promise of post-retirement appointments. For

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<sup>18</sup> See Iyer (1987), Dhavan (1980), Baxi (1982), Hazra and Debroy (2007) for a critique of the appointments process. Selection would be made on the basis of fitness rather than seniority. Unlike the lengthy confirmation process of a judge in America, the Indian Supreme Court and high court judges do not undergo such scrutiny. Once they are picked by the collegium, their names are sent to the Council of Ministers either at the state (for HC judges) or at the Center (for SC judges) for approval, and then to the President. Several committees, most recently the Administrative Reforms Committee recommended more transparent methods of selection, and a Judicial Council to ensure accountability.

<sup>19</sup> Dhavan (1980), p. 59

instance, Justice Krishna Iyer (1995) points out that the institution favoured the state in TADA cases because a district judge on the verge of retirement could be appointed by the government (with the CJ's consent) as a member of the Designated Court, thus allowing him to continue working even after retirement. "One who is obliged to the state by extension beyond superannuation is less than impartial in a 'terrorist' trial."<sup>20</sup>

It is debatable, however, whether executive interference in appointments before 1993 actually occurred, and reduced the quality of judges. Our analysis shows that seniority was usually the main criteria for elevating judges from the High Court to the Supreme Court.<sup>21</sup> After 1993, the concentration of the appointment power in the hands of the Chief Justice did not necessarily increase the quality. The whole selection process, particularly at the High Court level, is murky.<sup>22</sup>

Even if the appointments process before 1994 gave leverage to the ruling party, has the judiciary been political? Have judges aligned their decisions with the preferences of the ruling party? Again, numerous studies show that the judiciary and the executive clashed a number of times, particularly in the late 1960s and early 1970s.<sup>23</sup> The question of who has the final word on interpreting the Constitution – the legislature or the judiciary – is by no means settled (Mehta, 2005).

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<sup>20</sup> Iyer (1995), p. 64

<sup>21</sup> Mehta (2005) points out that a government affidavit in 1993 during the Second Judges case said of 575 appointments, the government had rejected the Chief Justice's opinion in only a handful of cases. Also see Gupta (1997) *Decision-making in the Supreme Court*, New Delhi, Kaveri Books. Gupta shows that of the sixty nine appointments studied more than half of those elevated were chief justices.

<sup>22</sup> The Right to Information Act now allows citizens to ask for information on the process by which judges were selected for the High Court and the Supreme Court.

<sup>23</sup> After losing two important constitutional cases in 1970 and 1971, Prime Minister Indira Gandhi dissolved the Parliament. She returned to power with a large enough majority to enable her pass several amendments. Indira Gandhi passed the 24<sup>th</sup> and 25<sup>th</sup> amendments which sought to reduce the level of judicial review of legislation, particularly those pertaining to some Directive Principles (Article 39b and c). These amendments were challenged in *Keshavananda Bharati v State of Kerala AIR 1973 SC 1461*, where the majority held that the Parliament could not alter the basic structure or framework of the Constitution. See Seervai (1983)

#### **4. The Probit Model**

Dhavan's observations with which this paper began is not valid today. We can test the influences of the political, social and personal influences on the probability of a judge deciding for or against the state and spell out the trends of judicial behaviour. We use the probit technique to measure discrete political variables where an event either occurs or it does not. For instance, in anti-terror cases where the government is a litigant, the outcome is either pro-state or anti-state. The model gives us the level of significance i.e.  $p$  less than .10 or .05. which means that there are only 10 or five chances in a hundred that the relation between a Hindu judge and anti-state judgments would occur by chance; there is at least a 90% or 95% probability that the relationship is not simply due to chance.<sup>24</sup> The model, which holds other variables constant, allows us to test the relative importance of the three elements – legal, political and public concerns - in determining the behaviour of judges. We constructed a new variable, 'verdict', which combined two variables:

- a) The judgment was upheld when the plaintiff was the state
- b) The judgment was dismissed when the defendant was the state.

To test our hypotheses we collected information about Supreme Court cases registered under anti-terror laws; a profile of these cases; a profile of all the judges involved in these cases; data on the political parties in power when the judges were appointed, and when the judgments were delivered; and presence or absence of a national crisis in this time period.<sup>25</sup> In order to assess changes in behaviour induced by the Emergency, we also collected data on preventive detention cases before the emergency. Our database comprises all Supreme Court judgments on preventive detention, TADA and POTA from 1950 - June 2006.

