CHAPTER-6
EFFICACY OF UNLAWFUL ACTIVITIES (PREVENTION) ACT AND NATIONAL INVESTIGATION AGENCY ACT TO PREVENT AND COMBAT TERRORISM

6.1 Introduction

Indian Anti-Terrorist laws are the upshot of reactive measures towards the terrorist incident transpired causing violence, loss of life, liberty, threat to security of person and property, creating disorder and fear in the society and above all challenging the sovereignty, unity and integrity of India. It is expected that set of laws should be framed within the rule of law framework in a democracy to prevent and combat all forms of terrorism effectively. Such set of law is a guiding principle for the law enforcement agencies in the operation of counter terrorism or insurgency.

Considering the vulnerability of the country to the brutal acts of terror and complexity associated therein, the government felt that conventional laws are not capable of handling the menace caused by terrorism and to bring terrorist for justice, it had relied on the stringent special laws accompanied with provisions which depart from the established principle of criminal justice system. Such legislative framework will be effective only when the offences are unambiguously defined, objects clearly spelled out, the procedure law for enforcing them are fair and efficient and execution of law are non abusive, in accordance with rule of law and with respect for human right. Legislature must have all corner debate before enacting anti terror legislation and must not come with such legislation in haste as a reactive measure empowering law enforcement agencies by limiting civil liberties.

6.2. Efficacy of The Unlawful Activities (Prevention) Act, 1967

6.2.1. Declaration of Association as Unlawful – Check on Government Powers

Section 3 of UAPA empowers the government to declare any association as unlawful association.\(^1\) Unlawful association is an association whose any of object of formation is of

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\(^1\) The Unlawful Activities (Prevention) Act, 1967, (as amended upto 2012), Section 3 (1).
unlawful activity or which encourages or aids person to undertake unlawful activity or whose members undertakes any unlawful activity including the activity punishable under section 153A and 153B of IPC. Unlawful activity means an act committed by an individual or association or presentation made by them either by words spoken or written or by sign or by visual mode with having intention or supporting or inciting the cession of a part of the territory of India; or disclaims, question, disrupts the sovereignty and integrity of India; or causes or intended to cause disaffection against India. Secession of a part of territory of India includes the assertion of any claim of foreign country or to determine whether such part will remain a part of the territory of India.

The procedure limit is placed upon the government exercise of power while declaring any association as unlawful. The declaration of government shall by notification in the official gazette. Such notification shall specify the grounds for issuing it and other particulars as the government think necessary except those which are against the public interest. The declaration will not be effective unless it is confirmation by the tribunal and such order of tribunal shall be published. The government shall refer the notification to the tribunal for adjudication within 30 days from the date of its publication. Such notification shall also be published at least in one daily newspaper and it shall be served upon the association by affixing a copy of it at conspicuous place of the office or serving a copy on principal bearer of association or by proclamation by beating of drums, use of loudspeaker or any other manner as may be prescribed.

On the receipt of reference the tribunal shall serve notice to the affected association to show cause within 30 days as to why it should not be declared as unlawful. The tribunal may hold an inquiry as per section 9 and after receiving reply from the association and calling further information from the government if required may confirm the declaration made in the notification or cancel the same. On confirmation by tribunal, the notification of government declaring the association unlawful will remain in force for a period of five years unless cancelled.

2. Ibid, Section 2 (p).
3. Ibid, Section 2 (o).
4. Ibid, Section 2 (b).
5. Ibid, Section 2 (i).
6. Ibid, Section 3 (2) and (3).
7. Ibid, Section 4 (1).
8. Ibid, Section 3 (4).
9. Ibid, Section 4 (2), (3) and (4).
10. Inserted by Section 3 of Unlawful Activities (Prevention) Amendment Act, 2012
11. Ibid, Section 6.
Exceptional power is also confirmed on the government to declare an association to be unlawful with immediate effect after publication in official gazette by passing the tribunal power which was sin quo non for giving effect to the notification. Such order of tribunal can be taken after its enforcement.\(^\text{12}\)

6.2.2. Power and Function of Unlawful Activities (Prevention) Tribunal

The central government is authorized to constitute a ‘Tribunal’ to be known as “Unlawful Activities (Prevention) Tribunal” presided over by a judge of High Court and properly staffed for discharge of its function.\(^\text{13}\) The tribunal is having power to decide whether the sufficient cause was there for declaring association as unlawful by the government and accordingly by order it may confirm or reject the notification of government within six month from the date of such notification.\(^\text{14}\)

The tribunal is having power to regulate its own procedure for all matters including the place for holding its sittings.\(^\text{15}\) The tribunal is having power of inquiry\(^\text{16}\) and for such purpose its having same power as a civil court in respect of summoning and enforcing the attendance of witnesses and examine him on oath; discovery and production of any document or other material as evidence; receive evidence on affidavit; requisitioning any public record from court or office; and issuing of any commission for the examination of witness. The proceeding of tribunal is a judicial proceeding and shall be deemed to be a civil court for the purpose of section 195 of the IPC.\(^\text{17}\) The decision of the tribunal is final.\(^\text{18}\)

6.2.3. Effect of Declaration of Unlawful Association

Upon declaration of association as unlawful, a person is prohibited- to be a member or continue to be a member of such association; take part in its meeting; contribute or receive any contribution for the purpose of association; assist the operation of association shall be

\(^{12}\) \textit{Ibid}, Proviso, Section 3(3).

\(^{13}\) \textit{Ibid}, Section 6 (1) and (3).

\(^{14}\) \textit{Ibid}, Section 4 (3).

\(^{15}\) \textit{Ibid}, Section 6 (5).

\(^{16}\) \textit{Ibid}, Section 3, 4, 5 and 9.

\(^{17}\) \textit{Ibid}, Section 6(6) and (7).

\(^{18}\) \textit{Ibid}, Section 9.
liable for imprisonment up to two years and fine. If a person is a member or continues to be a member of unlawful association and does any act aiding or promoting the object of the association and in possession of firearms, ammunition, explosives or other substance capable of mass destruction and commits any act resulting in loss of life or grievous hurt or damages any property shall be punished with death or imprisonment of life and fine if his act causes death of any person and in other case imprisonment for five years which may extend to life and fine.\(^{19}\)

The persons who are in possession of money, securities or credits which are being used or intended to be used for the purpose of unlawful association then the government may prohibit the person from paying, delivering, transferring or dealing in any manner with such money. Contravention of the order shall make him liable for imprisonment up to three years or fine or both.\(^{20}\)

Consequent upon declaration of unlawful association, the government may notify the building, house, tent or vessels used for the purpose of unlawful association and prohibit any person from using the same and making any entry therein. Contravention of this prohibitory order shall make the person liable for imprisonment up to one year and fine.\(^{21}\)

A person who takes part in or commits or advocates, abets, advise or incites the commission of unlawful activity shall be liable for imprisonment up to seven years and fine. If person assist any unlawful activity for unlawful association so declared shall be liable for imprisonment up to five years and fine.

### 6.2.4. Notification and De-notification of Terrorist Organisation

The Minister of State for Home, Sri R.P.N Singh has informed to the Lok Sabha that government has identified sixty five terror groups active in the country\(^{22}\) out of which thirty seven were banned as terrorist organisation and listed in the schedule.\(^{23}\) (Add list of banned

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terrorist organization) Section 2(m) has failed to give precise meaning to terrorist organisation except referring that it means an organisation listed in the schedule or it is operating under the same name as an organisation so listed in the schedule.\textsuperscript{24} The central government can add any organisation in the schedule if such organisation commits or participate in acts of terrorism or prepares, promotes or encourages or is otherwise involved in terrorism. It has also added in the schedule all terrorist organisations so declared by UN Security Council.\textsuperscript{25}

It also having power to remove or amend the schedule. The affected organisation or any person so affected by such inclusion in the schedule can make an application to Secretary to the Government of India sitting forth the grounds for removal of the organisation from the schedule. The government within 45 days from the receipt of such application shall dispose of the matter. If the application was granted then the organisation will be de-notified from the schedule otherwise on rejection the applicant may within 30 days apply to the review committee whose decision shall be binding on both the parties.\textsuperscript{26} Though the government is empowered to declare any organisation as terrorist organisation but the statute has not obligated the government to give reason for such declaration. Therefore, the government is unchecked to exercise its power and add any organisation in the schedule till the review committee makes an order contrary to it. Many a times the government has misused its power just for political gain or rift. A Sikh group filed a lawsuit demanding the federal court to declare the RSS as a foreign terrorist organisation and accordingly the court issued summons for US Secretary of state John Kerry to respond to the suit within 60 days.\textsuperscript{27}

6.2.5. Membership of Terrorist Organisation

A person who intentionally further the activities of a terrorist organisation and associates himself or profess to be associated with a terrorist organisation is said to commit an offence relating to membership of a terrorist organisation. Being a member of terrorist organisation is a

\begin{footnotesize}
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\item[24.] The Unlawful Activities (Prevention) Act, 1967, Section 2(m).
\item[25.] The Unlawful Activities (Prevention) Act, 1967, Section 35.
\item[27.] "Designate RSS as a foreign terrorist organisation: Sikh group files case in US", Available at http://www.firstpost.com/world/designate-rss-foreign-terrorist-organisation-sikh-group-files-case-us-2058693.html [accessed on 27-01-2015 at 1.43 a.m.]
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punishable offence liable for imprisonment for a term not exceeding 10 years or fine or both. The only escape for the accused is to prove that first, the organisation was not declared as terrorist organisations at the time when he became member or began profess to be member. Second, he has not taken any part in the activities of organisation after its inclusion in the schedule. It is important to note that lack of knowledge about the declaration of terrorist organisation was not taken as a relevant defense. Moreover, the membership in terrorist organisation is created as offence but it was not defined that what constitutes membership. Only on the ground that he was associated or professed to be associated with the terrorist organisation is sufficient for the police to arrest the person declaring that he is a member and the mensrea part of section 38 will be defended along with association clause only in trial before the court till then his liberty can well be curtailed by the government who has created vacuum in law to exercise power to achieve its ulterior objectives.

