CHAPTER- 4
EFFICACY OF ANTI-TERRORISM LAWS IN INDIA-
JUDICIAL RESPONSE

4.1. Introduction

Legislation to prevent and combat terrorism in India have always been presented before the Judiciary to check its viability on the ground of competence of legislature and violation of fundamental rights preserved and protected under the constitution. Prof. M.V. Pyle observed, “The combination of such wide and varied powers in the Supreme court makes it not only supreme authority in the judicial field but also the guardian of the constitution and law of the land.”¹ The success of the court depends upon how the court has responded on a given case and the extent of confidence the court inspire in the parties and the society as a whole. In the recent year the judiciary has played a vital role in giving creative interpretation leading to broadening criminal administration system particularly relating to anti-terrorist laws.

Until the passing of Unlawful Activities (Prevention) Amendment Act, 2008 and National Investigation Agency Act, 2008 the anti-terrorist laws has been given a sunset provision and made as an emergency and temporary arrangement to tackle the conflicting situation of the country. The Court has seen the intention of the legislature to make anti-terrorist laws not to give a permanent feature of law of the land until the introduction laws in 2008 which has raised numerous question pertaining to ordinary criminal law principles and constitutional law where the role of Judiciary and its response is paramount in protecting and preserving the rights of victims, terrorist, upholding the norms of constitution and maintaining the faith in judiciary by the common individual.

The Division Bench of the Bombay High Court has asserted that the menace created by terrorism destabilise the nation economic progress, challenges the sovereignty and integrity of nation, demoralise the security forces and to overthrow the democratically elected government.² The Judiciary has been given power to review the function of each organ of the

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state so that the rule of law can be preserved and to ensure the function of them are within the limits of the constitution.\textsuperscript{3} Lord Steyn has stated that judicial review is an admixture of acceptable principle of rule of law, separation of power and principle of constitutionality.\textsuperscript{4} The constitutionalism itself ensures that the organs of the state shall not exercise its power ultra virus to the constitution and the counter terrorism effort is to defend the state and protect the right of individual including the accused persons.\textsuperscript{5}

Therefore, terrorism having assumed the transnational character is a new challenge for whole world of civilized nation and their law enforcement machinery which can be stopped at the earliest stage with passing a new anti-terrorism law which is a necessary evil but much needed for a better future. In the case of Nandani Sundar the Supreme Court while answering on the question of what would be the efficient means to fight terrorism has asserted that all the means employed for fighting terrorism though deemed to be efficient cannot be effectuated by constitutional democracies. Means to combat terrorism may be deemed to be efficient but it may give rise to some other problem and may damage the constitutional goals. Therefore, all efficient means though they are efficient are not legal means supported by the constitutional framework.\textsuperscript{6} In such circumstance the role of the judiciary is very important to scrutinize the legislative intent, power and extensive provisions of anti-terrorist laws properly otherwise draconian provisions and misuse of its provision can germinate a new ground for new person to become a terrorist.

4.2. Balancing Civil Liberty and Security of the State

In given political, social and historical situation, the India is having a unique position which questions the viability and realistic approach in adopting the balance between national security and civil liberty of individual. In a conflicting situation which should be given importance

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5. G.V.K Industries Vs. ITO, 1 (2011) 4 SCC 36.
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and preference or how a balance between the two can be brought dependence on the intellectual skill and activism of the judiciary. The human civilization realized to create a balance between the two which is based on the assumption of favoring greater community interest compare to individual interest. The exponent of utilitarianism, Jeremy Bentham has stated that “an act is morally right only if it causes the greatest happiness for the greatest number”. Following this theory it means that while enforcing the counter terrorism legislative policy the civil liberties of individuals must be sacrificed in order to gain greater security for the majority and ultimately it represents the security of the nation. The state is justified in overriding the rights of individual to protect and preserve the rights of community.

In the Jayant Kumar case, Justice I.A.Ansari has observed that security of the state in all condition may not be allowed to override the civil liberty which is also subject to certain restriction as laid down in the constitution itself. Such restriction on the civil liberty will deny it to be used as a license to do anything which will at a certain point of time become disastrous for the state and defeat the rule of law. The Indian constitution itself at many juncture has created a balance between the security of the state and the civil liberties. Rights are guaranteed to individual and the states are empowered to make laws on the grounds of restrictions mentioned under the constitution. The concern for security of the State has, therefore, forced the State to make more and more stringent laws. Lest the State should not become as insensitive as a terrorist, all the acts of the State and the laws, made by the State, must be tested and interpreted on the touchstone of human rights and the constitutional norms.

Ganguly has asserted that the abuse of counter terrorism laws have served recruitment tool for the militants. It is vital for a government to protect their citizens from terrorism which endanger liberty but at the same time democratic societies committed to the rule of law must resist the pressure to give ‘short shift’ to fundamental rights in the name of fighting terrorism.
The extraordinary laws such as TADA, POTA have been used to target political opponents, human rights defenders, religious minorities, dalits, tribal communities, landless and other poor and disadvantaged people. These laws have led to arbitrary detention, torture, enforced disappearance and extra judicial killings of numerous terrorism suspects and others including Sikhs, Muslims and citizens of North Eastern States. The 2008 amendments contain the vague definition of terrorist activity and unlawful association as the previous laws. These laws granted significant powers to the Indian executive, thus providing greater opportunity for abuse and violation of human rights.\(^{13}\) Lack of hope for justice provides breeding grounds for terrorism and, therefore, in the fight against terrorism human rights will have to be respected.\(^{14}\) Since 1980, the Indian Judiciary, particularly the Supreme Court of India, has supported the effort through numerous judgment limiting the powers of the government including the police and other enforcement machinery which simultaneously expanding the notion of freedom and liberty.\(^{15}\)

### 4.3. Hierarchy of Criminal Courts having Jurisdiction in Terrorist related Offences

After the enactment of National Investigation Agency Act, 2008, the jurisdiction over the terrorist related offences are conferred upon the Special Court so constituted under section 11 and 22 of this Act. Court means special court other than the session court and high court.\(^{16}\) With regard to all the schedule offences investigated by the National Investigation Agency is to be tried by the Special NIA court only within whose jurisdiction the offence was committed.\(^{17}\) The Special NIA Court is having all the powers of Session Judge. Special NIA Court may also be assisted by more session or additional session judge having power of session or additional session judge. If the alleged terrorist crime was not handed over for investigation to the National Investigation Agency by the Central Government then the regular criminal courts in India will have jurisdiction over the offences upon the state police report or by the special criminal court

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13. Supra Note 11.
17. Ibid, Section 13.
so constituted by the state such as court constituted under the MCOCA. The jurisdictions of
the session court and the courts subordinate to it have been taken away by the constitution of
the special courts.

The Double Bench of the High Court is the immediate appellate court to hear the
appeal form any order/judgment/sentence made by the special NIA Court. Such appeal may
be entertained by the high court on the question of law as well as facts. An appeal from the
order granting or refusing to grant bail may be appealed before the High Court without obtaining
the leave of the high court as prescribed under section 378(3) of the code. The Supreme Court
of India being the highest appellate court is having jurisdiction in cases relating to terrorism.


The Constitutional basis for the creation of the National Investigation Agency Act,
2008 remains a matter of debate. Though prior to enactment of National Investigation Agency
and amendment to Unlawful Activities (Prevention) Act 2008, constitutionality of Anti terrorism
laws were tested by the Indian Supreme Court at number of occasion. The judicial attitude or
response to anti terrorism laws were in favor of its constitutionality. The court has tried to find
reasons for upholding the anti terrorist laws even though it was evident that such laws were
variedly misused and used for violating human rights.

The NIA Act was challenged before the division bench of the Bombay High Court in
the case of Pragyasingh Chandrapal Singh Thakur Vs. State of Maharashtra through
Additional Chief Secretary & Ors\textsuperscript{18} wherein, Information was lodged at Azad Nagar Police
Station, Malegaon, for the bomb blast that took place on 29.09.2008 at Malegaon, Nasik. The petitioner
were accused for offences punishable under various Sections of the Indian
Penal Code, the Explosive Substance Act, Arms Act and the Unlawful Activities (Prevention)
Act, 1967. The same crime was also re-registered with ATS Police Station, Kala Chowki,
Mumbai. The DIG, ATS, Mumbai has invoked the provisions of the Maharashtra Control of
Organised Crime Act, 1999 (MCOCA) to the said crime and subsequently the prosecution
sanction was accorded by the Additional Director General of Police. The learned Special

\textsuperscript{18} 2014 (1) Bom.C.R.(Cri.) 135.
(MCOCA) Court took the cognizance upon the charge sheet filed by the investigating agency, ATS and issued process under (MCOCA), IPC, UAPA and under Arms Act.

Bail application was filed by some of the accused of the case and the Special (MCOCA) Court was pleased to discharged all the accused from the provisions of MCOCA Act. The said order was challenged by the State of Maharashtra by invoking the MCOCA before this court along with some other connected appeals. The Division Bench of the Bombay High Court by its common order strike down the order of discharge accused passed by the Special (MCOCA) Court. Thereafter, the affected parties including the present petitioner has filed Special Leave Petition (Criminal) before the Honorable Supreme Court of India in which the notice has been issued to the respondents before admission and which is yet to be disposed of.