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<sup>24</sup> Epstein (1995)

<sup>25</sup> The Manupatra database from which I drew the cases, has 80%-90% of the judgments reported in the official Supreme Court Recorder.

## **5. Results**

If the embedded negotiator approach is valid, we expect to find the following patterns in anti-terror cases:

### ***a) Law matters***

Overall, judges are more likely to give pro-state judgments because of the constitutional emphasis on security over the rights of detainees. Supreme Court judges favoured the state in 54% of the cases and invariably upheld the right of parliament to make draconian laws.<sup>26</sup> Lower court judges were even more likely to support the state – a fact reflected in our dataset where the state was the defendant in 93% of the cases.<sup>27</sup> Judges interpreted the laws in line with what they saw as the intent of the constituent assembly - fundamental rights were hedged in by restrictions imposed on grounds of national emergency to be determined by the parliament, and legal rights were suspended in cases dealing with state security.

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<sup>26</sup> Of the 193 cases, judges favoured the state in 105 cases and the accused in 88 cases.

<sup>27</sup> While special courts or the High court functioned as trial courts for anti-terror cases, appeals and constitutional challenges to the anti-terror laws were heard by the Supreme Court.



### Probit: Judges and Pro-State verdicts

Verdict1 (pro-state)	z	p>z
Hindu Judge	0.83	0.40
Post 2001 verdicts	2.49	.01
Village feud cases	3.20	.00
Security of State cases	3.60	.00
Muslim litigant	0.20	.23
TADA cases (post-Emergency)	-3.33	.00
BJP govt in power during judgment	3.39	.00
Another probit: Congress govt in power	-2.55	.01
No political affiliation	-2.70	.23
Khalistani separatist	-2.48	.01
1987 (TADA renewed)	0.59	.55
Khalistanis post-1987	2.19	.02
Hindu judges and Muslim litigants	-2.21	.02
Coalition governments during judgment	-2.98	.00

Let us see if the merits of the case demanded the use of an anti-terror law. Civil rights activists argue that the police often use anti-terror laws to imprison criminals and others i.e. in non-terror cases.<sup>28</sup> In *Dr. Lohia v Bihar*, the Court explained the difference between the three concepts of law and order, public order and the security of the State and fictionally drew three concentric circles, the largest representing law and order, the next representing public order and the smallest representing security of the State.<sup>29</sup> Every infraction of law must necessarily affect order, but an act affecting law and order may not necessarily also affect the public order. Likewise, an act may affect the public order, but not necessarily the security of the State. The anti-terror laws were applicable only to those actions that affected the security of the state.

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<sup>28</sup> See SAHRC reports.

<sup>29</sup>Dr.Lohia v. Bihar the Court agreed with Lohia that the Magistrate wrongly used "public order" and "law and order" synonymously. A threat to law and order, mentioned in detention order, was not the same as public order. Hence the order was invalid.

We subdivided the cases into five categories based on the description in the judgment.<sup>30</sup> These were village feuds, criminal cases, security of the state, arms and possession of country made guns without a license, grain hoarding and explosives. Normally, TADA would apply only in cases involving security of the state, which comprised only 42% of the cases.

**Table: Type of Cases**

Type of Case	Number	POTA	TADA	PD
Village feud	23	0	22 (13 pro-state)	1 (pro-S)
Criminal	42	1 (anti-S)	29 (12 pro-S)	12 (5 pro-S)
Security of State	82	5 (4 pro-S)	42 (24 pro-S)	35 (26 pro-S)
Grain Hoarding	6	0	0	6 (2 pro-S)
Arms possession (country made gun without license)	17	0	13 (5 pro-S)	4 (3 pro-S)
Explosives (unrelated to security threats)	6	0	5 (2 pro-S)	1 (pro-S)
Other	18	2 (pro-S)	10 (anti-S)	6 (4 pro-S)
Total	194	8	121	65

Cases involving security threats and explosives were more likely to be decided in favour of the state as compared to criminal cases and others, supporting the view that judges display an institutional tendency to support the state in the face of security threats. However, judges went an extra mile and gave the benefit of doubt to the state by upholding the conviction of people involved in village feuds even though TADA was not applicable in such cases. This finding has a significant implication for the way the state frames the cases. If the state prosecution framed the case as a ‘security’ threat, the state was more likely to be the winner. It