Members of Kabir Kala Manch were arrested for being a member or terrorist organization. Mumbai High Court granted bail taking note that the charges filed indicated that they were sympathetic to the Maoist philosophy but not active member of the Maoist organization. The court said that ‘drastic provision’ were added in UAPA which required that membership in an illegal organization be interpreted in the light of fundamental freedoms such as the rights to free speech and expression and thus ‘passive membership’ was insufficient for prosecution. A lower Sessions court in Mumbai denied bail to Mrs. Sathe who is eight months pregnant was denied bail. Dr. Binayak Sen, a physician and human rights activist, was convicted for sedition for allegedly acting as a courier for Naxalite leader in jail. Later he was awarded with Jonathan Mann for Global Health and Human Rights. He was released by the Supreme Court saying that he may be a sympathizer that does not make him guilty of sedition.

6.2.6. Support to a terrorist organisation

Section 39 of UAPA provides that a person who commits the offence relating to support given to a terrorist organisation is liable for imprisonment for a term not exceeding 10 years or fine or both. It is important to note that lack of knowledge about the declaration of terrorist organisation was not taken as a relevant defense. Moreover, the membership in terrorist organisation is created as offence but it was not defined that what constitutes membership. Only on the ground that he was associated or professed to be associated with the terrorist organisation is sufficient for the police to arrest the person declaring that he is a member and the mensrea part of section 38 will be defended along with association clause only in trial before the court till then his liberty can well be curtailed by the government who has created vacuum in law to exercise power to achieve its ulterior objectives.

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years or fine or both. A person is said to give support to terrorist organisation when he is having the intention to further the activities of terrorist organisation by inviting support. Such support is not restricted only to provide money or other property. A person with intent to further the activities of terrorist organisation arrange or manage or assist in arranging or managing a meeting and he is having the knowledge that such meeting is to solicit support or further activities of terrorist organisation or the meeting was address by a person who associated with or profess to be associate with the terrorist organisation is an offender under the Act.30

There is a lacuna in assigning a meaning to the term ‘support’ which was not clearly defined by the UAPA. The definition of it is also not covered in the Indian Penal Code or the Code of Criminal Procedure. The term support even if construed in economic sense is already covered by many section of the Act and repetition of the same has caused confusion and duplicacy of the content giving wider scope of its misuse. When the terms like abet, advocates, attempt, incite etc has been used at different places and particularly in section 18 then the desire to use such term as open the flood gate for police to act on the direction of political leaders to take revenge.

The Chief Minister of Tamil Nadu, Smt. Jayalalitha directed to arrest several member of rivalry party including Vaiko (MDMK) leader for showing sympathy by making speeches for LTTE. He was made to be in jail unless released after eighteen months. Yasin Malik in J&K was arrested under POTA for being sympathetic toward the separatist movement but soon released after the government gets changed. Chief Minister Mayawati allowed the arrest of Raja Bhaiya and Mulayam Singh government released him.31 All these examples show the arbitrary application of anti-terrorism laws particularly for supporting any group on sympathetic basis.

6.2.7. Terrorist Financing Offences

Terrorist financing is criminalized under UAPA after amendment in 2004, 2008 and 2012 in fulfilling obligation under International Convention for the Suppression of the Financing

Terrorism. Section 17 of UAPA makes it a criminal offence for raising or collecting or providing funds, either directly or indirectly from legitimate or illegitimate source or attempts to provides such funds to a person(s) with knowledge that such funds are likely to be used by person(s), or by terrorist organization or terrorist gangs or by individual terrorist\(^{32}\) to commit a terrorist act. It is immaterial whether such funds are actually used or not. Punishment attached to person is imprisonment for a period not less than 5 years but may extend to life imprisonment and also fine. Section 40 of UAPA, further state that raising of funds for terrorist organization by inviting others to contribute or receive or providing money or property with intent to further terrorist activities of terrorist organization is punishable with imprisonment for not exceeding 14 years or fine or both.

Explanation to section 17 is inserted by UAPA amendment 2012 which has enlarged the scope of its application. Raising funds shall include raising or collecting or providing funds through production or smuggling or circulation of high quality counterfeit Indian currency and providing benefits which are not specifically covered under section 15 of the Act. The Investigation of High Quality Counterfeit Currency Rules, 2013 have been notified as the guiding principles for the law enforcement agencies for investigation of such cases under the UAPA amendment Act of 2012. Further the third schedule of UAPA which defines the security features of High Quality Counterfeit Indian Currency Notes has been amended by expanding the list of security features.\(^{33}\) The term fund was not defined in the Act but may be construed with the meaning of property given under section 2(h) of the Act.

Section 40 clearly requires the presence of intention but the same was missing form section 17. Section 17 does not require a specific intention but refers ‘knowledge’ that such funds are likely to be used to commit terrorist act. Therefore, knowledge of mere possibility of such use suffice and it does not matter whether such funds are actually used or not for the commission of terrorist activities. It excludes a situation where the donor, raiser or provider intends the funds to be used or knows that they will be used for non-terrorist purposes, such as by JHF as family support or personal comfort expenses which are not taken care of by the law.

\(^{32}\) Inserted by section 6 of Unlawful Activities (Prevention) Amendment Act, 2012.

Section 40 refers both ‘intention’ and ‘knowledge’ that ‘reasonable cause to suspect’ that the funds could be used for terrorist purpose.

The term attempt was not used in section 40 as well covered under Section 17 of the Act. But with reference to section 18 only it may be said that conspiracy, attempt or abetment etc are within the offence category. Further, punishment provided under section 40 is imprisonment not exceeding 14 years and under section 17 the punishment provided is not less than 5 years which may extend to life imprisonment. Though both section punishes for similar nature and gravity of act but punishment provided by them varies. Section 17 prescribes a limit that the punishment shall not be less than 5 years at least and it may be extended to life imprisonment. Such limit is not prescribed under section 40 and a person may be imprisonment for a year also in the discretion of the court.

Therefore, it is required that intention may also be included in section 17, attempt to raise or invite or provide funds may be included in the section 40 and punishment provided under both the section must be brought at parity as the nature of the act is similar.

6.2.8. Proceeds of Terrorism- Power and Procedure for Forfeiture

Forfeiture of property is one of the recognized punishments in the legal system but used seldom in traditional offences unless the accused has made illegal gains by commission of offences. Forfeiture of property is effectively employed in economic offences where the offender has made illegal gains without justification.\textsuperscript{34} Chapter V of UAPA deals with forfeiture of proceeds of terrorism or any property intended to be used for terrorism.\textsuperscript{35} All the proceeds of terrorism held by a person or terrorist organization or terrorist gangs are liable to be forfeited to the central or state government. It is immaterial whether they are prosecuted or convicted for offence under chapter IV or V. If the proceeding has been commenced then the court may pass an order directing attachment or forfeiture of the property.\textsuperscript{36} UAPA has prohibited all from holding or being in possession of any proceeds of terrorism.\textsuperscript{37} The “proceed of terrorism”

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\item \textsuperscript{34} Subhash Goudappanavar, “Anti-Terrorist Laws in India: Forfeiture of Property: Severe Punishment. Innocents are punished”, available at http://subhashgoudappanavar.blogspot.in/2013/08/anti-terrorist-laws-in-india-forfeiture.html [accessed on 21-01-2015 at 2:00 p.m.]
\item \textsuperscript{35} The Unlawful Activities (Prevention) Act, 1967, Section 24.
\item \textsuperscript{36} Section 24A(3) inserted by section 10 of Unlawful Activities (Prevention) Amendment Act, 2012.
\item \textsuperscript{37} \textit{Ibid}, Section 24A (1).
\end{itemize}
means all kinds of properties which have been derived or obtained from commission of terrorist act or have been acquired through funds traceable to a terrorist act and includes and any property which is being used or is intended to be used for the purpose of an individual terrorist or terrorist gang or a terrorist organization.\textsuperscript{38}

The investigating officer with approval of Director General of Police (DGP) is empowered to make order seizing property or attaching property even the cash\textsuperscript{40} and after such seizure or attachment is to inform to the designated authority within 48 hours. The designated authority may confirm or revoke the order within a period of 60 days from the date of such production of property. Opportunity of being heard must be provided to person(s) whose property is in question and a copy of order must be served to him. Aggrieved person may go in appeal to the court against the order of designated authority.\textsuperscript{41} The court may revoke such order and release the property or confirm the order and order for forfeiture of such property.\textsuperscript{42} The court may direct to sale the perishable property or appoint administrator of such property with such condition as it deems necessary.\textsuperscript{43} The person aggrieved by the decision of court may prefer an appeal to the High Court within one month from the date of receipt of such order. If the high court annulled the order of lower court or the accused is acquitted from the offence under the Act then the property shall be returned or price of the forfeited property along with reasonable interest shall be paid.

Any order of forfeiture shall not prevent the infliction of any other punishment upon the accused who is liable under this Act.\textsuperscript{44} The designated authority shall investigate into any claim or objection raised by third party and may pass order accordingly unless it was made with frivolous motive causing unnecessary delay.\textsuperscript{45} Subsequent transfer of such forfeited or attached property after the order is made is null and void.\textsuperscript{46}

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  \item \textsuperscript{38} \textit{Ibid}, Section 2.
  \item \textsuperscript{39} The Unlawful Activities (Prevention) Act, 1967, Section 2(g).
  \item \textsuperscript{40} \textit{Ibid}, Section 25 and Section 33.
  \item \textsuperscript{41} The Unlawful Activities (Prevention) Act, 1967, Section 25.
  \item \textsuperscript{42} \textit{Ibid}, Section 26.
  \item \textsuperscript{43} \textit{Ibid}, Section 27.
  \item \textsuperscript{44} \textit{Ibid}, Section 28.
  \item \textsuperscript{45} \textit{Ibid}, Section 30.
  \item \textsuperscript{46} \textit{Ibid}, Section 32.
\end{itemize}
Section 33 confers additional power on the court to attach the property of accused person during the trial. The court may award forfeiture order in addition to punishment under chapter IV or VI upon a convicted person. The court can pass an order to confiscate the property if it believes that the trial of the case cannot be concluded due to death of the accused or accused is a proclaimed offender or due to any other reason. Before the UAPA amendment 2012 there was no comprehensive equivalent value of confiscation but now provision was made to forfeit property equivalent to or value of proceed of terrorism.\(^\text{47}\) Forfeiture of property amounts to deterrent effect on the dependant’s family of the terrorist who are not having any knowledge or suspicion about terrorist activities.