In November 2010, Swami Aseemanand was arrested from Haridwar, Uttarakhand who has given statement before Learned Chief Judicial Magistrate, Panchkula, Haryana, under section 164 of the Code of Criminal Procedure, 1973 which was retracted by his statement made before Chief Judicial Magistrate, Ajmer, Rajasthan. On the basis of his statement he has been arraigned as an accused in Samjhauta Train bombings of February 2007, Ajmer Blast and also Hyderabad blasts and all these crimes are being re-investigated by the National Investigation Agency (NIA). In April 2011, the Union Home Ministry, handed over the investigation of Malegaon bomb blast to the National Investigation Agency (NIA) which was lodged at Azad Nagar and was earlier transferred to ATS. The petitioner who is in custody since 10.10.2008 is greatly aggrieved by the decision of the Union Home Ministry to hand over the investigation of Malegaon bomb blast 2008 to National investigation Agency and has challenged the legislative competence of the parliament to enact the NIA Act, 2008.

The Division Bench of Bombay High Court (Darmadhikari S.C and Shukre S.B.,JJ) has upheld the constitutional validity of the National Investigation Agency Act, 2008. The court has refereed the statements of objects and reasons for enactment of NIA to ascertain the conditions prevailing at the time which actuated the sponsor of the bill to introduce the same and the extent and urgency of evil which he sought to remedy. The Court has stated “NIA Act 19. The principle to refer statement of object and reason to the necessity for the introduction of law was laid M.K. Ranganathan and another Vs Government of Madras and others, AIR 1955 S.C. 604. Also see; Subhash Ramkumar Bind @ Vakil and Others Vs. State of Maharashtra, AIR 2003 S.C. 269."
is to constitute an investigating agency at the national level to investigate and prosecute offences affecting the sovereignty, security and integrity of India, security of State, friendly relation with foreign States and offences under Acts enacted to implement international treaties, agreement, conventions and resolutions of the United Nations, its agencies and other international organizations and for matters connected therewith and incidental thereto”. The court has asserted that the Parliament had to step in because of incident of terrorist attack not only in the militancy and insurgency affected areas, but the areas affected by left wing Extremism and the incident of bomb blast and that the India has been the victim of large scale terrorism sponsored from across the borders. These incidents were found to have complex inter State and international linkages and investigation of it have national ramifications.

4.4.1. Judicial Interpretation of Legislative Competence of Parliament to enact the NIA Act, 2008

In a federal system like India, questions are always raised with respect to competence of the enacting body to enact certain piece of legislation. Unless prohibited by the constitution, legislative powers to enact on a subject within its legislative competence are plenary. The Indian federal constitution by article 246 read with seventh schedule of the constitution elaborately provides scheme of division of powers and functions between the centre and the state. The three lists does not confer power of legislation but only define the areas of legislative competence of Central and State government. Power to make laws is conferred by article 246 and other provisions of the constitution. In Pragyasingh case the Division Bench of the Bombay High court has relied upon the ratio given by the Hon’ble Supreme Court in the case of Naga People’s Movement of Human Rights Vs. Union of India wherein it was stated that legislative competence of parliament depends on the answer to the question whether the subject matter falls in the State List which Parliament cannot enter. If the answer is in negative it means the Parliament is having legislative competence on the basis of Union list or

residuary powers under Article 248 read with Entry 97 of the Union List-I in such cases there is no need to go further in finding out whether it falls within the limit of Union or Concurrent List.

The National Investigation Agency Act, 2008 is a procedural law empowering a special agency to investigate and prosecute the offences under the enactment so enlisted under its schedule. The court has applied the doctrine of Pith and Substance to find the true nature and character of the legislation and the entry within which it would fall. The NIA Act does not create any offence by itself. It only provides for creation of machinery for investigation and prosecution of certain offences. Entry 8 of List I entitled “Central Bureau of Intelligence and Investigation” empowered the Parliament to enact a legislation so as to constitute an Investigating Agency at the national level. This is not akin to setting up a police force which is covered by Entry 2 of List II i.e. State List.

Therefore, when it comes to defence of India and matters relating to Naval, Military and Air Force, any other Armed Forces of the Union, Atomic Energy and mineral resources, so also, Central Bureau of Intelligence and Investigation, then, in relation to the same the Parliament is not incompetent to make any law. Therefore, assuming that the State has power to make a law in relation to Police, still going by the wide wording of Entry 1 and Entry 2 of List-III, namely, Criminal law and Criminal procedure, it is clear that the Parliament is competent to enact the NIA Act, 2008.

Further, schedule enactment of NIA is pertaining to Atomic Energy, Anti-Hijacking, Safety of Civil Aviation, Act against the state and of Counterfeit of currency notes etc are of national importance wherein the Parliament is having power to legislate upon and create offence within the meaning of those schedule Act are matter of Entry 93 of the Union list-I. When the Parliament having power to make an act as offence then it is equally empowered to set up enforcement machinery having limited function of investigation and prosecution of those offences and for that purpose enact NIA Act. Further, the preamble of the NIA state to implement international treaties, agreement, conventions and resolution of the United Nations and its agencies. The Constitutional legislative scheme from Article 250 to Article 253 also enables Parliament to make NIA for implementing those treaties, agreements or conventions. The
Court has applied the principle of harmonious construction as laid down in the *State of Karnataka Vs. Union of India*\(^{23}\) and concluded that the Parliament was competent to enact the NIA Act. Moreover, mere possibility of abuse cannot be counted as a ground for denying the vesting of powers or for declaring a statute unconstitutional.\(^{24}\)

It is observed that there is absence of entry federal crime which is having transnational in nature. Terrorism being a global issue where India is putting all efforts to eradicate such problem there is a need to amend the constitution to the extent of inclusion of federal crime in the Union List-I to remove any conflicting issue between the centre and the state as far as legislative, institutional and administrative efforts to prevent and combat terrorism is concern.

It was not the first occasion when the judiciary is sitting to check the constitutional validity of the anti-terrorist laws and upholding its constitutionality. In the case of *Kartar Singh vs. State of Punjab*\(^{25}\) the judiciary has examined provisions of TADA and its consistency with the Constitutional safeguard. While upholding the constitutional validity of the Act that the court was of the view that ‘terrorism is a crime against the humanity’. The challenged section 3, 4 and 11 of the Act was held constitutional while seeing the nexus to the object of the Act but the court has agreed to lay down additional safeguards with regard to confession made to police officer in order to ensure protection of fundamental rights.

According to C. Raj though the stringent laws were made and applied but it has not stopped the terrorist from triggering lawlessness in the society.\(^{26}\) It is true that people may be deprived of their personal liberty particularly while implementing the terrorist laws but such deprivation should not be unduly long keeping the trials pending and negating the speedy justice which is one of the core objects of article 21 of the constitution.\(^{27}\) Moreover, knowing this fact that the TADA was enacted only to control the conflicting situation in Punjab and it's

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\(^{23}\) (1997) 4 SCC. 608; AIR. 1978 SC 68.


\(^{25}\) (1994) 3 SCC 569.

\(^{26}\) C. Raj Kumar, “*Combating Terrorism While Preventing Civil Liberties*”, Denver Journal of International Law and Policy, University of Denver, Volume 33, Number2, Spring 2005, pp207-209.

\(^{27}\) *Shaheen Welfare Association Vs. Union of India*, AIR 1996 SC 2957.
having a sunset provision, the court was reluctant to see the provisions of the Act not in
consistency with the established criminal law procedure.

In the case of **People’s Union for Civil Liberties Vs. Union of India**\(^{28}\) the
constitutional validity of section 14\(^{29}\), 18, 19\(^{30}\), 27\(^{31}\), 30\(^{32}\) and 32\(^{33}\) of POTA was challenged. The court has restricted itself to examine the provision in light of question whether sufficient procedural safeguard were provided to ensure compliance with due process or not. The Supreme Court has observed that terrorism affects the security and sovereignty of the nations and it should not be equated with the law and order or ‘public order’ problem which is confined to the state alone. The Court felt the need of collective global action and therefore upheld the competency of the parliament stating that the Parliament possesses power under Article 248 and entry 97 of list I of the Seventh Schedule of the Constitution of India to legislate the Act. Does it mean that the terrorism can be prevented or combated only by compromising with the value of human rights? Inadequacy of capability in the law enforcement machinery cannot be covered by making stringent laws keeping aside the liberties of individual otherwise the same can become a ground for breeding another terrorist. The Supreme Court while upholding the constitutionality Armed Forces (special powers) Act, 1958 in **Naga peoples’ movement of human rights Vs. U.O.I**\(^{34}\) and held that provisions of the Act do not violate Articles 14, 19 and 21 of the Constitution. The court has arrived at conclusions laying down certain guidelines that the central government while declaring any area as ‘disturbed area’ under section 4 should consult the state government. The court further stressed that the declaration has to be effectuated for a limited duration and it should be reviewed after expiry of every six month.

Any violation of the guidelines laid down by the court would amount to arbitrary and extra-judicial execution and arbitrary deprivation of the right to life or false encounters. However, the Court did not take into consideration the actual implementation of practice of the Act. The


\(^{29}\) Section 14 permitted police officer to compel any person to furnish information.

