A LEGAL STUDY TO EVALUATE THE EFFICACY OF EXISTING INDIAN LAWS TO PREVENT AND COMBAT TERRORISM

ABSTRACT

Terrorism perpetuated in the world since long for multiple reasons, however no definite date and time can be assigned for its initiation. Terrorism is a threat to the life, liberty, security and property of individual. It challenges the political stability, economic growth and international image of the nation. It disturbs peace and tranquility on the earth and causes panic, widespread disorder and generates fear psychosis in civilized societies. Various states of India have witnessed unprecedented terrorist attack like Jaipur, Delhi, Bangalore, Hyderabad, Lucknow, Ayodhya, Guwahati, Ahmadabad and Kolkata. North East and J&K is facing highest number of terrorist attacks triggered for various causes including social, political, ideological, economic crises and were given different names as anarchists or revolutionary or fundamentalists. Terrorist movement may be motivated by nationalist, ethnic, religious, ideology etc. and accordingly they undertake insurgency, Naxalism, Maoism, Guerrilla or terrorism as a tactics to spread mass casualties or state of fear. The concept of “one man’s terrorist could be other man’s freedom fighter” often creates problem in understanding terrorism and do creates dilemma.

The nexus of terrorism with organized crime, development in science and technology, advancement in the means and modes of communication particularly cyber networking system has made the problem of terrorism more complex in nature. Osama Bin Laden, a terrorist had threatened to acquire Weapon of mass destruction purposely to use it against American, Israel and India. The attack on world trade centre in September 2001 has shown the capability of terrorist to interfere with air navigation and use flight as missile to target WTC and other places which created panic and terror across the world. Moreover, Mumbai attack have revealed that the terrorist are acquainted and equipped with highly
sophisticated arms, ammunition and including global positioning system handset, satellite phones, voice over internet Protocol phone service, and high resolution satellite photo of the target. It has also revealed the security lapses to protect the border and stop infiltration.

Terrorist attack has always raised question on the efficacy of legislative framework, function of institutional and administrative agencies, their pro-active and responsive capacity to prevent and combat terrorism. Mumbai attack has questioned the institutional and administrative set up, its efficacy to prevent and combat terrorism as intelligence was there but it could not be materialized into preventive intelligence management, preventive security management and terrorism disaster management strategy.

There is progress at an International and Regional level to have a comprehensive set of universal legal instruments to prevent and combat terrorism. International community has stressed on developing national criminal justice system to prevent, combat and bring the perpetrator of terrorism to justice without which international counter terrorism efforts are futile. The criminal justice system of a state are obligated to prevent and combat terrorism in all forms due to treaty based obligation on ratification of the universal legal instruments against terrorism, obligation imposed by security council resolution on counter terrorism, obligation under international human rights, humanitarian, refugee and customary law.

India’s anti-terrorist laws including the Unlawful Activities (Prevention) Act, 2004 was failed to prevent the occurrence of terrorist attack including the recent Mumbai attack of 2008. Earlier legislations like TADA and POTA, though their constitutional validity was upheld by the judiciary has been branded as draconian law and the government was forced to allow these laws to lapse or repealed respectively. Hurriedly after the Mumbai attack in the year 2008, Indian government showed its reaction towards terrorism by enacting Unlawful Activities (Prevention) Amendment Act, 2008 and National Investigation Agency Act, 2008 without having much debate on it. Both the legislations are having provisions departing from the establish principle of criminal law. The operation of UAPA was enlarged and the National Investigation Agency was constituted with object to investigate and prosecute offences relating to terrorism. Therefore, the National Investigation Agency Act and Unlawful Activities
(Prevention) Act as amended in 2008 needs to be analyzed in conformity to established criminal law principles, human rights and judicial interpretations.