6.2.9. Economic Security- Power of Central government

Section 51A of the Act empowers the central government to prevent and cop up with terrorist activities and for this object it is having power to freeze, seize or attach and prohibit the use of ‘funds, financial assets or economic resources’ of individuals or entities enlisted under the schedule of the Act as suspected to be engaged in terrorism. It may prohibit any individual or entities so enlisted for making such funds or economic resources available for the benefit of such prohibited entities. This provision implies that any funds or assets which are jointly held by terrorist or terrorist organization, either with a non-terrorist are also covered.

The MHA has issued guidelines providing details about the officers designated under the UAPA responsible for receiving or providing the relevant information, list the authorities to which the list of designated individual or entities needs to be communicated and giving instructions on how the financial sectors have to deal with funds, financial assets or economic resources or related services held in the form of bank account, stock or insurance policies etc.\(^\text{48}\) Property of a designated individual, valued at more than Rs. 1.5 billion has been seized. Attached and forfeited by the Indian law enforcement authorities and courts based on the provisions of Indian laws. Two bank account suspected to be involved in financial terrorism have been frozen under 51A of UAPA.

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47. Section 33(3), (4), (5) Inserted by Section 11 of The Unlawful Activities (Prevention) Amendment Act, 2012.
Though the MHA has laid down instructions for the financial sectors but there are no appropriate measures in place to monitor the compliance with the relevant legislation and guidelines and to impose sanctions for non-compliance. Further, there is also no monitoring agency to ensure compliance with freezing mechanism outside the financial sector. Moreover, the affected person has no access to assets necessary for basic expenses. There is no safeguard that the person will in need have access to assets for basic expenses. This section has essentially empowers the government to control over the finance or movement of an individual’s on the basis of mere suspicion which is subjective standard of proof.

6.2.10. Obligation to Furnish Information

To make the investigation process in relation to terrorist offences more efficient and effective, section 43F of UAPA has conferred power upon the investigating officer to get useful and relevant information from person in possession of such information. Such power was absent in TADA and UAPA 2004 but incorporated in POTA\textsuperscript{49} and duplicated in UAPA 2008. Section 43F cast obligation upon officer or authority of central and state government, local authority like panchayati raj or municipality, officers of banks or company or firms, or other institution, establishment, organization and any individual to furnish information in his or her possession in relation to such offences when so demanded by the investigating officer. Such power must be exercised by the investigating officer with prior approval of Superintendent Police (SP) but not below to his rank.\textsuperscript{50} Failure to furnish such information or furnishing false information is an offence and punishable with imprisonment upto three years or fine or both.\textsuperscript{51}

The question arise that whether the investigating officer can seek information from other investigating officer or authority or from intelligence agencies or from any law enforcement agencies under section 43F as they are also the instrumentalities of central or state government. Failure to provide information may also bring penal liability on all these agencies. It is important to note that success of any case does not depend only on investigation but on the valuable work of intelligence, prosecution, court/tribunal adjudication and prison administration.

\textsuperscript{49} The Prevention of Terrorism Act, 2002, Section 14.
\textsuperscript{50} The Unlawful Activities (Prevention) Act, 1967, Section 43F(1).
\textsuperscript{51} The Unlawful Activities (Prevention) Act, 1967, Section 43F(2) and (3).
Therefore, it is required that all these wings must have an active coordination and accountability except the judiciary to maintain its independence.

Moreover, there is absence of judicial scrutiny as to why and how such information is relevant or useful. Executive was given unquestionable power which can be misused by them as proper procedural safeguard was not placed as in existence in Canada. Such information may be demanded by the investigating officer on application made to the judicial officer for its approval and not to the Superintendent of police (SP). Such information must be furnished before the judicial officer sanctioning the application and not before the police officer. The person giving the information must be given right to consult counsel and shall not be obligated to provide protected or privileged information under the law in force unless special order of the court is taken. It is further suggested that the NIA may be interlinked with NATGRID so to obtain and share information relating to terrorism which otherwise is protected or privileged in nature.

6.2.11. Protection of Witnesses

Efficacy of legislative response to terrorism is much depends upon nature of protection guaranteed to the witnesses. Witnesses’ protection and anonymity of witnesses is necessary due to threat to the safety, trauma, age, sex etc. Section 16 of TADA, section 30 of POTA and Section 44 of the UAPA which is similar in content to section 17 of NIA provides certain protection to witnesses. Section 44 gives discretionary power to the court to hold the proceeding of terrorist related trial in camera.52

The court on the application of witnesses or public prosecutor or suomotu may keep the identity of witnesses and his/her address secret if there is danger to the life of the witness.53 For keeping the identity and address of witnesses secret the court may undertake following measures- hold proceeding at such place as it deemed fit, avoiding mention of the name and address of witnesses in the order or judgment or any records which are accessible to the

52. The Unlawful Activities (Prevention) Act, 1967, Section 44 (1) and The National Investigation Agency Act, 2008, Section 17 (1).
53. The Unlawful Activities (Prevention) Act, 1967, Section 44(2).
public, issue direction for non disclosure of identity and address, order that the proceeding shall not be published in any manner.\textsuperscript{54} Contravention of the court decision or direction towards keeping the identity and address of witnesses secret is punishable with imprisonment upto 3 years or fine or both.\textsuperscript{55} Indian witnesses deposition was made before the members of Pakistani Judicial Commission at magistrate court in connection with Mumbai attack in high security where they are cross examined by the judicial members itself which was earlier denied.\textsuperscript{56}

It was recommended by the Madava Menon Committee\textsuperscript{57} that due facilities to the witnesses have to be provided in criminal courts and they have to be treated with appropriate courtesy. Law Commission in its seventh report stated that there is a need to balance the right of an accused to an open and fair trial with need for fair administration of justice in which the victims and witnesses can depose without fear or danger of their lives or property or those of their close relatives. Accused shall be disallowed to see the witness by using screen while recording his statement to ensure that the witness is not frighten by the presence of the accused and there is no confrontation and to save justice from miscarriage.\textsuperscript{58}

At the same time hostile witnesses giving false evidence must be dealt in accordance with the existing perjury law and shall be tried summarily and punished without waiting the end of the main trial.\textsuperscript{59} Compelling the witness presence in the court unnecessarily be avoided.

Expert witnesses are pre occupied in their daily life and may not be convenient to attend the court proceedings time and again which will impair the delivery of justice on time. Therefore, deposition of witnesses' statements and cross examinations through affidavits, audio-video conferencing etc have to be incorporated in the system.

\begin{itemize}
\item \textsuperscript{54} \textit{Ibid}, Section 44 (3).
\item \textsuperscript{55} \textit{Ibid}, Section 44 (4).
\item \textsuperscript{56} “26/11 terror attack case: Deposition of Indian witnesses before Pakistani panel begins”, NDTV, press Trust of India, September 24, 2013, available at \url{http://www.ndtv.com/article/india/26-11-terror-attack-case-deposition-of-indian-witnesses-before-pakistan-panel-begins-422941} [accessed on 14-12-2014 at 5.15 p.m.]
\item \textsuperscript{58} \textit{Sakshi Vs. Union of India}, AIR 2004 SC 3566.
\item \textsuperscript{59} The Code of Criminal Procedure, 1973, Section 344. See also, Second Administrative Reform Commission, ‘PUBLIC ORDER’ (5th Report), Government of India, New Delhi, June 2007, Para 7.7.3.6, p 96.
\end{itemize}
6.2.12. Interception of Communication

India is perhaps the only democratic nation that does not require a judicial warrant for intercepting private telephonic conversations of an individual. Unlawful Activities (Prevention) Act 1967 as amended in 2004 and 2008 provide provision for admissibility of evidence collected through the interception of communications. It states that the evidence collected through the interception of wire, electronic or oral communication under the provisions of the Indian Telegraph Act, 1885 or the Information Technology Act, 2000 or any other law for the time being in force, shall be admissible as evidence against the accused in the court during the trial of a case subject to furnishing, not less than ten days before trial, hearing or proceeding, a copy of the order of the competent authority under the aforesaid law, under which the interception was directed.60 Contrary to the UAPA, the POTA had provided a Separate chapter 5 containing detailed provisions and safeguards for interception and admissibility of it in evidence.

Interception can be done if it was believed that such interception might provide or had provided evidence of any offence involving a terrorist act and the central government certifies that interception in the interest of grounds mention in Article 19 (2) of the constitution.61 It is to be noted that, the evidence collected through interception to be admissible in the court under this section must be collected or gathered in accordance with the procedure laid down in Indian telegraph Act, 1885 or Information Technology Act, 2000. The Indian Telegraph Act, 1885 permits the Central government or state Government to direct that any message or class of messages to or from any person or class of persons or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph,...shall be intercepted or... disclosed to the government. Such interception can take place on “occurrence of any public emergency or in the interest of public safety which is sine quo non”.62

R.M Malkani Vs. State of Maharashtra,63 wherein, taped telephonic conversation which was not obtained in accordance with the interception provision of the Telegraph Act

60 The Unlawful Activities (Prevention) Act, 1967, as amendment in 2004, Section 46.
61 The Constitution of India, Article 19(2). Freedom of speech and Expression may be restricted on the grounds of “the sovereignty or integrity of India, defence of India, security of state, friendly relations with foreign states or public order.
62 Section 5 (2) The Telegraph Act, 1885.
was produced in evidence and relied upon by the Trial Court and High Court which was challenged before the Supreme Court. The court held that there is no bar in admitting relevant contemporaneous evidence even if it is obtained illegally. Supreme Court of India tried to remove the procedural anomaly in the P.U.C.L. case\textsuperscript{64} and directed the Government to follow a specific modus operandi before proceeding with the interception of messages. However, alongside laying down the procedure in P.U.C.L case, the Supreme Court stressed upon the fact that “it is entirely for the Central Government to make rules on the subject but till the time it is done the right to privacy of an individual has to be safeguarded.”