\(^{30}\) Section 18 and 19 deals with notification and de-notification of terrorist organisation.

\(^{31}\) Section 27 empowers to direct the accused to give bodily samples.

\(^{32}\) Section 30 deals with keeping the identity of witnesses secrete.

\(^{33}\) Section 32 deals with admissibility of confession made to police officers.

Court simply reduced the concept of state responsibility and accountability in a list of ‘Dos and Don’ts’ to be followed by the uniformed forces of the state. These guidelines were, up to that point, unknown to the public and were revealed in affidavits filed by the Union of India in the course of litigation and the judiciary was convinced with it beyond a reasonable doubt.

In the case of The Extra Judicial Execution Victims Families’ Association and Another Vs. Union of India and Others\(^35\) has exposed 1528 cases of alleged false encounter killings committed by security forces in Manipur and the court formed the Hegde Commission to investigate six sample cases which established the false killings of persons non maintenance of proper record by the armed forces regarding action taken, arrest made, ammunition used, allegation registered and disposed off.\(^36\) Several case studies, documented by human rights organizations, concluded that in reality, these guidelines are cosmetic. 1528 allegations of false encounters put forth in the current petition are examples of it.\(^37\)

Theoretically and practically, the AFSPA violates the right to life. It provides a wide scope for the use of abusive lethal force in the name of security. AFSPA violates both national and international norms concerning inalienable human rights guarantees.

The Maharashtra control of Organized Crime Act, 1999 (MCOCA), whose constitutionality was heard and decided by the Supreme Court in the state of Maharashtra Vs. Bharat Shantilal Shah.\(^38\) MCOCA was enacted to deal with organized crime, but is usually used for prosecuting terror related cases as well. The court has upheld its constitutional validity except part of section 21(5) that dealt with the denial of bail under the Act if the accused was on bail under any other Act as well because the court did not find any nexus with the object of MCOCA, which is to prevent organized crime and hence to that extent, the section was struck down.\(^39\)

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35. Writ Petition (Criminal) 129 of 2012.
37. Ibid.
39. Ibid.
In the case of **Zameer Ahmed Latifur Rehman Sheikh Vs. State of Maharashtra and Ors.** the constitutional validity Section 2(1)(e) of the Maharashtra Control of Organised Crime Act, 1999 (MCOCA) so far it relates to ‘promoting insurgency’ was challenged on the ground that after enactment of the Unlawful Activities (Prevention) Amendment Act, 2004 amending the Unlawful Activities (Prevention) Act, 1967 the application of section has become void. The Court has assumed the legislative competence of the state legislature by applying the doctrine of pith and substance and stated that the subject matter fall within the competence of the state legislature and entrenchment, if any, is purely incidental or inconsequential. The Court further clarified that ‘organized crime’ contained in Section 2(1)(e) ‘promoting insurgency’ comes under ‘public order’ is used to denote a possible driving force for ‘organized crime’ but the Act does not punish ‘insurgency’ per se, but punishes those who are guilty of running a crime organization, one of the motives of which may be the promotion of insurgency. The Constitutional validity of anti-terrorist laws were also upheld by the Supreme Court at earlier occasion.

### 4.4.2. Investigation of Schedule Offences by the NIA and Article 14 and 21

The another ground for challenging the NIA Act was that section 6 which was alleged to be the heart of the Act waws unconstitutional and ultra virus to Article 14 and 21 of the constitution and therefore, the whole of the enactment must fail. The Division Bench in the **Pragyasingh case** has held that Section 6 of the NIA Act does not confers arbitrary, unbridled and unguided powers upon the Central government. The court was of the opinion that there are guidelines mentioned in the section itself for exercise of this power by the central government. The central government is guided by the report of the state government or information received from other sources, gravity of the offence and other relevant factors while

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41. ‘organized crime’ means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organized crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency.
42. **Pragyasingh Chandrapal Singh Thakur Vs. State of Maharashtra through Additional Chief Secretary & Ors,** 2014 (1) Bom.C.R.(Cri.) 135.
arriving at a conclusion that is a fit case to be investigated by the NIA.\textsuperscript{43} For determining whether the offence is grave or not reference to preamble and statement of object is a guiding factor. Section 6 (4) and (5) requires the central government to form an opinion for investigation of offence by the NIA but no where it has mandated the central government to record the opinion in writing. But surprisingly the court has read the words in the subsection as indicative of the intent of the Law Makers. The Division bench was eroded in its decision while upholding the section 6 of the NIA Act as intra virus to Article 14 and 21.

It shows the intent of the court to safeguard the provisions of the Act from any challenge instead of referring it for correction or in other sense it can be said that the court has impliedly added what was not provided in the Act just to save the provision from challenge. Power to decide the matter is one thing and responsibility to record the reason of decision is another thing. If the statute confers power but does not obligate the authority to record reason for exercising such power it means it has conferred unfettered, arbitrary, unbridled and unguided power on the authority. Even under the Act the appeal provision is absence against such exercise of power by the central government which makes the judicial review necessary. Where there is absence of a statutory requirement to give reason, an administrative order need not to be a speaking order\textsuperscript{44} except where there was a provision for an administrative appeal. As in the case of referring the case to NIA the action of administrative authority is not statutorily appealable therefore, it is mandatory that the reason must be provided.

The only exception seems to be that of public safety.\textsuperscript{45} But even public safety cannot be a ground in terrorist related cases for not giving reason for applying special stringent law against a person. For protecting the community interest in contrast to individual interest the civil liberties of individuals are compromised now it is the public interest which demands the disclosure of reason for handing over the investigation to NIA so that the society may be alert about the development which is going on in criminal administration of justice.

The Court has referred the \textbf{Jamanadas case} in which it was held that the exercise of power by the Central government involves two element- an objective and a subjective element,

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  \item \textsuperscript{43} The National Investigation Agency Act, 2008, Section 6(3).
  \item \textsuperscript{44} \textit{Mahabir Jute Mills Vs. Shibban Lal Saxena}, AIR 1975 S.C. 2057.
  \item \textsuperscript{45} \textit{A.K.Gopalan Vs. Government of India}, AIR 1966 S.C. 816.
\end{itemize}
the existence of the former is a condition precedent for the exercise of the later power, and the former is jurisdictional fact and is subject to judicial review but not the later.\textsuperscript{46} The subjective matter was not justifiable as it was an inference to be drawn from the fact by the government and the court would not sit in appeal over the government’s opinion.\textsuperscript{47} The same principle cannot be made applicable in terrorist cases where by reference of the case for investigation by the NIA affects the rights and liberties of the individual extraordinarily as compare to ordinary law and procedure.

Moreover, the court was of the view that the aggrieved party may apply for judicial review of the action taken by the central government before the High Court and the Supreme Court if it violates the article 14 and 21 of the constitution. Judicial review of discretionary power fall into two major classifications i.e. abuse of power by the authority and non exercise of power. If the power exercised by the government is induced by malafide, or bad faith, or for an improper purpose, or after taking into account irrelevant or extraneous considerations, or after leaving out of account relevant consideration, or in a colorable manner, or unreasonably then the aggrieved person may challenged the exercise of power by administrative authority. Further acting under dictation or acting mechanically or fettering discretion may be grounds for judicial review of administrative discretion exercised under section 6 of the NIA. A discretionary power is not completely discretionary being entirely uncontrolled. There cannot be an absolute and unfettered statutory discretion. Even when a statute uses words so as to confer ex facie an absolute discretion on administrative authority concerned, the discretion can never be regarded as unfettered.\textsuperscript{48}

\textbf{4.4.3. Re-Investigation, Denovo Investigation and Further Investigation By NIA}

Investigation of offences under the Act by the NIA relates to the circumstances in which either investigation is already completed and State police or Special Investigating Agency of state or centre has filed the charge sheet or investigation is in progress by the state police or Special Investigating Agency of state or centre or suo motu the power is conferred on the NIA by the central government for the first time. In either of the case when the Central Government

\textsuperscript{46} Jamanadas Vs. Sate of Gujarat, AIR 1974 S.C. 2233.
\textsuperscript{47} Ibid.
\textsuperscript{48} Padfield Vs. Minister of Agriculture, (1968) A.C. 997.
exercises its power under section 6 of the Act and hand over the investigation task to the NIA, does it empower the NIA for further investigation or reinvestigation or Denovo or fresh investigation is a matter came before the Division Bench for determination.