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<sup>30</sup> I used the description of the case given by the judge. If the judgment said that the case involved a village feud that did not threaten the security of the state, it was coded as “village feud”. For instance, a eyewitnesses confirmed that the accused shot a man with an AK-47 gun to take his tractor. Or a man in a village shot his neighbour with a gun for which he did not have a license. In several cases, the court pointed out that the issue was criminal (gang warfare); the police used anti-terror laws to detain criminals; these cases were coded as “criminal”. Other cases that involved security threats to the state through the use of explosives, and arms and ammunition were coded as “security”. Technically, anti-terror laws were supposed to be used for cases in the ‘security’ category.

would be instructive to assess whether the shift towards pro-state verdicts after 2001 were because the cases were framed as security threats. Over half the security cases came after 2001, of which 33 cases went in favour of the state. This implies a worrying trend for civil liberties if the shift occurred because the cases were framed as security threats. The over-use of these laws against non-security related cases debunks the emphasis by many on the need for strong anti-terror laws.

But the laws also offered opportunities, which judges found. A significant percentage (45%) of all judgments were anti state. Judges seized opportunities within the legal framework to craft judgments that carried legitimacy with litigants from religious and political minorities.

### ***Evidence for Mechanism Driving the Embedded Negotiator Approach***

Our approach predicts that post-emergency judges will support vulnerable groups regardless of judicial independence. “Judges realize that the main strength of judicial administration in a democratic country is the confidence which the public in general and the litigating public in particular places in the fairness, impartiality, and objectivity of their decisions,” said Chief Justice Gajendragadkar, emphasizing the importance of public perception of the court.<sup>31</sup> Not many citizens were willing to buy Chief Justice Ray’s argument in a controversial habeas corpus case in 1976 that the judiciary should abandon all scrutiny of governmental control of individual activities once an emergency was proclaimed, particularly after the egregious misuse of such power by the executive during the Emergency. The case challenged emergency laws instituted by Prime Minister Indira Gandhi on 25 June 1975. One of the justices, Justice Chandrachud, who had agreed with the majority view

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<sup>31</sup> Gajendragadkar (1965), p. 13

even apologised to the public (much later) saying that he wished he had the courage to resign during the trial.

The empirical data provides strong evidence for the mechanism underlying the embedded negotiator model, namely the post-emergency institutional move to reclaim legitimacy. After the Emergency, we expect increased scrutiny of cases involving minorities, regardless of the level of judicial independence produced by the political configuration.<sup>32</sup> The only way they could recover public legitimacy within the limits of the laws and the political environment was to negotiate a public image as a protector of vulnerable groups without enraging the government.

TADA and POTA targeted militancy in Punjab and Kashmir, making Sikhs and Muslims more vulnerable to these laws. Let us examine the data on the behaviour of judges towards Muslims and Sikhs as compared to Hindus. In the anti-terror cases (preventive detention, TADA and POTA), Muslims and Sikhs comprised 25% and 22% respectively of the litigants.<sup>33</sup> Our model allows us to examine the probability of judges favouring or targeting minorities irrespective of the size of the sample. We expect to find the following trends:

(i) Judgments by post-emergency judges will be more anti-state than those by pre-emergency judges. Judges were more likely to be suspicious of the state in TADA cases as compared to preventive detention and POTA cases, indicating a shift by post-emergency judges towards protecting vulnerable groups.<sup>34</sup>

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<sup>32</sup> One could argue that the Congress regime was indifferent to anti-terror verdicts when minorities were involved because Muslims formed part of the Congress vote bank in the 1980s.

<sup>33</sup> Of the 120 TADA cases, only 57 favoured the state; of 65 PD cases, 42 favoured the state; and of 8 POTA cases, 6 favoured the state. Our dataset had 51 Muslim plaintiff/defendants, 43 Sikhs, 97 Hindus, and 3 others.

<sup>34</sup> I ran a probit with the years of experience as judges, Muslim litigant, and preventive detention cases, and also included the interactions between these variables.

ii) In anti-terror cases, judges will not target religious minorities even when the political party in power has an ideological anti-minority preference. Hindu judges were more likely to give anti-state rulings when Muslims were in the dock. In another model (see Preventive Detention cases and Muslims prohibit), more experienced judges were more likely to give the benefit of doubt to Muslim litigants. Judges, particularly Hindu judges, shunned majoritarianism and made a distinction between religion, separatism and security of the state, and between Sikh and Kashmiri separatism. Neither Muslims nor Sikhs were targeted by the judges. Even in an anti-Muslim environment triggered by the World Trade Center bombings and the December 13<sup>th</sup> attack by militants on the Indian Parliament, judges did not target Muslim litigants.