\textit{State of Maharashtra Vs. Bharat Shanti Lal Shah and others,}\textsuperscript{65} The Maharashtra Control of Organized Crime Act, 1999 has provisions for interception and safeguards for the same.\textsuperscript{66} These provisions and their safeguards similar to the directives laid down by the Supreme Court in PUCL’s case. The court observed that though the interception of communications is an invasion of an individual’s right to privacy, the right to privacy is not absolute, thus the court is required to see that the procedure itself is fair, just, and reasonable. Pursuant to the procedural safeguards formulated by the Supreme Court in the P.U.C.L case, the Central Government brought out an amendment to the Indian Telegraph Rules, 1951 but failed to remove unguided interception.\textsuperscript{67} To fill the procedural gap the interception powers laid out in the Information Technology Act were amended in 2008, and in 2009 the IT Procedure and Safeguards for Interception, Monitoring, and Decryption of Information Rules, 2009 (“IT Interception Rules”) were notified. The above two development has supplement the procedural lacuna of Unlawful Activities (Prevention) Act, 1967, 2004, 2008 and 2012 as far as the procedure for interception is concern. Even the National Investigation Agency may use the power of interception but only with the procedural safeguard which now included under the IT amendment 2008 and IT Interception Rules 2009.

\textbf{6.2.13. Restrictive Role of Review Committee}

To prevent and combat terrorism the requirement of sound legislation with fair procedure for enforcement of anti-terrorist laws are necessary. Such legislative provisions are very harsh

\begin{footnotes}
\item[\textsuperscript{64}] People’s Union of Civil Liberties \textit{Vs.} Union of India, AIR 1997 SC 568.
\item[\textsuperscript{65}] (2008) 13 SCC 5.
\item[\textsuperscript{66}] The Maharashtra Control of Organised Crimes Act, 1999, Section 13-16.
\item[\textsuperscript{67}] Rule 419-A, G.S.R. 123 (E), dated 16.02.1999.
\end{footnotes}
and are contrary to established criminal justice principle. Therefore, sufficient protection and check and balance to prevent any misuse of such stringent provisions must be present in the legislation itself. The UAPA Act provides the establishment of ‘review committee’ which is having restrictive role to play as compare to the provisions of POTA or National Security Act or COFEPOSA. Section 37 obligates the central government to establish one or more review committee for the purpose of De-notification of a terrorist organization. The committee shall consist of a chairperson who shall be a judge of a high court. It may have maximum of three members who is an officer not below the rank of secretary to the government of India and has one year of experience in legal affairs or administration of criminal justice. The Scope of power exercised by the review committee is limited to section 36 of UAPA i.e. De-notification of a terrorist organization. The committee can review the order of central government who have rejected the application of organization or affected person to remove an organization from the schedule list. The Committee may review the order of central government if it is of the opinion that the government was flawed in rejecting such application and the central government may remove the organization on the basis of the order of review committee.

The provision of POTA is much wider in application as compare to UAPA in relation to power of review committee. The power of review committee extends to De-notification of terrorist organization and to review every order of the central government authorizing for interception of communication. It had power to make order and direction upon an application whether there is a prima fascia case for proceeding against the accused and if prima fascia case is not made out then the pending proceeding against the accused shall stand withdrawn from the date of such direction. Therefore, the POTA amendment 2003 empowered the review committee to even interfere in investigation and trial and its order was binding on the investigating officer and central/state government.

68 The Unlawful Activities (Prevention) Act, 1967, Section 37 (2) and (3).
69 Ibid, Section 37 (2) and The Qualification for the Members of The Review Committee Rules, 2004, Rule 3.
70 The Unlawful Activities (Prevention) Act, 1967, Section 36 (5),(6)and (7).
71 The Prevention of Terrorist Act, 2002, Section 19,40, 46 and 60.
72 The Prevention of Terrorism (Amendment) Act, 2003, Section 2.
Under the UAPA there is no provision empowering the review committee for periodical scrutiny of the cases registered and also of prevailing situation in the areas notified as ones affected by terrorist activities as it was suggested by the Supreme Court. The review committee is to ensure that no misuse of the stringent provision of anti-terrorist laws should take place and any case in which application of such law is unwarranted then necessary remedial measures shall be taken. If the review committee is of the opinion that the application of anti-terrorist laws in a given case is unwarranted on the basis of material present before it then withdrawal of case may be recommended. On such recommendation the public prosecutor is expected to make a suitable application to the special court under section 321 of Cr.P.C. and the court must give due weightage to the opinion of public prosecutor and the recommendation of the review committee.

There are various rigorous provisions under the UAPA regarding bail, investigation, preventive detention, trial etc. which even considered necessary for preventing and reacting terrorist activities, it is equally necessary to provide for effective statutory institutional mechanism to check any misuse or abuse of provisions. The review committee must act independently and should review all the pending cases of terrorism under UAPA every three month. It should carefully examine all the evidence collected, material brought before it and then come to conclusion for withdrawal or continuing of cases till the final charge sheet is filled in the special court. the recommendation of second Reforms Committee was not given due weightage in the UAPA provision and to that extend it lacks the statutory independent institution to review the terrorist cases and place limit on the executive power to misuse the provision of UAPA on political or any other frivolous consideration infringing the basic rights of individual and organizations.

6.2.14. Cognizance of Offence

Section 45 of UAPA 2008 provides that all the courts are bared to take cognizance of an offence enumerated in chapter III of the Act pertaining to offence and penalties i.e. for being

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73 Kartar Singh Vs. State of Punjab, 1994 (3) SCC 569.
a member of an unlawful assembly, dealing with funds of unlawful assembly, contravention of
an order made in respect of notified area and for unlawful activities unless the previous sanction
of the central government or of authorized person is obtained. The provision further states that
the court shall not take cognizance of an offence enumerated under chapter IV and VI pertaining
to punishment for terrorist activities and terrorist organization unless the previous sanction of
the central government or the state government is obtained.76

The Unlawful Activities (Prevention) (Recommendation and Sanction of Prosecution)
Rules, 2008 specify seven working days time limit for the authority to make its report containing
recommendation to the Central or State government as the case may be on the receipt of
evidence gathered by the investigating authority.77 The central or state government shall take
decision regarding sanction of prosecution within seven working days after receipt of the
recommendation of the authority.78 Till the decision of the central or the state government is
taken the offence is within the perview of state law enforcement agencies. Compare to law
commission recommendation in clause 31(1) for ten days time period for DGP and 30 days for
review committee, the UAPA do provide much less time and prompt action on terrorist related
matter at the disposal of authority of government. But no time limit is prescribed for investigating
officer to give report to the authority for further course of action.

6.2.15. Protection of executive action done in good faith – official Immunity

Section 49 of UAPA 2008 is analogous to section 26 of the TADA and section 57 of
the POTA, which provide shield to the act of executive or law enforcement agencies under the
Act from any suit or legal proceedings or prosecution on the ground of ‘good faith’. The
central government, state government, any officer or authority of the central or state government,
officer authorized by District Magistrate (DM), Para military forces are protected from any
legal proceedings if there act is done in good faith while carrying out act or operation towards
combating terrorism.79

76 The Unlawful Activities (Prevention) Act, 1967, Section 45 (1).
77 The Unlawful Activities (Prevention) (Recommendation and Sanction of Prosecution) Rules, 2008,
Rule 3.
79 The Unlawful Activities (Prevention) Act, 1967, Section 49 (a) and (b).
Such clause ‘act done in good faith’ is necessary to allow the executive to function independently without any fear. But the same should not create an unreasonable and disproportionate limitation on the right of accused or person who are victim of malicious prosecution to access the court for justice against the law enforcement agencies. Andhra Pradesh High Court while granting bail to the accused in Hyderabad Mecca Masjid blast case that claimed 14 lives stated that substantial part of the charge sheet in the case have been devoted to make allegation in innuendo against an organisation and persons associated with it.80

6.2.16. Power of Investigating Authority and Designated Authority under UAPA

Section 43 of the UAPA clarifies that who are competent to investigate the offence of terrorism specified under chapter IV and VI of the Act. The Deputy Superintendent of Police (DSP) or police officer of equivalent rank shall investigate the offence of terrorism and in metropolitans areas it shall be investigated by a police officer not below the rank of Assistant Commissioner of Police (ACP).

‘Designated Authority’ means officer of Central government not below the rank of Joint Secretary to that of government and officer of state government not below the rank of Secretary to that government as notified by the respective government in his behalf.81

6.2.17. Adverse Inferences and Presumptions of Guilt

There is presumption of guilt in respect of a terrorist act, when arms, explosion or other substance specified in section 15 are recovered from the possession of the accused and there are reason to believe that similar nature of arms, explosive or other substance were used in the commission of such offence. Similarly, presumption is raised when finger prints or any of the definitive evidence suggesting the involvement of accused is found at the site of the offence or on the arms or vehicles used in connection with the commission of such offence.82

81 The Unlawful Activities (Prevention) Act, 1967, Section 2(e).
82 The Unlawful Activities (Prevention) Amendment Act, 2008 Section 43E.
Section 43E negates the golden rule of criminal justice system i.e. no one can be held guilty unless proved before the court of law and let thousands offenders be free but not one innocent be punished. As noted by the UN’s special rapporteur on the promotion and protection of human rights and fundamental freedom while combating terrorism, “the right to a fair trial is one of the fundamental guarantees of human rights and rule of law”. The right to fair trial is protected under Article 14 of the International Covenant on Civil and Political Rights (ICCPR), to which India is signatory. Article 14 protects number of rights considered necessary for a trial to be fair, including the presumption of innocence and the right to silence. Under Article 51 of the Indian Constitution the government is obligated to “endeavour to …. Foster respect for international law and treaty obligation”. Therefore, any anti-terror legislation must not violate the right to a fair trial by denying accused the presumption of innocence or reversing the burden of proof. The presumption of innocence being a fundamental human right principle, the burden of proving guilt is placed on the prosecution, which must prove guilt beyond reasonable doubt.