One principal object of criminal law is to protect society by punishing the offenders with fair trial. It is the duty of the court to ensure that the investigation in an adversarial system of criminal administration is fair, just and equitable. The Indian Criminal Jurisprudence demands fairness in investigation and to be in accordance with law and at the same time prevent the escape of offenders due to external influence on investigation process.\footnote{Rubabbuddin Sheikh Vs. State of Gujarat (2010) 2 SCC 200 : (AIR 2010 SC 3175).} Section 2(h) of the Code defines ‘investigation’ which includes all the proceedings under the Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf. The investigation commences with lodgment of information relating to the commission of an offence under section 154 of the Code.\footnote{Ashok Kumar Todi Vs. Kishwar Jahan, AIR 2011 SC 1254.}

In the cases of \textit{H.N. Rishbud Vs. State of Delhi}\footnote{AIR 1955 SC 1961; Vijaya Raghvan Vs CBI, 1984 Cri.L.J. 1277 (Ker HC). Navinchandra N. Majithia Vs. State of Meghalaya and Ors., (2000) 8 SCC 323) : AIR 2000 SC 3275; State of M.P. Vs. Mubarak Ali, AIR 1959 SC 707 and H.N. Rishbud and Anr. Vs. State of Delhi, AIR 1955 SC 196. also see Narmada Bai Vs. State of Gujarat reported in AIR 2011 SC 1804 wherein the legal position was reiterated.}, the court has discussed the scope of investigation which includes proceeding to the place of occurrence, ascertainment of facts and circumstance of the case, discovery and arrest of the suspected offender, collection of evidence, and at last formation of opinion as to whether the material collected during the investigation is sufficient to justify the prima facie case against the accused and is fit for trial by a Magistrate may file final report under section 173 of the Code. Upon the final report the Court may initiate the proceedings.\footnote{Hemant Dhasmana Vs. Central Bureau of Investigation and Another (2001) 7 SCC 536; AIR 2001 SC 2721.}

In the case of \textit{Samaj Parivartan Samudaya Vs. State of Karnataka}\footnote{AIR 2012 SC 2326.} the Supreme Court held that once the investigation is complete the investigating officer is bound to file a report before the Court of competent jurisdiction upon which the Magistrate can proceed to try the offence or commit the case to the Court of Sessions. In
Alsia Pardhi Case\textsuperscript{54} the court has directed for fresh investigation by CBI of kidnapping of a girl belonging to Pardhi Community a denotified tribe from rush market.

Nevertheless, as per facts and circumstances of the case, to do complete justice and to instill confidence in the public, the case may be handed over to special investigation agencies by the order of the court for further investigation.\textsuperscript{55} In the case of Amitbhai Anilchandra Shah Vs. The Central Bureau of Investigation and Anr\textsuperscript{56} the Supreme Court has held that no fresh investigation can be done by the CBI in the name of further investigation. Filing of fresh charge sheet by CBI is violative of fundamental rights under article 14, 20 and 21 of the constitution. In the case of Rubabbuddin Sheikh v. State of Gujarat\textsuperscript{57} the Court had declared that in appropriate cases, the Court is empowered to hand over investigation to an independent agency like CBI even when the charge-sheet had been submitted. If the offence committed at different places and at different time correlates to the series of facts and form same transaction will be an appropriate case for transfer to special agency.

As per section 173(8) of the Code, further investigation of the case may be done even after filing the charge sheet by that investigating agency who have conducted the investigation earlier but it does not means that reinvestigation or denovo investigation may be undertaken. The object of further investigation is to arrive at truth and do justice even it may cause delay.\textsuperscript{58} It is an expectation of the society from criminal justice system that the guilty person of an offence should not go unpunished.\textsuperscript{59} On completion of further investigation, the investigating agency is required to submit a further report also known s supplementary report to the competent court and not a fresh report.\textsuperscript{60} It is only the High Court and the Supreme Court in exercise of its inherent power may order for complete reinvestigation or denovo/fresh investigation under Section 482 of the Cr.P.C or 136 of the Constitution of India, respectively.

In the matter of activities of PFI against the Prof. Joshep hand chopping case, of NIA registered case no RC-01/2011/NIA/DLI, the NIA took over the investigation of case on the

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\item \textsuperscript{54} Alsia Pardhi Vs. State of M.P. and Ors., (2014) 2SCC 725.
\item \textsuperscript{55} Mohamed Bux Vs. Emperor, AIR 1934, Sind 103,105.
\item \textsuperscript{56} AIR 2013 SC 3794.
\item \textsuperscript{57} (2010) 2 SCC 200 : (AIR 2010 SC 3175).
\item \textsuperscript{58} Hasanbhai Valibhai Qureshi Vs. State of Gujarat, AIR 2004 SC 2078.
\item \textsuperscript{59} National Human Rights Commission Vs. State of Gujarat and Ors., (2009) 6 SCC 342.
\item \textsuperscript{60} Rama Chaudhary Vs. State of Bihar,(2009) 6 SCC 346 ; AIR 2009 SC 2308.
\end{itemize}
central government order which was already registered and investigated by Kerala Police. Kerala police filed charge sheet against 27 accused before the Special Court of NIA, Ernakulam under various provisions of UAPA, IPC and Explosive Act. After reregistration of the case the NIA filed an application under section 173(8) before NIA special court which granted permission for further investigation.61

Further, In the case of State vs. Devendra Gupta and others before the Additional Metropolitan Session Judge Cum Special Court for NIA cases Hyderabad, A.P., in relation to bomb blast in 2007 at Mecca Masjid, Hyderabad, initially the case was investigated by the Alam Police, Hyderabad. Later the case was transferred to CBI for continuing the investigation who have filed charge sheet against two accused in the year 2010. In 2011 the case was handed over to NIA for further investigation which has filed three supplementary chargesheet till 2013.62 Malegaon bomb blast occurred in 2006 was before the Special Court constituted under MCOCA Act and NIA Act 2008, Mumbai, wherein the state police has investigated the case and then it was transferred to ATS Mumbai who have filed charge sheet in 2006. The case was handed over to CBI for further investigation and charge sheet was filed in 2010. In 2011 the case was handed over to NIA who have filed the charge sheet in 2013. From the chargesheet filed by the NIA before the NIA special court under various cases registered by NIA, it is clear that the NIA has under taken only further investigation in continuation of the investigation conducted either by the state police or by any other special investigation agency. It is also important to note that neither the Preamble of the Act nor its stated object or Parliamentary debated at the time of passing this Act has ponder about the nature of investigation required to be undertaken by the NIA. The application of the Act with regard to the terrorist activities committed before the date of application of this Act must be made clear by the Parliament itself.

The Division bench in the case of Anant Gopal Sheorey Vs. the State of Bombay has held that once the power of investigation is procedural in nature and there is no vested right created in the accused to object to the course permitted by the statute. The Court held that the accused is having a ‘vested right of action’ but not a ‘vested right of forum’. It also held that unless by express words the new forum is available only to causes of action arising after the creation of the forum, the general rule is to make it retrospective. In the case of Hitendra Vishnu Thakur and Ors Vs. State of Maharashtra and Ors wherein the court held that clause (bb) of Section 20(4) of TADA introduced by an Amendment Act governing Section 167(2) of the Cr. P.C. in relation to TADA matters was in the realm of procedural law and the same would be applicable retrospectively. The procedural law is retrospective in operation. The Pragyasingh Case the Court it was alleged that the NIA in the name of further investigation in Samjhauta Train bomb blast, Ajmer blast and in Hyderabad bomb blast has assumed power to reinvestigate or denovo investigation without the consent of the state government as the case was earlier investigated by the ATS. The Court has held that “in the name of fresh investigation or additional investigation, if the NIA proceeds to reinvestigate or undertakes a denovo investigation, then, the parties are not remedy less and can bring the matter in the notice of the competent criminal court about their grievances. They can also seek intervention of the superior court.” Mere apprehension of abuse of power by the authorities will not enable the court to declare the alleged provision as unconstitutional. It is well settled that wherever and whenever the State fails to perform its duties, the Court shall step in to ensure that Rule of Law prevails over the abuse of the process of law. Such abuse may result from inaction or even arbitrary action of protecting the true offenders or failure by different authorities in discharging statutory or legal obligations in consonance with the procedural and penal statutes.

63. AIR 1958 SC 915.
67. Ibid.
Moreover, it was also observed that though the NIA is constituted to investigate the schedule offence but other investigation agencies are also not excluded from the investigation of the schedule offences till the Central Government has made the notification in this behalf transferring the case for investigation to the NIA. When the cases were registered by the state police under various provisions of Unlawful Activities (Prevention) Act, Explosive Substance Act, Act against the state or counterfeiting offences under IPC, and subsequently after investigation charge sheet was filed by the state police it means that the state has not reported the matter to the central government under section 6(1) and (2) or even after receipt of the report the Central Government was not interested to make any order. The NIA has not been given any power to undertake jurisdiction to investigate the related offences suo motu and has to depend on the notification of the central government which in turn depend upon the report of the state government. There is need to review the provision of Section 6 to make it more visible in application.

4.5. Detention and Bail- Judicial View

4.5.1. Bail Application under section 439 of Cr.P.C. not Maintainable: In the case of Jayant Kumar Ghos Vs. National Investigation Agency, the Division Bench of the Guwahati High Court has held that bail application made by invoking section 439 of the Code is not maintainable. Three of the accused person invoked the jurisdiction of the High Court under section 439 of the Code instead of applying for regular bail before Session Judge. The Hon’ble court of Justice I.A. Ansari and A.C. Upadhyay has held that further detention can be extended by the special court or court of session and the source of power to grant bail lies in section 43D and section 437 of the Code and not section 439. The high court cannot invoke its power under section 439 to grant or refused to grant bail and cancel the bail if already granted by the special court. The proper course of action is that the aggrieved party may prefer an appeal under section 21 to the Division Bench of the High Court. Therefore, Bail application under section 439 before the High Court is not Maintainable in law due to extraordinary procedure laid down in the NIA Act.