The hypothesis for this work is that the National Investigation Agency Act and Unlawful Activities (Prevention) Act including the institutional and administrative set up is not adequate and efficient to prevent and combat terrorism in India. The doctrinal legal research methodology is adopted and the work is based on the secondary source of data. The work is delimited with respect to the introduction of two legislations after the Mumbai attack in 2008 i.e. Unlawful Activities (Prevention) Amendment Act, 2008 and National Investigation Agency Act, 2008 their efficacy and application.

The work in this thesis organised into seven chapters. The first chapter includes a brief introduction to the broad area of consideration highlighting the background of terrorism, statement of problem, need and justification of study, objectives of the study, hypothesis, research methodology and the scope of the study with research plan. The delimitation of the study is also specified. The second chapter includes the brief details about the incident of terrorism, concept and meaning of terrorism, common element, various causes, kinds and means of terrorism, terrorism and other related activities, psycho-socio effect of terrorism. The third chapter highlight the international conventions, regional instruments and Indian legislation on terrorism before and after the Mumbai attack of 2008. This chapter also includes all the legislation enlisted under the National Investigation Agency Act, 2008 as schedule enactment. The fourth chapter covers the response of the judiciary on various issues raised before them in due course of implementation of anti-terrorist laws in India. The fifth chapter deals with the institutional and Administrative response to terrorism and cover proactive and reactive measures, roles of MHA, MEA, Intelligence agencies security forces, NCTC, NATGRID, Central Investigating Agencies, NIA Special Court etc. The sixth chapter is an evaluation of various provisions UAPA and NIA legislation and their efficacy to prevent and combat terrorism on the basis of standards of criminal law principles, development in science and technology, basic tenets of human rights and legal reasoning and rational deductions. The seventh chapter enumerates the conclusion arrived at as a
result of the study and constructive suggestions to the stakeholders prevent and combat terrorism effectively.

Despite terrorism being recognized as a global phenomenon, there is no universal definition of terrorism. The definition of federal crime, organized crime and terrorism is not provided in the IPC. Organized crime groups and terrorists are acting in the same criminal sphere where artificial distinction is required to be maintained so to prevent organized crime including potential to prevent and combat terrorist threats. The extensive meaning was given to the meaning of terrorism which has emphasized more on the means of causing terrorism without providing punishment based on means so adopted. Even means under Section 15 of UAPA does not state the use of cyber networking or nexus of terrorist act with cyber crimes. Though the main thrust to provide definition of terrorism is on causing terror but the same has not been defined under the UAPA. The definition of terrorism given in U.K., U.S., Canada and Australia do contain the cause for doing so like political, religious, ideological, but such reference were not made under the definition of terrorism extended by UAPA and Section 153A and 153B of IPC is not within the preview of schedule of NIA Act. There are difference between terrorist and freedom fighter.

The United Nation and its specialized agencies of General Assembly and Security Council have adopted many resolutions along with International Legal instruments on hijacking, kidnapping of diplomats, hostage taking, act committed on aircraft, maritime navigation, fixed platform, bomb, nuclear safety etc. At the Regional level also various Conventions have been concluded. Many of the International Conventions does not apply in relation to the military and war time situation as they are governed by the International humanitarian law.

In the case of Pragya Singh Chandrapal Singh Thakur Vs. State of Maharashtra through Additional Chief Secretary & Ors [2014(1) Bom.C.R.(Cri.)135] the constitutionality of the National Investigation Agency Act, 2008 was upheld by the Division Bench of Bombay High Court and the appeal against it is pending before the Supreme Court. The Division Bench has committed has committed error of law while upholding the section 6 of the NIA
Act as intra virus to Article 14 and 21. While applying the Armed Forces Special Powers Act, 1958 many cases of human rights violation and abuse of power by the law enforcement agencies was brought before the court but still AFSPA is continuing. In the case of Shatrughan Chauhan & Anr[(2014) 3 SCC 1] the apex court held that the ratio laid down in Devender Pal Singh Bhullar is per incuriam and the President and Governor’s power of pardon under Article 72 or Article 161 is subject to limited judicial scrutiny.