Under the 2008 UAPA Amendments this presumption is denied to the accused. During the parliamentary debates, the union minister for home affairs justified this reversal of the burden of proof on the basis that in the past, terrorist have evaded conviction because they were permitted to remain silent. The court in Kartar Singh case held that section 3 of TADA operates when a person not only intends to overawe the Government or create a terror in people etc., but also when he uses the arms and ammunitions which results in death or likely to cause deaths and damages the property.

Rights and duties are correlated to each other. If the duty is imposed upon the person to speak truth and assist the court in discovery of truth and give evidence on own behalf then going away from their positive obligation may be created as an offence. The adverse inference and shifting of burden to the accused were accepted by the nations following the Common

84 Human Rights Committee, General Comment No.32, Article 14: Right to equality before Courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, Para 6, 2007.
87 Supra Note 73.
Law system after the terrorism and organized crime has shaken their political, social, economic and legal system. To have a balance between the constitutional right of accused person, rights of the victims and the security of the nation, drawing an adverse inference and presumption of guilt is justified in terrorist related offences. Moreover, such presumption is not conclusive in nature and can be refuted by the accused by producing evidence to the contrary.

6.2.18. Cognizable offence

All the offences mentioned under the UAPA are cognizable offences.\(^8\) A cognizable offence is one in which the police officer can arrest a person without a warrant issued by the magistrate. They are also having power to start the investigation of cognizable offence suo moto or on the lodging of First Information Report (FIR). A non cognizable offence is one where a police officer gets power to arrest a person and start investigation only on the order of magistrate having power to try such cases or commit the same for trial.

6.2.19. Regular and Anticipatory Bail

If literal rule of interpretation is applied then Section 438 of Cr.P.C. is not be applicable to UAPA and therefore, provision for anticipatory bail is not available to a person accused of terrorist activities.\(^9\) The Kerala High court has applied the Purposive approach held that the NIA Special Court is having original jurisdiction as far as bail and anticipatory bail is concern and the High court is having only appellate authority. By this decision the jurisdiction of the session court is barred as far as grant of bail is concern.

Further, Section 43D(5) provides that person accused of terrorist activities under chapter IV and of terrorist organization under chapter VI and are in custody, cannot be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release.\(^10\) While granting bail the court must satisfy itself on the basis of police case diary or police report made under section 173 of Cr.P.C. that there is no reasonable ground for believing that accusation against such person is prima facie true.\(^11\)

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88 The Unlawful Activities (Prevention) Amendment Act, 2008, Section 43D (1).
89 Ibid, Section 43D (4).
90 The Unlawful Activities (Prevention) Amendment Act, 2008, Section 43D (5).
91 Ibid, Proviso of Section 43D (5).
Section 43D (6) declares that restriction on grant of bail imposed under sub section 5 of section 43D is in addition to restriction imposed under the Cr.P.C. and other law in operation for grant of bail. No bail can be granted to a foreign national who are accused under UAPA and have entered on Indian soil without authority or illegally.\footnote{Ibid, Section 43D (7).}

Bail being a legal right has to be liberally granted unless it is shown that it will be prejudicial to the search for truth or to the administration of justice.\footnote{Supra Note 57, Para 6.4, p25.} Investigation agencies have put forward the argument that person accused of terrorism are not ordinary criminals and witnesses are afraid to depose against them. Moreover, gathering evidence against them is difficult and time consuming and if such persons are let out on bail they are bound to adversely influence the investigation.\footnote{Supra Note 75, Para 4.3.5, p 53.}

Therefore, the procedural check for grant of bail is first giving an opportunity to the public prosecutor and second, the satisfaction of court about non commission of terrorist act. The victim of terrorist act or their family has not been given an opportunity to oppose the bail rather they along with society have to rely upon the skill and interest of public prosecutor in opposing the bail application of the accused person. There is a predisposition for prosecution to oppose the bail in routine manner without application of mind to unearth whether detention of accused is indispensable or not. Therefore, the investigation agencies and the public prosecutor must be made responsible and accountable for dereliction in their duty with safeguard if act done in good faith.

The second procedural check placed is also too strict in nature. Can there be same punishment for different act amounting to terrorism or there may be variation in punishment on the basis of gravity of charges levied against the accused. There is need that for grant of bail the court must classify the terrorist offences on the basis of the intent required for commission of offences, nature and mode of commission of the act, gravity of fear caused or causality done, commission by hardcore under trials and direct or indirect participation of the accused in commission or threat to commit the terrorist act. The court must give differential treatment to all the accused of terrorism based on facts and circumstances of each case and taking into
consideration the above named classification so that the anti-terrorism laws should not be applied unreasonably making the very provision for bail meaningless.

6.2.20. Period of Police Remand/Detention

Section 43-D of the UAPA provides vide powers in the hands of NIA i.e. to detain the accused for a long period of 180 days. Section 167 of the Cr.P.C. applies subject to the modification that where the investigating authority fails to complete the investigation within a period of 90 days and the court is satisfied with the report of Public prosecutor indicating the progress of investigation and reason for extension of detention then the court may extend detention period up to 180 day.\(^95\) The same was also recommended by the Second Administrative Reforms Commission in its eighth Report.\(^96\)

Section 167 states that a person arrested must be produced before the magistrate if the investigation cannot be completed within the 24 hours. Upon production of arrested person the magistrate may order police remand for a maximum period of 15 days beyond which he shall be kept in judicial custody for maximum of 90 days or 60 days as the nature of the offence alleged to be committed. Departing from this general principle the TADA was provided much longer detention of 60 days, 180 days and 180 days\(^97\) as compared to POTA as 30 days, 90 days and 90 days\(^98\) as contrary to 15 days, 90 days and 60 days as provided under the Cr.P.C. After repeal of POTA similar provision were not incorporated under the UAPA 1967 by 2004 amendment but was adopted by 2008 amendment to UAPA.

India’s 180 days period is much longer than the permitted maximum detention in other democratic states. The U.K. Terrorism Act permits 28 days judicially authorized pre-charge detention\(^99\). In the United States the pre-charge detention is limited to 48 hours\(^100\), except for aliens suspected of committing a terrorist act, who can be detain for seven days under the

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95 The Unlawful Activities (Prevention) Amendment Act, 2008, Section 43D (2) (a) and (b).
96 Supra Note 75, Para 4.4.5, p 58.
98 The Prevention of Terrorism Act, 2002, Section 49.
99 Terrorist Act, 2006 (UK).
PATRIOT Act\textsuperscript{101}. Under the Australian crimes Code the maximum pre charge detention is 24 hours, which does not include “dead time” when the subject is not questioned.

A judge considering the extension of pre-charge detention should consider whether there is adequate evidence against the accused, justifying his or her continuing detention, not merely whether the investigation is progressing. As noted by the council of Europe Parliamentary Assembly, “lengthy pre-charge detention may have detrimental effects ……on private and family life …… freedom of movement and the employment situation of the person detained. This can amount to, effectively, a “sentence” on a person who may never be charged with any crime.”\textsuperscript{102} Fair Trial International has also argued that “holding people without charge for lengthy period, based on assumption that evidence will be found to prove their guilt, is a disproportionate violation of the right to liberty and presumption of innocence.”\textsuperscript{103}

This provision is inconsistent with Article 21 of the constitution of India which assured not an animal existence but a right to lead dignified life. Arrest lead to abuse of powers and violation of human rights. Therefore, procedure prescribed for the arrest must be strictly followed by the law enforcement agencies.\textsuperscript{104} The sweeping powers conferred by the Act, in the hands of Agency which in effect means, politicians and police are free to pursue their priorities and may misuse and is likely to misuse the power as in the case of Raja Bhaiyya by the Chief Minister Mayawati in Uttar Pradesh and imprisonment of Vaiko under POTA by the Chief Minister Jayalalitha for two years in Tamil Nadu\textsuperscript{105}.

6.2.21. Interrogation and Judicial Custody to Police Custody

Section 43D (2)(b) proviso of the UAPA empowers the police officer making the investigation to request the court for police custody of a person in judicial custody by filing an

\begin{itemize}
\item \textsuperscript{101} “Uniting and Strengthening America by providing appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001 (USA PATRIOT Act, 2001).
\item \textsuperscript{102} Home, Alexander, and Gavin Berman, “Pre-Charge detention in terrorism cases”, House of Commons, UK Parliament, March 1, 2011. Council of Europe Parliamentary Assembly, Proposed 42 days Pre-charged detention in United Kingdom”, Committee on Legal Affairs and Human Rights, 30 September 2008.
\item \textsuperscript{103} A Hakimi, Monica, “International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide” Yale Journal of International Law, Vol.33, 2008.
\item \textsuperscript{104} \textit{D.K.Basu Vs. State of Best Bengal}, (1997) 1 SCC 416.
\end{itemize}
affidavit stating the reason for doing so and also by explain reason for delay in requesting such police custody.