68. (2014) 1 GLT 01.
4.5.2. Bail- Interlocutory order: In the matter of National Investigation Agency Chikoti Garden, Begumpet, Hyderabad, Rep. by I.R.S. Murthy, Addl. Superintendent of Police, NIA, Hyderabad Vs. Mohamed Anwar Shak and Anr., the division bench of the high court of Andhra Pradesh has held that an order granting or refusing to grant bail is an interlocutory order and no appeal would lie against such order except under section 21(4). Section 21 (4) of the NIA Act has departed from this general rule contained in section 437 to 439 of the Code and accommodated an appeal to the Division Bench of the High court against the order to grant or refuse to grant bail. The Court has relied on the judgment given by the apex court in State of Gujarat vs. Shaikh Salimbhai, Abdulgaffar, wherein the same question was answered by the court with reference to section 34 of POTA which is pari material to section 21 of the NIA. The Supreme Court in the case of Sadhwi Pragya Singh Thakur vs. National Investigation Agency, has held that no interlocutory order passed by the Special NIA Court is appealable except the grant or refusal to grant bail application which can only be heard by the Division Bench of The High Court.

4.5.3. Supervised Medical Treatment -Ground for Bail: There cannot be any hard and fast rule regarding grant and refusal to grant of bail by the court and each case has to be treated on merits with application of court discretion. Supervised medical treatment does not mean and could not have stretched to mean supervised medical treatment outside the jail or outside the hospital or within the precinct of the house of the accused. The Court in Redaul Hussain Khan Case has laid down some of factors which are to be kept in mind while granting bail. If the case of the accused involvement is made prima facie he cannot be released on bail. The nature and gravity of offence committed by him, severity of punishment which can be inflicted, chance of accused being absconding, the character, behavior, antecedent, likelihood of repetition of offence possibility of tampering evidence etc. may be considered while hearing application of bail. Though the court has to give reason for taking action on application on bail but it does

69. (2013) 1 ALD (Cri.) 821.
72. (2014) 1 SCC 258.
not require detailed examination of evidence and elaborate documentation on merit of the case.

The Redaul H Khan was released on interim bail solely on the medical ground which was not within the contemplation of section 43D of UAPA Act or of Section 437 of the Code. The Special court has granted bail on medical sickness without finding that while keeping him in custody it was not possible for the accused to have adequate medical treatment. It was the legislative intent that person against whom reasonable reasons are there to believe that he is guilty of an offence punishable with death or life imprisonment then he should not be released on bail except in circumstances provided under the section 437 of the Code. Sickness of accused may be taken into consideration not in routine manner but in exceptional circumstances and also on being satisfied that his release would not adversely affect the investigation or trial and that his treatment is not possible if kept in custody.

In the instant case the accused has applied for bail on numerous grounds at different dates and even after grant of bail he had opted tactics not to make himself present in the court. Moreover, these facts were not taken into consideration by the special court while extending his bail and court opinion regarding the accused requirement to have homely atmosphere to get health improvement was also not certified by the Medical board or experts. Therefore, Medical ground alone cannot be a ground for bail without determining the seriousness of the disease or degree of seriousness.

4.5.4. Bail and Principle of Parity: In the Case of Izharul Haq Abdul Hamid Shaikh and Anr. Vs. State of Gujarat, the Supreme Court has applied the principle of parity which means if one of the co-accused is granted bail then other co-accused is also entitled to bail. The appellant labourers were charged for offences committed under TADA, was alleged that they are involved in transfer of certain containers from one vehicle to another. There were other labourers also who are involved in such operation and have been granted bail as they had no knowledge of the content of those boxes and merely shifting them on instruction. The Court held that when other labourer were granted bail and was no material available to presume that

the appellant had knowledge of content of the boxes then he may be granted bail on the principle of parity with other labourers.

4.5.5. Detention Order against accused already in Custody: In the Case of [Huidrom Konungjao Singh Vs. State of Manipur and Ors], the Supreme Court has held that a person who is already in jail can be detained under the UAPA and there is no prohibition in law to pass such detention order provided that the detaining authority is having knowledge about the detenu already in custody. Further, he is having reason to form opinion on the ground of available material that there is real possibility of detenu being released on bail and after his release the detenu will indulge in activities which is prejudicial to the public order. Therefore, it is the subjective satisfaction of the detaining authority based on the reliable material before him that makes the necessity of passing such an order.

Now the question is on what material the detaining authority can base his opinion to detain the person already in custody. Can the detaining authority put reliance on the bail order in some earlier case which is not related to this case in which he is making an order? In the instant case the detaining authority has put reliance on the bail order of accused passed in some other case not related to this case. Even it is evident that the accused had never made any application for bail after his arrest was made under UAPA. Therefore, relying on material of some other case in which bail order was granted is irrelevant in the instant case and forming an opinion based on those bail orders that there is real possibility to be released if he will make an application in this case. When the accused person has not made any bail application after his arrest and he is in custody then where is any question about real possibility of his release and commit act prejudicial to public order. Real possibility to be released on bail arises when the application for bail has been made and is pending.

Moreover, if the co-accused has been granted bail in the case then it creates an apprehension in the mind of the detaining authority even though the detenu has not made an application of bail because release of one co-accused may leads to release of other which is a normal practice of the court. But in the instant case there is no co-accused who were been

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released on bail. Therefore, the Supreme Court has quashed the order of the detaining authority and set aside the decision of the Guwahati High Court.

### 4.5.6. Tender of Pardon- Bail and Detention:

In the case of **Aamir Abbas Dev Vs. State Through NIA**, it was held by the supreme court that every person accepting a tender of pardon shall unless he is already on bail be detain in the custody until termination of trial. In the case the appellant was an accused for involvement for causing bomb blast at Delhi High Court reception Counter. His application for grant of pardon was accepted by the special NIA court and got examined as prosecution witness. After that he filed an application for bail wherein the NIA also given no objection but the Special Court dismissed the application for release from jail relying on section 306(4)(b) of Cr.P.C. In appeal the Supreme Court has confirmed the decision of Special Court as well as the High Court.

### 4.5.7. Doctrine of Guilty by Association:

Section 43D (5) of UAPA states that the accused shall not be released on bail if the court on perusal of the case diary or the report under section 173 of Cr.P.C. is of the opinion that there is a prima facie case against him. In the case of **Kerala Vs. Raneef**, the Supreme court has relied on the judgment of the U.S. Supreme Court given in the case of Scales Vs. United States and Elbrandt Vs. Russell and held that those who joins an organization but do not share and participates in its unlawful objects are not threat to the nation and may be granted bail. The court has distinguish between an ‘active knowing’ membership and ‘passive/nominal’ membership in any organization and stated that all person associated with an organization cannot be declared as criminals. There must be a clear proof that person associated with association is having an intent to accomplish the aims of organization.

### 4.5.8. Act of Organization Subsequently Declared as Terrorist Organization:

In the case of **Redaul Hussain Khan Vs. National Investigation Agency**, the Redaul Hussain (Chief executive member of the North Cachar Hills Autonomous Council) was arrested for

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80. AIR 2011 SC 340.
transfer of funds to extremist organization, DHD(J) to enable it to purchase arms and ammunitions. Five days later the case was taken over by the NIA and after one month of arrest the MHA have notified DHD(J) as an ‘unlawful Association’. Bail Application by the petitioners was rejected by the Special Court of NIA and period of detention was also extended in terms of section 43D of UAPA read with section 167 of the Code. Division Bench of the High Court confirmed the order of Special NIA Court and dismissed the petition. In appeal the Supreme court while confirming the decision of the High Court has held indulgence in terrorist act by DHD(J) did not depend on whether it was declared as an unlawful association or not. It was the commission of terrorist act which resulted in the said organization being declared as unlawful association.

4.5.9. Application of Principle of Res-judicata to the Bail application: There can be no doubt that bail can be granted in a prosecution for offences under Chapters IV and VI of the UAPA Act only if the claim for bail would be justified under the proviso to Section 43D (5). The UAPA Amendment Act, 2008, has introduced Section 43D and put restrictions, by the proviso to Sub-section (5) of Section 43D, on the Court’s power to grant bail by imposing condition that an accused shall not be released on bail or on his own bond if the Court, on perusal of the case diary, or on the report, made under Section 173 of the Code, is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.

Thus, the UAPA Act, 1967, as the same stands today, puts serious fetters on the Court’s discretion to allow an accused to go on bail. The principles of res judicata are not applicable to bail applications. But, repeated filing of successive bail applications without there being any change of circumstances would lead to bad precedents. If sufficient period of time has elapsed after the earlier disposal of the bail application then it amount to be a change of circumstance justifying fresh hearing of bail application. While reviewing the subsequent fresh


bail application the findings of an earlier court on bail application is not much important as bail application is to be seen with fresh circumstances if any on the basis of which bail application is made. Even the fact that the rejection of earlier bail application was not appealed before the superior Courts cannot fetter the jurisdiction of the Courts concerned to consider subsequent bail applications or to take a different view. Such power of the court is given under section 43D itself which states that the court while granting the bail must be of “the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true”.