This result can be interpreted in two ways: firstly, that the cases against Muslims were poorly framed and hence did not pass muster. Recent data shows that Muslims have a disproportionately high representation in prisons – twice or thrice their share of the population in Maharashtra, Gujarat and Kerala.<sup>35</sup> In Maharashtra, their share was 10.6% , while their share of total prison inmates was 32.4%, and rose to 40.6% of those in prison for under a year. In Gujarat, the percentage of Muslims in the state was 9.06% but they made up over a quarter of all jail inmates. Civil rights activists contend that the disproportionate share of Muslims in prisons was because of prejudiced police, high poverty, and lack of opportunities including poor access to legal aid.

How do we test for this objection? Judges, when dismissing cases, highlight the flimsiness of the evidence and/or procedural irregularities. One of the reasons given in upholding or dismissing a case was whether circumstantial evidence was proven or not. Let us assume that the

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<sup>35</sup> Seema Chishti (2006) "Too many Muslims in prison, Sachar edits this out," The Indian Express, November 25, 2006

evidence was flimsy if circumstantial evidence was not proven. Of the 75 instances of poor circumstantial evidence and due process not followed, only a quarter had Muslim litigants, which also reflected their proportion in the entire sample. So cases with Muslims were not more likely to be dismissed for flimsy evidence.

A second interpretation is that judges saw cases against Muslims as being more politically charged and hence requiring more scrutiny. How do we corroborate these assertions? The institutional tendency to scrutinize cases where litigants were Muslims is indicated by the fact that 80% of the judges in our sample were Hindus. Muslim judges did not exhibit such leanings towards Muslim litigants, neither did Sikh, Parsi or Christian judges. Moreover, we could not find significantly different treatment of Sikhs, indicating that judges treated Sikhs the same way as they treated Hindus.

One explanation for the different judicial attitudes to Muslims and Sikhs rests with the text of the constitution. Hindu judges perceived Muslims as a different type of religious minority requiring more protection than Sikhs, because of the tendency in the laws to put Sikhs in the same category as Hindus for access to affirmative action and other benefits. Only a Hindu or Sikh could be classified as belonging to scheduled caste. Muslims and Christians belonged to a “foreign” religion, while Hindus, Sikhs, Jains and Buddhists were part of the local religion. The tendency to view Sikhs as a part of local and therefore safe religion even seeped into judicial attitude towards Sikh separatists prior to 1987.

Judges distinguished between religious and political minorities. A judge was more likely to be anti-state when the litigant had no political affiliation or when the litigant was a Khalistani (as compared to Kashmiri separatists). But where the Kashmiri separatist ambitions were evident,

judges were more likely to favour the state.<sup>36</sup> The previous section explains why judges tolerated Khalistani separatists. However, after the passage of TADA, judges became more pro-state when militants were in the dock. As the government stepped up its program of using force to check militancy in Punjab, judges backed the government. This confirms our hypothesis that the judiciary would be more supportive of the state in the face of separatist threats. Our result also indicates that laws enacted to combat terrorist threats from particular groups would make judges less disposed to those groups.<sup>37</sup>

By 2000, there was a general feeling that militancy in Punjab had been pacified. Judges reverted to their old attitude of giving the benefit of doubt and weaker sentences to Khalistanis.

“Nonetheless, we are inclined to show some leniency in the matter of sentence despite the largeness of the explosive substances involved. This is because the situation in Punjab has now admittedly improved very much and peace has come back to that region. Therefore, it is not necessary in this case to award a sentence beyond the minimum fixed by the statute. We, therefore, reduce the sentence of imprisonment to five years as for each of the appellants.”<sup>38</sup>

The harsh attitude towards Kashmiri militants could be because unlike Khalistani separatism which was treated more as a law and order issue and tackled primarily by the police, the Indian army was deployed against Kashmiri militants. Despite the deployment of the Indian army in Punjab on several occasions including Operation Bluestar and Black

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<sup>36</sup> I examined the judgment and if the judge linked the litigant to Kashmiri, Khalistani, extremism (Naxalite and other forms), then I coded the litigant as having a political affiliation. Otherwise, I coded it as “no affiliation”. This allows us to judge the judges on the basis of their statements without including one’s own opinions. We had information on political affiliation drawn from the judgments for 104 cases (about 50% of our cases). Of these, 23% had affiliation with Khalistan (Sikh homeland), 24% with Kashmiriyat(Kashmiri homeland).

<sup>37</sup> See Singh (2007, p. 53) who argues that TADA and POTA were used to arrest Muslims in J&K and Sikhs in Punjab for their association with the separatist movements.