In India, through the decision of Maneka Gandhi Case106, idea of “substantive due process” was incorporated, which implies that all government action, even in exceptional times must meet the standards of reasonableness, non-arbitrariness and non-discrimination. During the interrogation of Kasab one of the 26th November 2008 Mumbai Attack accused it was proved (during the investigation as Kasab was not responding to any of the question but, when a police officer from his village started friendly conversation he confessed the truth) that humane treatment to the accused reveals a better information than torture and coercive interrogation techniques.107

6.2.22. Role of Defence Lawyer

Advocate Mahamood Parcha, Supreme Court Lawyer is engaged in around 70 terror cases across India was received threatening calls and messages by members of mafia gangs after his press statement that police officers who fabricated cases against youth should be tried and sent to jails. He believes that it was abetted by the investigating agencies handling those terror cases. It is important to note that Adv. Parcha was not provided security and no action was taken to bring the culprit before the justice. At earlier occasion also advocates Late Mr. Shahid Azmi and Late Mr. Akbar Patel were assassinated and many other defence lawyers were assaulted who were defending terror cases across India.108 Advocate Anjali Waghmare had revoke back her engagement to defend Kasab due to protest outside her house. Even advocate Dinesh Mota had withdrawn himself to represent Kasab citing his personal ethics and risk to his life.

It is an established principle of natural justice and criminal law that the before deciding the case the party must be given an opportunity of being heard personally or through a counsel.

Defence lawyer plays very important role and should be a person of the choice of the accused and if he is unable to get defense lawyer then the court must help him in providing the same. At the later stage the Kasab one of the main accused in Mumbai attack was given senior lawyer at the expense of state for trial and appeal.

The UAPA and NIA are silent on the point of extending protection to defense lawyer as protection to prosecution is covered. The state sponsored legal aid is inadequate to provide effective and quality services to indigent litigants particularly in terrorist related cases. Therefore, comprehensive legislative measures must be incorporated to introduce the system of Board of Advocates for Terrorist Cases (BATC) composed of panel of lawyers who are well skilled and voluntarily offering services to defend accused. It selection, training and other matters shall be the matters independent from the National Prosecutor Academy (NPA) suggested for public prosecutor.

Bar Council of India shall be request to propose changes in the existing Advocates Act, 1961 so that the remedies against the advocates abusing the process of courts, carrying corrupt practices, misusing their position so to raise the standards of professionalism and accountability in the profession of advocates.

6.2.23. Admissibility of Confessions to Police Officers

The amendment of 2004 and 2008 to the UAPA did not contain provision of admissibility of confession to police officer as it was present in earlier enactment of TADA\textsuperscript{109}, POTA\textsuperscript{110} and MACOCA\textsuperscript{111}. A confession made before a police officer is not admissible under the Evidence Act unless it leads to discovery of a fact deposed by him and connected in crime.\textsuperscript{112} Law commission in it number of report (48\textsuperscript{th}, 69\textsuperscript{th}, 173\textsuperscript{rd} and 185\textsuperscript{th} Report) has recommended the admissibility of confession to police officer for counter terror legislation. Terror related offences are mostly planned and committed secretly where due to dearth of eye witnesses and other evidences leading to incriminating the accused leads to their acquittal resulting loss of faith in

\textsuperscript{109} The Terrorist and Disruptive (Prevention) Act, 1985, Section 15.
\textsuperscript{110} The Prevention of Terrorism Act, 2002, Section 32.
\textsuperscript{111} The Maharashtra Control of Organised Crimes Act, 1999, Section 18.
\textsuperscript{112} The Evidence Act, 1872, Section 25.
justice delivery system. It is also accepted fact that how the terrorism was committed and who were the abettor, instigator, facilitator and persons involved in the commission of crime are within the knowledge of the accused person which are very relevant and needed to be extracted for administration of criminal justice and upholding the national security. A situation were science and technology has changed the dimension of terrorism it is desired that such science and technology shall be used with procedural safeguard to ensure evidentiary value to voluntary statement given by the accused or witness and it must find place not only for terror related confession but also in the ordinary law.

The Second Administrative Reform Commission in its 5th Report on ‘Public Order’\(^{113}\) has recommended that confession made before the police officer should be made admissible if recorded in video or audio (electronic) mode and accused has been warned on the recorded tape that any statement made is liable to be used against him and he is entitle to the presence of his lawyer or family members while making such confession which must be later confirmed by the magistrate about the voluntariness and absence of duress. Second Administrative Reforms in its 8th report\(^{114}\) and Madhava Menon committee Report\(^{115}\) has also supported the admissibility of confession made by the witness and accused before the police office with procedural safeguards and use of technology. All the recommendations made by various committees were not given due weightage by the government and presently in absence of such valuable provision only recourse which is left is relying on section 164\(^{116}\) of the Cr.P.C. which is prescribes procedure for recording confession not before the police officer but before the Judicial Magistrate.


#### 6.3.1 Extent and Application of NIA Act:

The National Investigation Agency Act extends to the whole territory of India including the Jammu and Kashmir. The Act applies to Indian citizen who are within or outside India,

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114. Supra Note 75, Para 4.5.10, p 62.
Government servant, person on ship or aircrafts registered in India wherever they may be at the time of commission of schedule offences.  

The Act is having extra territorial operation on the basis of nationality. Therefore, for terrorist activities committed beyond India by Indian National shall be dealt by NIA in the same manner as if the act had been committed within India. Terrorist activities committed by Indian national or any foreigner on the ship or aircraft registered in India can be tried in India.

**TABLE 13.**

**TRENDS OF VIOLENCE IN JAMMU AND KASHMIR (2008-14)**

<table>
<thead>
<tr>
<th>YEAR</th>
<th>INCIDENT KILLED</th>
<th>TERRORIST KILLED</th>
<th>S.F. KILLED</th>
<th>CIVILIANS KILLED</th>
<th>TOTAL KILLED</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>708</td>
<td>339</td>
<td>75</td>
<td>91</td>
<td>1213</td>
</tr>
<tr>
<td>2009</td>
<td>499</td>
<td>239</td>
<td>79</td>
<td>71</td>
<td>888</td>
</tr>
<tr>
<td>2010</td>
<td>488</td>
<td>232</td>
<td>69</td>
<td>47</td>
<td>836</td>
</tr>
<tr>
<td>2011</td>
<td>340</td>
<td>100</td>
<td>33</td>
<td>31</td>
<td>504</td>
</tr>
<tr>
<td>2012</td>
<td>220</td>
<td>72</td>
<td>15</td>
<td>15</td>
<td>322</td>
</tr>
<tr>
<td>2013</td>
<td>170</td>
<td>67</td>
<td>53</td>
<td>15</td>
<td>305</td>
</tr>
<tr>
<td>2014*</td>
<td>46</td>
<td>24</td>
<td>4</td>
<td>4</td>
<td>78</td>
</tr>
<tr>
<td>TOTAL</td>
<td>13186</td>
<td>5523</td>
<td>1373</td>
<td>2880</td>
<td>22962</td>
</tr>
</tbody>
</table>

*2014 is upto March. Source: Annual Report, Ministry of Home Affairs, GOI.

It is important to note that the NIA Act though applicable to whole India but the cases of terrorism and insurgency reported from the State of Jammu and Kashmir is not handed over to the NIA. **Table 13** shows that since 2008 to 2013 1425 incidence of violence occurred but the central government has not referred the case to NIA. In the list of schedule offence under the Act, the provision of Ranbir Penal Code having similar provisions of IPC pertaining to waging war against the State and provisions dealing with circulation of fake currency is not enlisted. The NIA has asked the central Government to extend its jurisdiction over the terror case of J&K also as terror groups are much active therein. Sri Rajnath Singh, Home Minister has assured about a comprehensive policy on Kashmir soon which is still awaited to see in application.  

6.3.2 Power to Investigate and Prosecute not to Prevent Terrorism

According to section 3 of the Act, the central government may constitute special agency to be called as National Investigation Agency for the investigation and prosecution of schedule offences throughout the country under this Act. The agency so created is conferred with only power to investigate and prosecute and not to prevent the terrorism/schedule offences in relation to terrorism. The agency is having power to arrest person connected with such offences and for doing so the agency officers are having same power, duties, privileges and liabilities which police officers have in connection with investigation of offences. The officer of agency of and above the rank of Sub-inspector shall exercise power of the officer in-charge of police station in the area in which he is present for the time being for discharging his duties.

It is noted that the agency is not having power to prevent the terrorism but only to investigate and prosecute the schedule offences. For prevention of terrorism power for collection, collation, analysis, sharing and dissemination of intelligence is required which is absent under this Act. The FBI of U.S. was restructured after 9/11 and was empowered to involve and collaborate with others on counter intelligence activities.

6.3.3 Superintendence of Central Government- Political Interference

The Superintendence of NIA is vested in the Central Government though the Act fails to define what “the superintendence” means.\textsuperscript{119} The Act leaves unclear the extent to which the supervision of agency is done. The central Government has to determine on the basis of report of State Government or suo motu that whether the offence committed is a schedule offence and then whether it is a fit case to be referred to NIA for investigation.\textsuperscript{120} These determinations are made by the political executives rather than the DG, professional expert appointed to administer its function. The Act fails to acknowledge the unique place of DG to craft key organizational and investigative decisions rather than a political executive which can be clear from the Government decision in these two cases.

\textsuperscript{119} The National Investigation Agency Act, 2008, Section 4(1).
\textsuperscript{120} \textit{Ibid}, Section 6(3).
The case of Burdwan blast wherein two persons were killed and another injured in a bomb explosion in a rented house at Khagragarh, Burdwan on 2nd Oct. 2014. It was revealed that the individuals present in the house were members of Jamaat-ul-Mujahideen Bangladesh and were engaged in preparation of bombs and organizing terrorist camps in pursuance of a larger conspiracy to terrorist attack in India and Bangladesh. The Burdwan blast case was handed over to NIA despite reservation of the West Bengal Government. The Government has not taken consent of the State Government and suo motu directed the agency to conduct an investigation. The NIA has arrested a Burmese national Khalid Mohammed from Hyderabad who was an IED maker and belongs to Rohinaya Muslim Solidarity group who has admitted to undergone training conducted by Tehreek-e-Azadi-Arakan with trainers from Pakistan.

Another case of terrorism was Bangalore-Guwahati Express bomb when it was moving into the Chennai Central Railway. After initial investigation a case of terror nature was confirmed. The Tamil Nadu Government has not sought NIA probe. Home Minister Sushil Kumar Shinde was of the view that unless and until the State Government seeks an investigation by the NIA, the centre could not take a call on its own though a team was sent to collect data.