4.6. Time Limitation for Completion of Investigation by The NIA

In the case of Younus Aliyar S/o. Aliyar, Aged 30 Years, Vellilavunkal Veedu, Koottamangalam Village, Nellimattom Kara Vs. The Sub Inspector of Police, Muvattupuzha Police Station, represented by The Public Prosecutor High Court of Kerala, Ernakulum and The The National Investigation Agency, Kerala Unit, Ernakulum, represented by its Special Public Prosecutor, High Court of Kerala, Ernakulum, appeals are preferred by the appellants under Section 21 (4) of the National Investigation Agency Act, 2008 against the order of the special NIA Court to grant regular bail. It was alleged in the case that a conspiracy was hatched and 8 persons allegedly committed the abhorrent act of chopping off the right palm of the said Prof. Joseph. The crime was initially registered alleging offences punishable under the Indian Penal Code. Subsequently, allegations have been raised against the accused persons for having committed offences punishable under the Unlawful Activities (Prevention) Act, 1967 also.

The special court has taken cognizance on the final report submitted by investigating agency of Kerala State Police. Subsequently, the investigation was taken over by the National Investigation Agency and investigation was being continued under Section 173(8) of the Code of Criminal Procedure. At this juncture, the appellants do not deserve to be enlarged on bail. It was referred by the Special Prosecutor that while dismissing the earlier applications 84.

for bail and while disposing of appeals earlier, Courts have taken the view that there is reasonable grounds to attract the proviso to Section 43D(5) of the UAPA Act.

The court has held that the mere fact that the Courts earlier have taken a view on the play of the proviso to Section 43D(5) shall not fetter the right of the appellants to claim bail at later stages of the investigation, if sufficient circumstances are there. In this case the final report had been filed, but the NIA does not stand by the final report rigidly. According to them, further investigation is in progress. Investigation cannot evidently go on endlessly. There must be a sense of expedition on the part of the investigators to complete the investigation at the earliest. The court has fixed the time within which the final report of the NIA investigation has to be submitted. The court has said that “We are conscious of the challenges before the investigators in a crime like this. It is not our intention to prescribe any rigid time frame for completion of investigation. That the investigators need further time to complete the investigation, and collect materials against the appellant, shall not be reckoned as a relevant circumstance after the date which was fixed by this court. Investigation will have to be completed at the earliest. If investigation is not completed by then, needless to say, the appellant shall be at liberty to renew his application for bail and thereupon the question shall be considered afresh as to whether the appellant deserves to be granted bail in accordance with the proviso to Section 43D(5).

4.7. Retrospective Validity of Illegal custody- Defeat Justice

In the case of Sayed Mohad. Ahmed Kazmi Vs. State, GNCTD and Others, Kazmi was apprehended in relation to causing explosion involving an Israeli Embassy Vehicle and produced before the Chief Metropolitan Magistrate (CMM), NIA Special Court who has remanded to police custody and later a judicial custody. Before expiry of 90 days period of his custody, an application of prosecution was allowed by the Chief Metropolitan Magistrate extending the period of investigation and custody for another period of 90 days which was declared as illegal on appeal by the Additional Session Judge stating that it is only the session

85. AIR 2013 SC 152; (2013) Bom CR(cri) 111.
judge and not the Chief Metropolitan Magistrate is having the competence to extend the judicial custody of the accused for another period and hence the custody of appellant was illegal.

On the next hearing before the CMM appellant field application under section 437 of Cr.P.C. seeking regular bail which was dismissed despite the observation made by the Additional Session Judge. Further, appellant filed application under section 167(2) of Cr.P.C seeking default bail as no charge sheet has been filed within the 90 days period of the Appellant’s custody. The accused will be entitled to bail not on the merits of the case but on account of the default of the investigating agency to complete the investigation within the prescribed limit of 90 days from the date of the first remand of the accused. It was observed by the Supreme Court that the application under section 167(2) was listed for hearing but instead of hearing the application the CMM adjourned the hearing and de-notified the date of hearing allowing the state to file fresh application seeking extension of custody. The CMM allowed the application of the state for extension of custody instead of hearing upon the application of appellant for default bail. The said application was dismissed by the CMM and further investigation and custody was extended for 90 days.

The Supreme Court has not accepted the procedure adopted by the CMM who was biased while giving undue advantages to the state. Moreover, by allowing the extension of custody for another 90 days the CMM has tried to give retrospective validity to illegal custody which has defeated the statutory right of appellant to bail on failure of state to file charge sheet even after expiry of 90 days. It is a well established principle of criminal law that if accused does not exercise his right to grant statutory bail before charge sheet is filed then he loses his right to such benefit once the charge sheet is filed and thereafter only regular bail can be applied. Once the bail application made under section 167(2) is granted mere by filing charge sheet subsequently does not amount to cancellation of bail and the state prosecution must apply under section 437 (5) or 439 (2) for cancellation.

4.8. Victims Right to Appeal

Prior to the Amendment Act of 2008, a victim was only seen as an informant/complaint who sets the system into motion by informing the police about the occurrence of a cognizable offence under section 156(3) of Cr.P.C or by the approaching a Magistrate with his complaint under section 190 of Cr.P.C. The victim was not given the right to seek information on progress of the investigation and his participation in the investigation process was also dependent on the need of the investigation agencies.

Even in matters of acquittal of the accused the right of appeal against the order/Judgment of acquittal was given to the state which was made subject to the leave of the High Court. Though in a complaint case the right of appeal against the order/Judgment of acquittal is given to the complainant but the same is also made subject to special leave from the High Court. And in police case, the said right of appeal is only given to the state and not to the complainant or the victim. However, in case where the state prefers not to file an appeal, the complainant or the victim has been provided the remedy of revision but the power of revisional court under Section 401 of the code was very limited as the revisional court cannot convert the order of acquittal into the order of conviction and therefore, the only relief which could be claimed by the victim in revision was to order either re-trial and remand.

The Malimath committee and the law commission recommendation have brought many changes in the Code of 2008. Victim and Victim’s right to appeal is found place in section 2(wa) and 372. The newly added provision of 372 of the code, for the first time confers right on the victim to appeal in Criminal Jurisprudence of our country. The said provision specifies three situation in which the victim can file and these are as follows:-

(a) Against acquittal of the accused, or
(b) Conviction of the accused for a lesser offence, or
(c) For inadequate compensation.

89. See Bhagwant Singh Vs. Commissioner of Police (1985) 2 SCC 537.
90. The code of Criminal Procedure, 1973,Section 378(1) & (2).
91. Ibid, Section 378(3).
92. Ibid, Section 378(4).
93. Ibid, Section 401(3).
It is to be noted that the provision does not provide for the victims right of appeal for enhancement of sentence which still remain the prerogative of the State under section 377 of code. Since no amendment was made to section 378, therefore, a question arises that whether or not leave to appeal of the High Court would be required in case of appeal against acquittal. There was division of High Court Judgment on this issue. In the Bhikhabhai Motibhai Chanda Vs. State of Gujarat,\textsuperscript{94} the complainant preferred an appeal against the order of acquittal in spite of the fact that the State has already preferred an appeal against the order of acquittal in which the leave has been granted by the High Court and the appeal was admitted. The Bench held that the victim’s right of appeal is neither absolute nor higher than that of the state and only if the state is not pursuing the matter with a proper spirit the victim may validity raise a grievance and file an appeal.

The Division Bench of Patna High Court in Guru Prasad Yadav Vs. State of Bihar\textsuperscript{95} rejected the maintainability of the appeal filed by the victim without any application for grant of leave. Similar view was taken by Punjab & Haryana High Court in Ram Kauri Vs. Jagbir Singh.\textsuperscript{96} In the case of Balasaheb Rangnath Khadi Vs. State of Maharashtra,\textsuperscript{97} the two Judge Bench (Kanade J. and Thipsay J.) differed in their opinion and their the matter was placed before a third Judge Roshan Dalvi who held that the victims right to appeal under the provision to Section 372 of the Code is absolute and unfettered and is a part of his human rights. The court is duty bound to hear the appeal on merits and allow it or dismiss it on merit.

By making the amendment to the code the legislature has attempted to give due recognition to the rights of the victim in the Criminal Justice system. The right of appeal was brought with an idea to ensure that the victim would not go without remedy even if the state fails to perform its duty. But when the said right to appeal of the victim came for application the provision led to disparate interpretation. The judicial pronouncement has shown that the provision to Section 372 was added without much deliberation and non application of mind by the law maker.\textsuperscript{98}

\textsuperscript{94} (2010) Cri LJ 3325 (Guj).
\textsuperscript{95} Criminal Appeal number 582 of 2011.
\textsuperscript{96} (2010) 3 RLR (Cri no. 391)
\textsuperscript{97} Bom. CR(Cri) 632.
4.9. President and Governor’s Pardoning Power - Terrorist Related Offences

Article 72 and 161 of the Constitution of India confer pardoning power on the President and Governor respectively for providing remedy to convicts. The nature of power may provide remedy as of respite, reprieve, remission, commutation, suspension of sentences and pardon for all offences except the death sentence which was already been executed. In India, Pardon power is neither a matter of grace nor of privilege but is an important constitutional responsibility which is executive in nature and it expected to be exercised on the aid and advice of the Council of Ministers. The Pardoning power in England has been seen as an act of grace and humanity exercised by the Sovereign to safeguard from judicial error or other reasons of the state. In US the pardoning power of the President is found in the constitutional scheme. President scrutinizes the evidence on the record of the criminal case recorded by the court and accord pardon from the guilt. Act of the President does not amount to amending or modifying or superseding the judicial record.