<sup>38</sup> Jeet Singh and Anr v State of Punjab, (2000)9SCC588

Thunder, Khalistani separatism was seen as an indigenous movement. The historical indeterminacy of Kashmir's status and the tussle with Pakistan contributed to the perception of Kashmiriyat as a threat to the integrity of the Indian state.

(iii) *Judicial independence will create more space for judges and produce more anti-state judgments.* Our model weakly corroborates that post-1994 verdicts were more likely to be anti-state. Whether this was due solely to operational independence of the judiciary is debatable. What we can say is that judges were less likely to favour the state in TADA cases and judicial independence seems to weakly enhance this tendency.

**Probit: Judicial independence**

<b>Verdict1 (pro-state)</b>	<b>Z</b>	<b>P&gt;Z</b>
Post 1994 verdicts	-1.79	.07
Hindu judge	1.37	.1
Muslim litigant	0.62	.5
Security of state case	3.09	.00
Kashmiri separatist	1.64	.08
Hindu judge and Muslim litigant	-2.11	.03

### **b) Political configurations matter**

Chief Justice Chandrachud, who was appointed from 1978 to 1985, held the “belief that in matters of national integrity and security, and in the rarest situations when enforcement of rights threatens the survival of the Supreme Court as an institution, the Supreme Court should not intervene against the Supreme executive even if fundamental rights are thereby jeopardised.”<sup>39</sup> Judges prefer to pursue the path of least resistance against a proven adversary. Unfortunately for the court, Mrs. Gandhi, whose Emergency regime had violated civil liberties and had introduced court-curbing measures, returned to power in 1980 with a

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<sup>39</sup> Baxi \*1985), p.81



large majority in the legislature. Mrs Gandhi was considering similar moves to curb the court. Choosing civil liberties and anti-terror laws for judicial activism would not only have pitted the courts against the other organs, but also would have been unpopular with the public. In such a situation, the Chief Justice and other judges had to be very careful about relations with the executive, particularly in judging anti-terror cases where they had to decide between the citizen and the government. The rise of militancy in Punjab and the subsequent assassination of Indira Gandhi in 1984 by her Sikh bodyguard heightened public concerns about the nation's security.

If our embedded negotiator perspective is right, we should expect the pre and post-emergency court to avoid clashes with a strong executive, but post-emergency judges will favour vulnerable groups. So, we expect more pro-state judgments during single party majorities than during coalitions; as the political regime becomes more unstable, judges will become less pro-state, and have more room to negotiate for legitimacy.

### **Test**

*Does fragmentation in the political landscape increase the opportunities for judges?* From the late 1980s, India saw a series of coalition and minority governments running the central government. Judges tended to be strongly anti-state during the era of coalition governments as compared to single party rule. This supports the view held by many scholars that courts will be less afraid/more willing to scrutinize rights based cases during coalition rule.<sup>40</sup>

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<sup>40</sup> Govind Das (2000); Tate and Vallinder (...)

**Table: Coalition Governments and Verdicts**

<b>Verdict1</b>	<b>Coalition</b>	<b>Non-Coalition</b>
Anti-State	46	44
Pro-State	39	65
Total	85	109

*Does the political ideology of the party in power influence judgments?* Our analysis shows that when the BJP was in power heading a multiparty coalition at the center, judges were more likely to give pro-state rulings. Conversely, when the Congress was in power at the center either as a majority party or as part of a coalition, the judges were less likely to favour the state. The anti-state behaviour of judges during congress and congress-led coalitions is not puzzling if we separate Congress majority governments from Congress led minority and coalitions. Except for a brief period of opposition rule in 1977-80, the Congress Party romped to power with large majorities from 1950-88. The party headed a minority government from 1991-1996, and from 2004 onwards. In another model, judges were more likely to be pro-state during single party majorities (invariably led by the Congress party) and more likely to be anti-state during coalitions. This result shows that it is the parliamentary dominance of the party in power that generates pro-state rulings, not the ideology.