Now the question is, what was the consideration for the Government to exercise suo moto power and probe the Burdwan case by NIA? Why the government has not exercised its suo motu power in Bangalore-Guwahati blast case when involvement of terrorism was established at the initial stage of investigation itself. The act of central Government is fully political in nature and there is no standard policy for conferring jurisdiction on NIA to investigate terror cases.

122. Soudhiriti Bhabani, “West Bengal is India’s new terror heaven: Bangladesh border creates major channel for militants and fake currency”, available at: http://www.dailymail.co.uk/indiahome/indianews/article-2787086/West-Bengal-India-s-new-terror-haven-Bangladesh-border-creates-major-channel-militants-fake-currency.html [accessed on 03-02-2015 at 12.06 p.m.]
6.3.4 Power and Procedure to bestow Investigation on NIA

According to section 6 of NIA Act, Power to confer investigation of any schedule offence on NIA rest with the Central Government which can be exercised first on the basis of a report of State Government and second suo motu. In the first case, the State Government after receiving a report from officer in-charge of the police station, that information was received and the same was recorded under section 154 of the Cr.P.C regarding commission of schedule offence, shall forward the report to central Government as expeditiously as possible. It means that the FIR could be lodged at the police station but that does not vest the state police with power to investigate into the matter solely if it is of schedule offence. The police officer in-charge of station is obligated to forward a report on it to the State government who shall further forward it to the Central Government. Upon the receipt of such report, the Central Government (MHA) shall determine within 15 days that whether the offence committed is a schedule offence to be investigated by the NIA. For arriving at a conclusive decision the MHA may take into consideration the information provided by the State Government, information received from other sources, gravity of the offence and other relevant factors. It is not clear as to what other considerations are important for determination be the Central Government and the matter is purely political rather professional in nature.

In the second case, if the central Government is of the opinion that a schedule has been committed and which is required to be investigated by the NIA then the Government may suo motu direct the agency to investigate the said offence. In both the circumstances where the central Government directed the investigation by agency then the State Government and their enforcement agencies shall not proceed with investigation till the NIA has taken up the investigation and all the relevant documents and records shall be handed over to the agency. Moreover, the time limit for State Government to forward report to central Government is not fixed and an expectation to act as expeditiously as possible is created. This has allowed the State Government not to send report or delay in sending which created a rift between the two governance machinery.
There is no machinery to supervise the act of police officer in-charge of police station. Whether the police officer, obligated under section 6(1), is forwarding all the cases involving schedule offences to the State Government or not? No data base is created about all the cases registered at police station so to monitor the terrorist cases and to take prompt action for forwarding it to the State Government within 24 hours after receipt of initial evidences.

6.3.5 Jurisdiction of Agency (NIA) over Offences:

NIA is the only agency in India tasked for Investigation and Prosecution of terrorist related offence affecting the sovereignty, security and integrity of India, friendly relation with foreign States and offence under the Act enacted to implement international treaties, agreement, conventions and resolutions of the United Nations and other international organizations. It was mandated to detect, prevent, investigate and prosecution of terrorist related incident across the country and therefore, rupees 55.68 crore was granted under non-plan expenditure to meet 2011-12 expenses.125

The jurisdiction of NIA extends to the offences defined and punished by law which are enlisted in the schedule of NIA Act. The laws included in schedule of the Act are The Atomic Energy Act, 1962; The Unlawful Activities (Prevention) Act, 1967; The Anti-Hijacking Act, 1982; The Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982; The SAARC Convention (Suppression of Terrorism) Act, 1993; The Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platform on Continental Shelf Act, 2002; The Weapons of Mass Destruction and their Delivery System (Prohibition of unlawful Activities) Act, 2005; Section 121 to 130 and Section 489A to 489E of IPC.

Section 8 of NIA confers additional jurisdiction upon the agency with regard to other offences connected with the schedule offence. The investigating agency while investigating the schedule offence may also investigate any other offence which the accused is alleged to have committed provided the offence is connected with the schedule offence.126

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than terrorism it also deals offences relating to atomic energy, unlawful activities, anti-hijacking, aviation, maritime, weapon of mass destruction, obligation of SAARC convention, offences against the State, conspiracy or waging war against government of India, and counterfeiting of currency notes.\textsuperscript{127} Human trafficking, organized crimes and cyber crimes were not given space for investigation by NIA though having trans-border ramification. Enactment providing offences for it is not included in the schedule of the act.

6.3.6 Role of State Government Under NIA Act

The role assigned to State Government under the NIA Act is minimal and even where some role is conferred it is just to show that the State has been given due participation in administering federal offence. Mr. Chidambaram argued that ‘federal law enforcement agency (NIA) had to seek the permission of State Government to become involved in an investigation’\textsuperscript{128} does not get certified by the provision of section 6 of the Act.

As per section 6(2) the State Government is under obligation to forward the report of officer in-charge of police station about the commission of schedule offence to the Central Government as expeditiously as possible. Even the Central Government is having power to handover investigation to NIA suo motu where the interference or consent of State Government does not arise at all. Once the central Government directed investigation of schedule offence by agency then the State Government and their officers shall not proceed with investigation. State Government may be associated with investigation of schedule offence only at the request of NIA. The case may be transferred to the State Government for investigation and trial with previous approval of the Central Government.\textsuperscript{129} In both the cases the State Government may have jurisdiction upon the schedule offence only at the mercy of the agency. If the agency after having regard to gravity of offence and other relevant factor thinks that the State Government


\textsuperscript{129} The National Investigation Agency Act, 2008, Section 7.
may be included or State Government may be given charge of investigation or trial it may be
conferred accordingly. The State Government is not having any opportunity to have it say at
both the occasion and also at the initial State of conferring the investigation to NIA.

Section 9 of the Act, impose obligation upon the State Government to extend all
assistance and cooperation to the agency for investigation of schedule offences. If the schedule
offence is not directed by the Central Government to be investigated by the NIA under this Act
then the State Government is having power to investigate and prosecute schedule or other
offences. Section 22 empowers the State Government to constitute one or more Special
Court for the trial of schedule offences under this Act.

6.3.7 Efficient, Professional Prosecution

Prosecutors are the officers of the court whose duty is to assist the court in the search
of truth in order to administer justice. NIA defines ‘Public Prosecutor’ as public prosecutor or
additional public prosecutor or special public prosecutor appointed under section 15 of the
Act. Section 15 of NIA is analogous to section 13 of TADA and section 28 of POTA.

The Act prescribed law degree and experience of not less than seven years of practice
or in service as qualification for public prosecutor. Along with the degree of law and practice
experience the requirement of knowledge in forensic science, medical jurisprudence, cyber
law, knowledge in science and technology be included or training must be given in this regard
keeping in view the nature of preventive and deterrent measure required to combat terrorism.
The selection, training and supervision of prosecutors are very important. If the prosecutors
are not competent or are corrupt, administration of justice will suffer to the detriment of interest
of victims and the society at large. The system of prosecution system has to change towards
greater professionalism and accountability.

There is a need to separate the prosecution from executive machinery and their
interference. Therefore, there is a need to establish a National Prosecutor Academy (NPA) at

130. Ibid, Section 10.
132. Ibid, Section 15(1) and section 22.
133. Ibid, Section 15 (2).
134. Supra Note 57, para 6.7, p 27.
par with National judicial Academy (NJA) to appoint, impart skill, knowledge, training and to provide acquaintance with recent development on nature of terrorism, methods and modes employed, legislative and political development in other countries, art and skill used in other countries by prosecutors etc. to ensure professionalism in prosecution which will raise the efficacy and fairness in the administration of justice in relation to terrorism.

The public prosecutor may be given access through National Prosecutor Academy to the NATGRID, to seek information required in a given case on terrorism in which he was engaged so that prosecution case be represented strongly increasing conviction rate in terrorist offences.

6.3.8 Creation of NIA Special Courts

The National Investigation Agency Act, 2008 along with investigation power also provide for constitution, power and function of special courts for adjudicating upon the schedule offences under the Act. The Special court was created under the TADA\(^{135}\) and POTA\(^{136}\) law but not find place under the UAPA. The law commission in its 173\(^{rd}\) report and the Second Administrative Reforms Commission has recommended for constitution of special fast track courts exclusively for trial of terrorism related cases. France, Germany and USA does not have provision for creation of special court for trial of terrorist offences but UK and India do have\(^{137}\). The NIA Act in its Chapter IV, section 11 to 14 deals with the constitution, composition, power and function of special courts. Various Special Courts have been notified by the central Government of India for trial of the cases registered at various police stations of NIA.

Both the Central Government as well as State Government is empowered to constitute one or more special courts under section 11 and 22 respectively for cases or class or group of cases as specified in the notification. At present there are 39 Special NIA courts were set by the Central Government but it is interesting to note that no State Government has set up any

\(^{135}\) The Terrorist and Disruptive Activities (Prevention) Act, 1987, Section 9.

\(^{136}\) The Prevention of Terrorism Act, 2002, Section 23.

special court for trial of terror related cases.\textsuperscript{138} Such appointment shall be made on an application moved by the agency to the Chief Justice of the High court, who shall recommend the session judge of additional session judge to be appointed as presiding officer of special court. Even the attainment of superannuation will not have any impact on continuation of the trial. Any question as to the jurisdiction of these special courts is decided by the Government whose decision is final.\textsuperscript{139}

\textbf{6.3.9 Transfer of Case to Maintain Fairness, peace and Justice}

According to section 13 of the Act, the Supreme Court of India is empowered to transfer the cases from one special court to any other special court within or outside the State. The Supreme Court may do so when the exigencies of the situation prevailing in the state is such that it is not possible to have fair, impartial or speedy trial or it is not feasible to have trial without the breach of peace or there is threat to the life or liberty of accused, witnesses, public prosecutor or a judge or it is otherwise in the interest of justice. Transfer of case may be order on the application of Central Government or any of the interested party supported by an affidavit. The provision of UAPA and NIA prescribes special procedures departing from the ordinarily procedure law to deal with the offenders of terrorist activities effectively. Therefore, such special procedure must have speedy disposal of cases as an objective which is also a fundamental right guaranteed under Article 21 of the Constitution.\textsuperscript{140}

\textbf{6.3.10 Cognizance of Offence by Special Court and Appeal}

Special NIA court is presided over by the session judge of additional session judge. They are empowered with all the powers of the court of Session under Cr.P.C. for trial of any offense. According to section 16 of the Act, the Special Court may take cognizance of any offence either upon receiving a complaint or upon a police report without the accused being committed for its trial. Chapter XVIII of Cr.P.C, section 225 to 237 deals with provisions for


\textsuperscript{139} The National Investigation Agency Act, 2008, Section 11.