India before it executed Ajmal Kasab and Afzal Guru last year, who were convicted and sentenced to death in terrorist activities, had an execution free run for a period of 8 years. The manner in which it was executed has led many to believe and argue that India must consider the utility and desirability of retaining the power of President and Governor and the manner of its exercise. The Supreme Court rulings have averted at least 19 imminent executions in all in the recent past.

In the cases of Devender Pal Singh Bhullar Vs. State (NCT) of Delhi the Court has refused to commuted the death sentence of the convict persons on the ground of inordinate delay in the execution of sentence and mental health problems faced by the petitioner.

100. Kehar Singh Vs. Union of India & Anr., (1989) 1 SCC 204
The question before the court was that whether delayed disposal of the petition filed under Article 72 can justify judicial review of the decision taken by the President not to grant pardon and whether the Court can ordain commutation of the sentence of death into life imprisonment ignoring the nature and magnitude of the crime, the motive and manner of commission of the crime, the type of weapon used for committing the crime and overall impact of crime on the society apart from the fact that substantial delay in the disposal of the petition filed under Article 72 can reasonably be attributed to the internal and external pressure brought upon the Government on behalf of the convict by filing a spate of petitions and by using other means.

The court has held that while imposing punishment for murder and similar type of offences, the Court is not only entitled, but is duty bound to take into consideration the nature of the crime, the motive for commission of the crime, the magnitude of the crime and its impact on the society, the nature of weapon used for commission of the crime, etc. If the enormity of the crime is such that a large number of innocent people are killed without rhyme or reason, then too, award of extreme penalty of death will be justified. In such cases it cannot be characterized as arbitrary or unreasonable and the Court cannot exercise power of judicial review only on the ground of undue delay.103

Further, the court held that commutation of the sentence of death into life imprisonment cannot be invoked in cases where a person is convicted for offence under TADA or similar statutes. The seriousness of the crimes committed by the terrorists can be gauged from the fact that many hundred innocent civilians and men in uniform have lost their lives. At times, their objective is to annihilate their rivals including the political opponents. They use bullets, bombs and other weapons of mass killing for achieving their perverted political and other goals or wage war against the State.104

The Court relied on the rulings of Bachan Singh Vs. State of Punjab,105 and stated that the sentence of death can only be imposed in the rarest of rare cases. Meaning, of course, all death sentences imposed are impliedly the most heinous and barbaric and rarest of its kind

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103. Ibid.
104. Ibid.
105. (1980) 2 SCC 684
which includes terrorist offences also. All the terrorist cases stand on altogether different footing and cannot be compared with murder committed due to personal animosity or over property disputes.

The court while rejecting the petition for commutation of death sentence to life imprisonment on the ground of inordinate delay alone has relied on the minority views in the case of Smt. Triveniben Vs. State of Gujarat\textsuperscript{106}, and stated that the court cannot take into account the time utilized in the judicial proceedings up to the final verdict or the time taken for disposing of writ petition after the final judgment affirming the conviction and sentence. The inordinate delay may be a significant factor but that alone itself cannot render the execution unconstitutional.\textsuperscript{107} The court can review the act administrative authority only after satisfying that the delay was not caused at the instance of the accused himself.\textsuperscript{108}

On January 21, 2014, the Supreme Court in the case of Shatrughan Chauhan Vs. Union of India,\textsuperscript{109} commuted death sentences of 15 death convicts of terrorist cases to life sentence. The background of the case was that these death row convicts approached the apex court as a final resort after their mercy petitions were dismissed by the President of India. The Court held that various supervening circumstances which had arisen since the death sentences were confirmed by the Supreme Court in the cases of these death row convicts had violated their Fundamental Rights to the extent of making the actual execution of their sentences unfair and excessive. Soon after this decision, the Supreme Court in V. Sriharan Vs. Union of India\textsuperscript{110}, once again invoked this strand of death jurisprudence to commute the death sentences of all the three convicts in the Rajiv Gandhi Assassination case.

In the case of Shatrughan Chauhan & Anr\textsuperscript{111} the apex court held that the ratio laid down in Devender Pal Singh Bhullar is per-incuriam and here is no good reason to disqualify all TADA cases as a class from relief on account of delay in execution of death sentence. Each

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\item \textsuperscript{106} (1988) 4 SCC 574
\item \textsuperscript{107} (1988) 4 SCC 574
\item \textsuperscript{108} Ibid.
\item \textsuperscript{109} (2014) 3 SCC 1.
\item \textsuperscript{110} (2014) 4 SCC 242.
\item \textsuperscript{111} (2014) 3 SCC 1.
\end{itemize}
case requires consideration on its own facts. Further, this Court in *Yakub Memon Vs. State of Maharashtra*¹¹² and in subsequent cases commuted the death sentence passed in TADA case to imprisonment for life. The Court has held that unexplained delay is one of the grounds for commutation of sentence of death into life imprisonment and the said supervening circumstance is applicable to all types of cases including the offences under TADA. The only aspect the courts have to satisfy is that the delay must be unreasonable and unexplained or inordinate at the hands of the executive.¹¹³ A distinction cannot be drawn between IPC and non-IPC offences since the nature of the offence is a relevant factor is liable to be rejected at the outset.¹¹⁴ The court has laid down certain factors required to be framed as guidelines by the Union Government for deciding the mercy petitions.¹¹⁵

1. Personality of the accused (such as age, sex or mental deficiency) or circumstances of the case (such as provocation or similar justification);
2. Cases in which the appellate Court expressed doubt as to the reliability of evidence but has nevertheless decided on conviction;
3. Cases where it is alleged that fresh evidence is obtainable mainly with a view to see whether fresh enquiry is justified;
4. Where the High Court on appeal reversed acquittal or on an appeal enhanced the sentence;
5. Is there any difference of opinion in the Bench of High Court Judges necessitating reference to a larger Bench;
6. Consideration of evidence in fixation of responsibility in gang murder case;
7. Long delays in investigation and trial etc.

The Court has also laid own guidelines for effective governing of the procedure of filing mercy petitions and disposal of the same so that the executive action and the legal procedure adopted to deprive a person of his life or liberty must be fair, just and reasonable for even death row prisoners, till the very last breath of their lives. The guidelines laid down by the court are as follows:¹¹⁶

¹¹⁴. *Ibid*.
1. Solitary or single cell confinement prior to rejection of the mercy petition by the President is unconstitutional.

2. There should be provision in the Prison Manuals for providing legal aid, for preparing appeals or mercy petitions or for accessing judicial remedies after the mercy petition has been rejected.

3. As and when any such petition is received or communicated by the State Government after the rejection by the Governor, necessary materials should be called at once fixing a time limit for the authorities for forwarding the same to the Ministry of Home Affairs. After getting all the details, it is for the Ministry of Home Affairs to send the recommendation/their views to the President within a reasonable and rational time.

4. Prison manual must contain provision for informing the prisoner or his family of the rejection of the mercy petition by the Governor.

5. Death convicts are entitled as a right to receive a copy of the rejection of the mercy petition by the President and the Governor.

6. A minimum period of 14 days may be stipulated between the receipt of communication of the rejection of the mercy petition and the scheduled date of execution.

7. The prisoner must be allowed to have a last and final meeting with his family members.

8. There should be regular mental health evaluation of all death row convicts and appropriate medical care should be given to those in need.

9. The Prison Superintendent should be given discretion to stop an execution on account of the convict’s physical or mental ill health.

10. Final Meeting between Prisoner and his Family: The prison authorities must facilitate and allow a final meeting between the prisoner and his family and friends prior to his execution.

11. The Jail Manuals must provide for compulsory post mortem to be conducted on death convicts after the execution.

Long awaited hesitation of the judiciary was done away by the judgment in Shatrughan case. The Judiciary has at number of occasion has decline to frame any guidelines for exercise of those power due to presumption that constitutional authority acts with application of mind\textsuperscript{117} and the nature of power enshrined in Article 72/161. The Supreme Court of India in the case of Murum case did recommend the framing of guidelines for the exercise of power under Articles 72/161 of the Constitution so that there cannot be any scope left for exercise of Power

\textsuperscript{117} Bikas Chatterjee Vs. Union of India (2004) 7 SCC 634.
malafidely.\textsuperscript{118} In the case of Shatrughan the Court has changed its attitude as far as article 72 and 161 is concerned and was of the view that the executive orders under Article 72/161 should be subject to limited judicial review based on the rationale that the power under Article 72/161 is per se above judicial review but the manner of exercise of power is certainly subject to judicial review. In \textit{Narayan Dutt Vs. State of Punjab},\textsuperscript{119} the Court has stated that the act of the Governor without the advice of government or exceeding its jurisdiction or non-application of mind while exercising power or malafideness or action based on extraneous consideration or relevant material not consulted, and exercise of power is arbitrary in nature are the grounds on which the exercise of power by the Governor may be challenged.\textsuperscript{120}

Therefore, the impugned order of the President and Governor under Article 72 or Article 161 is subject to judicial scrutiny. Though the President/Governor is not bound to hear a petition for mercy and exercise of power is a matter of discretion wherein the courts would not interfere with the decision on merits. However, the courts retain the limited power of judicial review to ensure that the constitutional authorities consider all the relevant materials before arriving at a conclusion. It is surprising to note that what has not been contemplated in words or intended to be provided in the constitution has been expressly provided by the court and has put limitation on the exercise of pardoning power.