Though Section 38 of UAPA punishes member of terrorist organisation but the meaning of terrorist organisation, terrorist gang and what constitute a membership in that organisation is not clearly defined. Section 17 and 40 of the UAPA provides for similar nature of offence ‘financing of terrorism’ with only difference that Section 17 is general in nature and section 40 is with respect to terrorist organisation. There is no monitoring agency to ensure compliance with freezing mechanism within and outside the financial sector. There is absence of judicial scrutiny as to why and how such information is relevant or useful under Section 43F of UAPA. The Review committee established under UAPA is having very restrictive role to play as compared to earlier anti-terrorist laws.

The NIA, State police and intelligence should be legally empowered to carry out wire tapping and communication interception of terrorism suspects only by taking approval of the Judiciary and following the procedural safeguard which now included under the IT amendment 2008 and IT Interception Rules 2009. 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. 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 is not contained in UAPA though it was present in earlier anti-terrorist enactments. As the general public is scared of giving statements out of fear and the fact that terrorists plan their acts in great detail to prevent leaving behind of any evidence.

The jurisdiction of National Investigation Agency Act extended to the whole of India but cases of terrorism of Jammu and Kashmir were not conferred by the government
upon the NIA though the 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. There are no guidelines 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 NIA Branch offices are under staffed and there is lack of counter terror infrastructure. Now the NIA has started preparing its own data base of criminals and terror related investigation as it did not have good coordination with IB R&AW, BSF, Army and other anti terror agencies. The UAPA and NIA have stringent legal policy, while implementing it full disclosure about detail of persons arrested, date, time and duration of custody, date on which bail granted, duration of police or judicial custody has not been proactively provided. Due to lack of staff, scientific advanced tools and means of investigation, cyber and forensic skill and expertise its performance has suffered in investigating terror related cases.

The NIA Special court is working very slowly in disposal of terrorist cases. At present 39 NIA Special Court is constituted by the Central government but no court is created till yet by the State government. Till 30th may 2013 out of 35 cases only two cases has been resulted in conviction and in other 33 cases trial is in progress or pending. In many cases the court has not started the process of trial even after the agency has submitted the charge sheet. It is a fast track court and there is lack of time limit in disposal of case after charge sheet is filed.

There is a lack of good coordination, cooperation and accountability between the institutional and administrative agencies which badly undermine the effectiveness of institution role in preventing and combating terrorism. India has largest number of intelligence agencies compare to developed countries. Moreover, IB does not have any constitutional or statutory sanction for its existence. Number of Central and state armed forces are created to combat
terrorism. Federal agencies like NSG, BSF, CISF, CRPF, ITBP, SPF, SSB and State Police forces are standing to combat terrorism in India. Policing in general and counterterrorism operations in particular, have remained trapped in a low technology paradigm for decades. The para military and Central Police Forces are not properly trained, raised and equipped to deal with dynamic nature of terrorism which has resulted into much dependency on the army fight insurgency and terrorism. The conventional superiority of the army was downgraded to the level of paramilitary forces and paramilitary forces to that of ordinary police forces. There is lack of an effective border management policy which covers not only terrorist infiltration but illegal migration, smuggling and the flow of narcotics.

Dated: 6th May, 2015. (Kumar Priya Ranjan)
A LEGAL STUDY TO EVALUATE THE EFFICACY OF EXISTING
INDIAN LAWS TO PREVENT AND COMBAT TERRORISM

[ ABSTRACT SUBMITTED TO GAUHATI UNIVERSITY,
GUWAHATI FOR THE DEGREE OF DOCTOR OF
PHILOSOPHY IN THE FACULTY OF LAW ]

Submitted by:
Kumar Priya Ranjan

Under the Supervision of:
Dr. Jyoti Prasad Bora
Principal, University Law College
Gauhati University, Guwahati
Guwahati
Assam