**Table: Security Cases**

Nature of verdict	BJP	Congress
Anti-State	15	11
Pro-State	22	32
Total	37	43

The pro-state behaviour during BJP-led coalitions can be explained by separating the effects of heightened security fears and BJP's Hindu

nationalist ideology.<sup>41</sup> Our hypothesis that judges make decisions within a social environment suggests that judges will be less supportive of civil liberties during times of crisis than during times of peace, particularly if that is the preference of the ruling regime (and who are likely to override judgments to the contrary). The BJP rule from 1998 coincided with heightened security concerns induced by a low intensity war with Pakistan in Kargil in 1998, nuclear detonations in the sub-continent, and increased terrorist threats from separatist groups. The sense that the security of the country was at stake increased after 9/11 and particularly after the December 13<sup>th</sup> attack on the Indian parliament. Of the 71 cases decided during the BJP era, judges shifted from an anti-state to a pro-state orientation after 2001. So the pro-state behaviour of judges was influenced more by the crisis mentality rather than by BJP ideology. This finding is supported by another result that shows Hindu judges to be less pro-state when dealing with Muslim litigants.

**Table: Effect of Crisis**

Verdict	1998-2000	2001-2004
Anti-State	24	10
Pro-State	13	24
Total	37	34

It was harder to pinpoint the characteristics of judges who were consistently pro-state, anti-state or changed their mind. In the database, 112 judges were on the panel to judge 193 POTA/TADA/Preventive Detention cases. Of these 86 judges heard more than one case.<sup>42</sup> The only significant finding was that judges who decided larger number of

<sup>41</sup> The coalition comprised ...parties with different ideologies ranging from liberal to conservative, religious to non-religious, parties with significant Muslim vote banks to parties with Hindu vote banks.

<sup>42</sup> We created a new category, Vg1 and ran a probit. Rule for Vg1= Never favoured the state=0, favoured the state 1-49%=1; favoured the state 50-75%=2; 75%-99% favoured the state=3; 4=always favoured the state.

anti-terror cases were more likely to change their mind as compared to judges who decided fewer cases. This indicates that judges more experienced in anti-terror cases are less dogmatic about supporting or opposing the state. They seem to view the facts of the case on its own merits rather than coming to it with pre-conceived positions.

**c) Public environment matters.**

Crisis situations such as threats to national institutions and or/citizens would increase pro-state rulings and convictions of litigants with separatist ambitions. One can expect judges to be driven by the same security threats perceived by other citizens. A crisis situation would include a national emergency, war, or an attack on a national symbol. As a proxy, we used the year 2001 that had events like the terrorist attacks of 9/11 in America and the December 13th attack on the Indian parliament. Judges were strongly pro-state after 2001, and this was reflected in TADA and POTA judgments. An interaction between Muslim plaintiffs and 2001 showed no significance implying that even after national security crises, judges continued to be more suspicious of the state when Muslim litigants were involved. If judges do tend to favour the appeals of Muslim litigants, then the theory that courts in democracies are solicitous of minority rights seems to be plausible. The empirical validity of this theory can be established in a comparison of democracies and authoritarian systems.

## **Conclusion**

We found strong evidence for the mechanism underlying the embedded negotiator approach. The quest for legitimacy after the Emergency underpinned their behaviour towards Muslim minorities without political ambitions. Muslims were more likely to be convicted in the pre-Emergency preventive detention cases and more likely to be acquitted in the TADA cases where judges were more likely to support vulnerable minorities particularly during coalition regimes. The post-emergency judges made a distinction between the religion and political affiliation of the litigants.

To sum up, a Supreme Court judge is anti-majoritarian (supports Muslim minorities and briefly even Sikh separatists), anti-minorities with separatist goals like those espousing Kashmiri and Khalistani ambitions (after the renewal of TADA), pro-citizens without separatist ambitions, pro-state after a crisis (without targeting minorities), and anti-state during coalitions.

Our evidence has some worrying implications for the debates on the need for anti-terror legislation. The inability of the judges to distinguish between village feuds and security-of-the-state type cases is worrying, and the over-use by the state of these laws against non-security related cases debunks the emphasis by many on the need for strong anti-terror laws. Only 42% of the cases tried under the three anti-terror laws involved some threat to the security of the state.

The evidence suggests that even in overburdened courts struggling with over-use of anti-terror legislation, judges can and do protect vulnerable groups. It is harder to pin down where this attitude comes from. An embedded negotiator approach helps us understand that judges are not insulated from politics or society, rather they are susceptible to the

fluctuating influences of political machinations, public opinion and national crisis. If anything, the one certain thing about Indian judges is that they are more likely engage in a constant process of negotiation and adopt flexible positions. Judges think about their roles and grow into them. What I show here is that such a process exists. For instance, our model shows that the more cases a judge hears, the more likely he is to change his mind implying a lower level of dogmatism. Whether judges decide to protect some minorities seems to depend on their need to generate legitimacy for their rulings. This imperative functions more strongly after the institution experiences a crisis of legitimacy driven by its abandonment of civil liberties.