\textbf{4.10. ‘\textit{Enrica Lexi}- Marine Case} \\

Two fishermen namely Ajesh Bikini and Gelasine native of Tamil Nadu, were murdered by two Italian Marines abroad an Italian ship “\textit{Enrica Lexie}” who fired on them with automatic weapons which occurred at 20.5 nautical miles off the Kerala coast. Both were charged under section 302, 307 427 and 34 of IPC, Article 3 of the Suppression of Unlawful Act of International Maritime Navigation. The Italian Consul has filed a petition before the Kerala high court for staying all the proceedings against the mariners alleging that the Kerala police have no jurisdiction to investigate as the incident occurred beyond the Indian territorial waters and the accused is entitled for sovereign immunity.\textsuperscript{121}

\textsuperscript{118} \textit{Maru Ram Vs. Union of India}, paras 62, 63 & 65.  
\textsuperscript{119} \textit{(2011) 4 SCC 353}, para 24.  
\textsuperscript{120} \textit{Ibid}.  
\textsuperscript{121} \textit{Republic of Italy & Ors. Vs. Union of India & Ors.}, \textit{Writ Petition (Civil) No. 135 of 2012}, available at \url{http://judis.nic.in/supremecourt/imgs1.aspx?filename=39941} [accessed on 04-02-2015 at 6.40 p.m.]
The High court held that ‘combined reading of Article 33 and 56 would show that in CZ/EEZ, the costal State has the sovereign right with regard to exploring and exploiting, conserving and managing the national resources whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, current and winds. The exercise of above power shall be in accordance with the provisions of the convention and the costal State has right to protect its nationals exercising their legitimate rights inside the coastal State’s CZ/EEZ, and no one is allowed to simple shoot and kill at its will and then get away with its act on the ground that it happened beyond the territorial waters of the costal State. The court held that the Italian Marines accused were liable to be dealt with under Territorial water Act, IPC, Cr.P.C and SUA Act. 122

Further, Justice P.S. Gopinathan of High Court of Kerala has declared that the shooting of two Indians is not an act in exercise of sovereign function. It is not an action in defence of the State or vessels, but it is private, illegal and criminal act and they are not entitled to any sovereign immunity. The Italian Counselors have gone to the Supreme Court (SLP) against the judgment of High court. The question before the Supreme Court was whether State of Kerala or Union of India have jurisdiction to try mariners? Another question pertaining to sovereign immunity was raised.

The Supreme court has denied to hold jurisdiction in favour of State of Kerala to investigate into the incident as it took place at 20.5 nautical miles beyond its statutory limit of 12 nautical miles and it is Union of India which has jurisdiction to proceed with the investigation and trial and special court may be set up to try the cases and the pending proceeding before the Chief Judicial Magistrate stands transferred. The court has not conclusively decided upon the jurisdiction matter. The court held that though the Maritime Zone Act extended the application of IPC to EEZ, the incident happened was beyond the territorial jurisdiction of Kerala. The effect of notification was to extend the powers of the union and not of federal unit. Inclusion of section


188A to the Cr.P.C. which extends the criminal jurisdiction to EEZ does not expands to the State of Kerala. The court noted that this judgment will not prevent the petitioners invoking the provisions of Article 100 of UNCLOS 1982, upon questioning of jurisdiction of the Union of India to investigate into the incident and for court of India to try the accused may be reconsidered.

The Union of India has conferred the investigation of the case to NIA in April 2013 which was again challenged before the Supreme Court. The court sought response from the centre. On 06-02-2014 the MHA has superseded its sanction order and thus deleted section 3 of SUA Act. Hence, NIA has ceased to have jurisdiction in view of the mandate of section 3 of the NIA Act though the NIA was never consulted. In absence of SUA charges in the present case, the specialized agency to probe terror related matter is legally barred from probing the case. By a fresh plea before the court it was contended that the extending the whole of IPC to the exclusive Economic Zone is ultra vires of the Marine Zones Act, 1976.\(^{123}\) The Italian Consular have also raised contention regarding the jurisdiction of the NIA to probe into the case which is pending for disposals by the Supreme Court.

4.11. Conclusion

When enactment of anti-terrorism laws came before the Supreme Court for adjudication, the court has tended towards identifying its role as a mediator between the competing claims of national security and fundamental rights rather act as a guardian of fundamental rights. In the case of Pragyasingh Chandrapal Singh case the constitutionality of the National Investigation Agency Act, 2008 was upheld by the Division Bench of Bombay High Court and the appeal against it is pending before the Supreme Court. The Division Bench without stressing on the need of defining the federal crime has upheld that due to nature of terrorism as transnational in nature, it is federal crime and need to be combated by effective legislation and law enforcement machineries. The Court has find the legislative competence of the Parliament from referring to article 248 read with 97 of the Union List-I, article 250 to 253, entry 93 of List-I. The Court has responded in favour of legislative power of the Parliament even though the ‘Police’ and ‘law and order’ is a subject matter for state to legislate. When the question came

regarding preventing and combating terrorism, the organs of the states must be careful to fill the
gap wherever it was highlighted and not to cover it in the name of balancing the conflicting interest.

Legislations scheduled to the NIA Act are passed by the Parliament but the enforcement
agencies therein are the state only. Terrorism being highlighted to be a transnational crime can
be effectively be tackled by cooperation of all the state and recognizing their due existence in
such a grave matter. Law can be passed by the parliament in national interest provided other
requirement has been fulfilled. In the name of giving effect to the international conventions,
treaties and agreement when there is no universal understanding on its definition and nature,
application of the same without highlighting the local needs and requirement of the state police
structure is breach to the federal structure of the constitution. On earlier occasion also the
judiciary has responded in favour of legislative competence of the parliament in enacting anti-
terrorist laws in India. It was found that while applying the Armed Forces Special Powers Act,
1958 it was brought to the noticed of the court about the violation of human rights and abuse
of power by the law enforcement agencies and false killing was established but still the court
has not taken burden to hold the Act as ultra virus.

The Division bench was eroded in its decision while upholding the section 6 of the NIA
Act as intra virus to Article 14 and 21. Nowhere in the bare provision of the Act, it was
provided that the reason for forming opinion or satisfaction of central government must be
recorded in writing but the court has referred it. Where there is absence of a statutory requirement
to give reason, an administrative order need not to be a speaking order except where there
was a provision for an administrative appeal.

Section 6 of the Act does not empower the NIA for reinvestigation or Denovo or fresh
investigation but only further investigation. The investigation is procedural in nature and there is
no vested rights created in the accused to object to the course permitted by the statute. It was
held that those who joins an organization but do not share and participates in its unlawful
objects are not threat to the nation and may be granted bail. The UAPA made an offence for
just being a member of unlawful association. Indulgence in terrorist act by DHD (J) did not
depend on whether it was declared as an unlawful association or not but it was the commission of terrorist act which resulted in the said organization being declared as unlawful association. Further detention can be extended by the special court and the source of power to grant bail lies in section 43D and section 437 of the Code and not section 439. A person who is already in jail can be detained under the UAPA and there is no prohibition in law to pass such detention order. The high court cannot invoke its power under section 439 to grant or refused to grant bail and cancel the bail if already granted by the special court. The jurisdiction of the session court and High Court is excluded. The order granting or refusing to grant bail is an interlocutory order and no appeal would lie against such order except under section 21(4). The principles of res judicata are not applicable to bail applications. But, repeated filing of successive bail applications without there being any change of circumstances would lead to bad precedents. Section 21 (4) of the NIA Act departed from general rule contain in section 437 to 439 of the Code.

Victim’s right to appeal is found place in section 2(wa) and 372. It is to be noted that the provision does not provide for the victims right of appeal for enhancement of sentence which still remain the prerogative of the State under section 377 of code. There was division of High Court Judgment on this point.

The apex court in Shatrughan Chauhan declared the ratio laid down in Devender Pal Singh Bhullar case as per-incuriam and here is no good reason to disqualify all TADA cases as a class from relief on account of delay in execution of death sentence. The court has laid down certain factors required to be framed as guidelines by the Union Government for deciding the mercy petitions. The Court has also laid own guidelines for effective governing of the procedure of filing mercy petitions and for the cause of the death convicts so that the executive action and the legal procedure adopted to deprive a person of his life or liberty must be fair, just and reasonable for even death row prisoners, till the very last breath of their lives. Therefore, the impugned order of the President and Governor under Article 72 or Article 161 is subject to limited judicial scrutiny.