\textsuperscript{140} \textit{A.R.Antulay Vs. R.S.Nayak}; AIR 1984 SC 991.
trial by session court. Section 193 of the code provides that except as otherwise expressly provided by the code or any other law, no court of session shall take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate. The Provision of section 16 of the Act, is an exception to section 193 and the session court is given power to take cognizance of schedule offences or any other offence without the case being committed to it.

The trial of these courts are held on a day to day basis on all working days and have precedence over the trial of any other case against the accused in any other court. An appeal from any judgment, sentence or order of a special court lies with the high court.

6.3.11 Other Offences and Power of Special Courts:

As per section 14 of NIA, during the pendency of trial if it is found that the accused person has committed any other offences under this Act or under any other law enforce then the special court may convict such person for such other offence at the same trial if the offence is connected with terrorist activities. The special court is empowered to pass any sentence or award any punishment as authorized under this Act or under such other law.

In the case of Sri Mohet Hojai vs. Union of India & Others,141 Mohet Hojai was charge sheeted under section 120B, 121, 121A of IPC and section 16, 17, 18 and 20 of Unlawful Activities (Prevention) Act. The NIA during the investigation discovered and reported to Assam Government about misappropriation of Government fund and criminal misconduct of public servant. Accordingly, the case was handed over to CBI who charge sheeted the accused under section 120B, 409, 420 of IPC and section 13(1), (2), of Prevention of Corruption Act, 1988.

It was challenged by Hajoi that two parallel proceeding was going on one in the NIA Special court and other in CBI Special court for two different nature of offences though section 14 empower NIA Special court to convict a person for such other offence under the Act or under any other law. Since the offence under the Prevention of Corruption Act was committed during the investigation carried out by the NIA, therefore there cannot be a separate proceeding.

in the CBI court and the same NIA Special court should try both the offences along with schedule offences.

The CBI Special court has denied the contention and prayer of Hajoi and same was upheld in writ petition by the High Court. The court has reasoned that as per section 19, the NIA special court is empowered to hold the trial on day to day basis on all the working days and have precedence over the trial of any other case against the accused in any other court except the special court. The trial in any other court shall be kept in abeyance till the trial of special court is completed. In the instant case the NIA special court cannot have precedence over another Special court i.e. CBI here. Moreover, the Charges framed under prevention of corruption Act is not schedule Act under the NIA not the offence committed under the said Act in the instant case was connected to the NIA schedule offences. Therefore, the high court has rejected the contention of accused and hold the jurisdiction of CBI Special court as well as NIA Special court in the instant case as the nature of offence committed is different and tried by two different special court and therefore, section 14 and 19 of the NIA is not applicable.

6.3.12 Trial by Special Court to have Precedence

Section 19 of the NIA empower the special court to hold the trial on day to day basis on all the working days and have precedence over the trial of any other case against the accused in any other court except the special court. The trial in any other court shall be kept in abeyance till the trial of special court is complete.

6.4 Human Right Violation by the Agency and NIA Special Court

Advocate Abu Bakr Sabaq Subhani, stated to the press reporter that a Kashmiri youth accused of terrorism was brought by the agency before the NIA Special Court, Patiala District Court where he complained to the special court that before bringing him to the court he was physically tortured by the agency keeping him naked for hours to hours. He also alleged that his signature was taken on a blank paper. The youth has claimed that the alleged officer was present in the court room and he repeatedly demanded that the officer files be checked for
proof of his claim but was completely ignored by the special court and allowed the officer to go outside the court room.142

6.5 Conclusion

The Indian legislations particularly the Unlawful Activities (Prevention) Act, 1967 as amended in 2008 & 2012 and National Investigation Agency Act, 2008 along with rules framed therein are the manifestation of government to combat and prevent the act of terrorism in all forms and to fulfill the promise made at various international and regional Conventions/Treaties/agreements to fight against terrorism. These two piece of legislation are the overall existing laws in India presently on terrorism which are stringent special laws having features to depart from the established principle of criminal justice system except the conventional provisions of IPC. The power of National Investigation Agency (NIA) and the Special Court so constituted under the NIA Act extends to UAPA and other special laws along with limited provisions of IPC enlisted under the schedule of the NIA Act. The NIA Act does not extends to many other legislation providing offences having trans-border ramification and are related to the commission of terrorism like Information Technology Act, 2000, Human Trafficking law etc.

The existing UAPA and NIA do have effective provisions to combat terrorism (cognizable offence) but there are also some defects and demerits which needs to be addressed properly to make the law effective and efficient to prevent and combat terrorism. The Central governments is having power to declare any association as unlawful and prohibit and punish a person to be member, take part in its meeting, make or receive any contribution and provide any assistance to the unlawful association. The government has identified 65 active terror groups in India and banned 37 terrorist organisations though the UAPA has not provided a precise meaning to the term ‘terrorist organisation’ except providing the schedule list. The government is empowered to notify or denotify any terrorist organisation but not obligated it to give reason while doing so under section 35 and 36 of UAPA and section 2 and 3 of the Procedure for Admission and Disposal of Application Rules, 2004. Though section 38 of

142. NIA court room drama: bias or neglect for NIA officials conduct, available at http://twocircles.net/2014dec17/1418823345.html#.VNTR9dKUffm [accessed on 08-02-2015 at 8.47 p.m.]
UAPA punishes member of terrorist organisation but what constitute a membership is not defined. Further, lack of knowledge about the declaration of terrorist organisation was not taken as a relevant defence.

The term “support” used in section 39 is not defined and creates confusion in application of law because it has been given wider connotation when already terms like abet, advocates, attempt, incite etc is used at different places and particularly at section 18 of the Act. The provision of section 17 compare to section 40 is wider in application as it does not require the presence of intention and mere knowledge that funds are likely to be used to commit terrorist act is sufficient to penalize a person. Transfer of fund for non-terrorist purpose like JHF is not taken care. There is discrepancy in magnitude of punishment laid down in section 17 and 40 of the Act.

Forfeiture of proceed of terrorism or property of terrorism have a deterrent effect on the dependents family of the terrorist who are not having any knowledge or suspicion about terrorist activities. Power are conferred upon the central government to freeze, seize or attach and prohibit the use of funds, financial assets or economic resources of individual or entities but there is no appropriate measures in place to monitor the compliance with the relevant legislation and guidelines and to sanction for non-compliance. Further, there is no monitoring agency to ensure compliance with freezing mechanisms outside the financial sector. The affected person has no access to assets necessary for basic expenses.

The requirement under section 43F to furnish information is applicable on other intelligence, investigation and law enforcement agencies is not made clear. There is absence of judicial security as to why and how such information is relevant or useful. Though the provision of NIA has contained provision for protection of witnesses but the law as well as the legal system was not properly advanced to have deposition of witnesses, cross examination through technologically advanced mechanisms like audio-video conferencing. The Review committee established under UAPA is having very restrictive role to play i.e. de-notification of a terrorist organisation, as compared to earlier anti-terrorist laws which are extended even to interfere in investigation and trial and its orders are binding on the investigating officers and central/state governments.
No time limit is prescribed for the investigating officer to report to the state government for further course of action under section 45. Section 49 bar the judicial review of administrative action done in good faith but there is lack of provision for guarding unreasonable action or malicious prosecution done by law enforcement agencies as in the case of Liyaqat.

Provision of section 43E of UAPA regarding presumption of guilt and creation of adverse inference is violative of fundamental rights of accused but it is not conclusive in nature and can be refuted by the accused by providing evidence to the contrary. But due to it accused liberty is curtailed initially though it may be successfully rebutted at trial. Section 438 of Cr.P.C. provision for anticipatory bail is not applicable to UAPA. Section 43D of UAPA allow detention for a longer term of 180 days which is much stringent provision compare to other countries and are misused in political interest and meeting police demand.

There is absence of provision providing protection to the defence lawyer though protection to public prosecutor is provided by both UAPA and NIA Act. Confession made to police officers are not contained in UAPA though it was present in earlier anti-terrorist enactments and recommended by various committees and commission with safeguards. The power and procedure for electronic surveillance is not properly framed under the UAPA or NIA and the provision of Information Technology (amendment) Act, 2008 and Rules of 2009 were not incorporated within it.

The jurisdiction of National Investigation Agency Act does not extend to Jammu and Kashmir where terrorist incident reported are much higher. The agency so created is having power to investigate and prosecute schedule offences but not to prevent it as it lacks intelligence function and to depend upon other intelligence agencies. The provision of section 4 regarding superintendence of the central government is not defined and the power to get the case investigated by the agency is much influenced by political consideration rather done by professional experts with substantial reasons. What other consideration are important under section 6 for central government is also not clear. There is no guideline for exercising suo motu power for assigning investigation to agency. The time limit for the state government to forward the report to the central government is not fixed. There is lack of machinery to supervise the act of officer in-charge of police station for forwarding the report to state government as there is
no data base created relating terrorist offences. The role of state government is very minimal under the Act. The prosecution is influence by executive machinery in their appointment, promotion, and function.

At present 39 NIA Special Court is constituted by the central government but no court is created till yet by the state government. Special court is not empowered to convict a person accused of terrorist offence for other offence also committed by him which can be tried by the special court. The NIA special court has not been given precedence over other special court also on the ground that terrorism is to be tackled seriously.